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BY THE BENGAL SECRETARIAT LEGISLATIVE DEPARTMENT, BOOK DEPÔT BRANCH,

WRITERS' BUILDINGS, CALCUTTA.

cases of inheritance It may have been an arbitrary limitation but it has come down from very ancient times and was taken as a good working rule see Manu Chap III vers 5 Gautama Chap IV verses 2—5 Apastamba Chap II verses 11 15 16 Vasistha Chap VIII verses 1 2 And when blood connection (which had always been the ground of the prohibited degrees for marriage) was taken to be also the ground for the right of inheritance it was natural to take the same limitation as part of the new doctrines and so we find that modern authoritative commentators have assumed that the limitation of 5 degrees through the mother applied to *bandhu* inheritance see Mayne's Hindu Law (7th Ed) pages 690 692 786 787 West and Buhler (3rd Ed) 121 488 489, Dr Jolly's Tagore Lectures pages 213 214 *Lallubhai* v *Mankuvarbai* (1) *Umaid Bahadur* v *Udoi Chand* (2) *Babu Lal* v *Nanku Ram* (3) *Bhyah Ram Singh* v *Bhyah Ugur Singh* (4) and the Dattaka Mimansa section 6 verse 10 dealing with the question of the succession of adopted sons Against this there is only the opinion of G C Sarkar who is alive and might have been called as an expert as he was in a case recently heard by this Board The reason for some limitation for *sapinda* relationship in the matter of marriage is said in the Achara Kanda to be that without it all the world would be connected and there would be no possibility of marriage The same reason would apply to inheritance for all the world would be *bandhus* of a deceased person and the provision for inheritance by fellow pupils teachers, Brahmins and the Crown would be absurd It is suggested that the adoption of this rule in matters

(1) (18 6) I L R 2 Bom 388 4 6 (3) (18 4) I L R ? Calc 33? 34?
(2) (1880) I L R 6 Calc 119 1?4 (4) (18 0) 13 M o I A 3 3 3?0

(iii) that evidence was inadmissible to prove the dishonourable purpose for which Khagendra's false name was assumed.

(iv) that the evidence on the record of association with Pulin Behary Das and the Anusilan Samity were irrelevant for the purpose of proof of the conspiracy charged in that case and should not have been admitted.

(v) that the expression *Mayer Icha* had in itself no evil significance, and was frequently used by a person in distress who found all effort unavailing and realised how *inscrutable were the ways of Providence*.

(vi) that an abstract philosophical disquisition on *Yoga* could not rightly be cut up into isolated sentences and edited so as to furnish a possible text for revolutionary spirits without positive proof that it was so used.

(vii) that the fact that the name of Dinesh appeared in a list found at the search of the house of one Madan Mohan Bhoumick (of whom nothing was known) was not only valueless but not admissible against the accused being irrelevant for the purposes of the trial.

(viii) that since the cypher list was not put to the witness who had been called to prove Dinesh's handwriting on two post cards and who had been shown that cypher list by the police outside Court, the defence could make the legitimate comment that that was because he had failed to recognize the handwriting, and the Sessions Judge should not have proceeded in his judgment to compare that document with the writing on the post cards with a view to determine whether it was in the handwriting of Dinesh.

Barindra Kumar Ghose v. *Emperor* (1) and *Kurali Prasad Misser* v. *Anantaram Hajra* (2) referred to.

(i) Appeals by each of the five accused—Amrita Lal Hazra *alias* Sasanka, and four others.

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The facts of the case (commonly known as the

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of inheritance would lead to an absurdity, as the sons of the appellants (claiming through their father and so having 7 degrees) would clearly be *bandhus*, but there is no doubt the rule did apply to marriages, where equally absurd results would be produced. It is also said that limitations in the case of marriage have varied, so that the rule is not really definite. *But the rule the Mitakshara would naturally adopt*, is obviously the one stated by its author (namely 7 and 5 degrees) in the Achara Kanda The variations are set out in Mayne's Hindu law (7th Ed), page 103

Manu and Apastamba are the only writers who are supposed to adopt a different limit in the case of relationship through a mother The difference ascribed to Manu is due to a gloss of Kulluka see Mandlik, page 410, note (line 33), and the text of Apastamba was *very fragmentary and uncertain* The adoption of the rule of 7 and 5 degrees may have been only a blind following of the rule laid down for marriage—adopted as part of the distinction of *sapindaship* put forward by the Mitakshara But it is probable there was a definite reason for it

In and prior to Manu, *bandhus* were not recognised as heirs at all see for authorities prior to Manu Vol 2 "Sacred Books of the East," pages 132 133 and 202 verse 21, *Apastamba*, *Chap XIV*, *sections 1-5*; Gautama Chap XXVIII, section 21, Vasistha, Chap XVII, sections 79 and 81; and Manu, Chap IX, sections 185—189 So that up to the era of Manu, the only persons who would inherit were *sapindas* and *sakulyas*, and possibly *samanodakas*, but *in no* case were persons claiming through a female recognised. The term *bandhu* is used *in some of the* more ancient treatises, but merely *to denote gotraja* relations, and not in the technical sense *in which it* is used in the Mitakshara

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v.
EMPEROR.

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1915

AMRITA LAL HAZRA v. EMPEROR.

'Raja-Bazar Bomb case') out of which these appeals arose were very briefly as follows:—

Amrita Lal Hazra *alias* Sasinkasekhar Roy, Dinesh Chandra Das Gupta, Sarada Charan Guha and Chandrasekhar De were charged with having had in their possession under their control in a room in No. 296/1 Upper Circular Road, on the 21st November 1913 materials for making bombs with intent by means thereof to endanger life and with having thereby committed an offence punishable under section 4 (*b*) of the Explosive Substances Act (VI of 1908). These four accused together with Upendra Lal Roy Chowdhury *alias* Kalipada Ghosh and Khagendra Nath Chowdhury *alias* Suresh Chandra Chowdhury were further charged with conspiring between March 1911 and the 21st November 1913 with Satis Chandra Chakravarty *alias* Satis Chandra Bhattacharjya, Bhupendra Nath Sen, Profulla Ranjan Gupta, Jogesh Chandra Roy, Nirmal Kanti Roy, a person known as Biroji and other unknown persons to make and keep explosive substances with intent by means thereof to endanger life or make other persons to endanger life thereby committing an offence punishable under section 120B of the Indian Penal Code. On the 21st February 1914 Mr. H. M. Veitch, Joint Magistrate of 24-Pargannas had committed the above six accused to take their trial before the Court of Sessions after discharging the 7th accused Hiranmoy Banerji. Mr. F. B. H. Pinton, Additional Sessions Judge, 24-Pargannas tried the case with the aid of two assessors Babus Pratap Chandra Chaudhuri and Basanta Kumar Chakrabutti.

The accused with the exception of Sasinkasekhar had declined to make any statement to the committing Magistrate Mr. H. M. Veitch. In the Sessions Court they disclosed nothing orally but filed lengthy

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ABDUR
RAHAMAN.

GREAVES J.

should add that I am fortified in the view that I have expressed by a consideration of the provisions of Order XVI, r. 4 of the English Procedure Rules: see *Compania Sansinena de Carnes Congeladas* v. *Houlder Brothers* (1) and the notes in the English Annual Practice for 1915 at p. 221. Order I, rule 3 of the Civil Procedure Code is very similar in terms, in fact almost identical with Order XVI, r. 4 of the English Procedure Rules and is probably founded thereon and consequently the opinions expressed in Order XVI, r. 4, by the English Judges may well be considered in construing the provisions of Order I, r. 3. I accordingly overrule the preliminary objection.

W. M. C.

Attorney for the plaintiff: *N. C. Dutt.*

Attorney for the defendant Ghulam Mowlah: *H. C. Bannerjee.*

(1) [1910] 2 K. B. 354.

THE HIGH COURT,

1915.

——o——

Chief Justice:

THE HON'BLE SIR LAWRENCE H JENKINS, KT, K C I E (*Retired Nov 14, 1915*)

„ SIR JOHN GEORGE WOODROFFE, KT (*Acting*)

„ SIR LANCELOT SANDERSON KT, K C

Puisne Judges:

THE HON'BLE SIR JOHN G WOODROFFE

„ SIR ASUTOSH MOOKERJEE KT C S I

„ H HOLMWOOD

„ C W CHITTY

„ E E FLETCHER

„ S SHARFUDDIN

„ H R H COXE (*Retired Nov 14 1915*)

„ SIR HERBERT W C CARNDUFF, KT, C I E (*Deceased*)

„ D CHATTERJEE

„ N R CHATTERJEA

„ W TEUNON

„ T W RICHARDSON

„ A CHAUDHURI

„ S HASAN IMAM

„ C P BEACHCROFT

„ H WALMSLEY

„ E P CHAPMAN (*Additional*)

„ B K MULLICK (*Additional*)

„ W E GREAVES (*Additional*)

„ B B Newbould (*Additional*)

„ F R Roe (*offg*)

THE HON'BLE G H B KENRICK K C *Advocate General*

„ B C MITTER *Standing Counsel*

CORRIGENDA

Page 45 line 22 *for* busines *read* business
Page 72 lin 8 of head note *for* finds *read* binds
Page 93 line 7 *for* Lnd read Loyd'
Page 117 line 23 (head note) *for* Court *read* Courts
Page 119 line 13 *insert* K C *after* Lindsay
Page 227 line 1 *for* Courts *read* Court
Page 227 line 26 *omit* comma *after* only
Page 227 line 27 *for* person *read* receiver
Page 385 line 20 (head note) *for* relation *read* relation
Page 386 line 1 *for* mala holder *read* male holder
Page 390 line 18 *for* mothers *read* mother s
Page 393 line 15 *for* word *saptamat* *read* words in *saptamat*
Page 399 lines 21 and 22 for *bandhus* read *bandhu*
Page 490 line 9 *after* Waters *insert* form part
Page 505 line 19 *for* Gaun *read* Gann
Page 507 line 17 *for* equal *read* equal right
Page 524 line 24 *for* tidal *read* tidal
Page 528 line 20 for *pubilci* read *publici*
Page 535 line 19 for *Walkins* read *Watkins*
Page 716 line 21 *after* 1870 *insert* By doing so the High Court had put a wrong construction
Page 751 last line (ref) *for* C L J 555 *read* C L J 553
Page 960 line 23 *for* adopted *read* adapted
Page 962 line 33 *for* offence *read* offences
Page 968 line 31 *for* has *read* had
Page 1027 line 14 *for* be *read* he
Page 1030 line 15 *for* 1880 *read* 1830
Page 1036 line 21 *for* the *read* the
Page 1036 line 22 *for* Messr *read* Messrs
Page 1186 line 25 *for* Thon *read* John
Page 1187 line 28 *for* rules *read* rules apply

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Appeal—*Additional Evidence—Civil Procedure Code (Act V of 1908) O XLI, r 27, O XLVII, r 1—Jurisdiction of Appellate Court to admit additional evidence—Application to admit additional evidence before the hearing of the appeal if it can be entertained.* Where in an appeal an application was made before the hearing of the appeal for the admission of additional evidence *Held* that such an application was not warranted by the terms of O XLI, r 27, and the Appellate Court had no jurisdiction to entertain it O. XLI, r. 27, does not authorise an Appellate Court to admit fresh evidence documentary or oral, and whether or not it was in existence at the time of the judgment of the lower Court or at the time the appeal was preferred, unless the Appellate Court after examining the evidence on the record comes to the conclusion that it requires the additional evidence in order to enable it to pronounce judgment, namely, that there is a defect on the evidence on the record An application to admit fresh evidence discovered out of Court by the parties comes under O XLVII r 1, and not under O XLI r 27 *Kessowji Issur v. Great Indian Peninsula Railway Co* I L R 31 Bom 381, L R 34 I A 115, referred to GARDEN REACH SPINNING AND MANUFACTURING CO v SECRETARY OF STATE FOR INDIA (1914) I L. R 42 Calc 675

——*Criminal Case—Practice—Duty of Appellate Court in dealing with the evidence on appeal—Proper standpoint—Conviction not to be upheld unless guilt beyond reasonable*

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doubt affirmatively established—Criminal Procedure Code (Act V of 1898) s 423 In an appeal from a conviction it is for the Appellate Court, as it is for the first Court to be satisfied affirmatively that the prosecution case is substantially true and that the guilt of the appellant has been established beyond all reasonable doubt To hold that unless reasonable ground is given to the Appellate Court for differing from the lower Court the Appellate Court must accept its findings of fact is to approach the case from a wrong standpoint KANCHAN MALLIK v EMPEROR (1914) I L R 42 Calc ... 374

——*Letters Patent 1865, s. 15—"Judgment"—Order by single Judge on Original Side directing defendant to give security—Civil Procedure Code (Act V of 1908), O XXXVII r 2* An order made by a single Judge sitting on the Original Side under O XXXVII, rule 2 of the Code of Civil Procedure, directing a defendant to give security as a term on which leave to defend should be given is not a judgment within the meaning of s 15 of the Letters Patent and is not appealable *Justices of the Peace for Calcutta v Oriental Gas Company*, 8 B L R 433, followed *Sonbai v Ahmedbhai Habibhai* 9 Bom H C 398, referred to SUKHLAL CHUNDERMULL v EASTERN BANK, LD (1915) I L R 42 Calc 735

——*Practice—Filing of certified copy of decree appealed from after the prescribed period of limitation without leave of the Court effect of—Inherent power of High Court—Ex parte order in application for review of order of dismissal passed at preliminary hearing, setting aside of, at final hearing of appeal—Civil Procedure Code (Act V of 1908) s 151, O XLI, rr. 1, 11; O XLVII, rr. 4, 7—Limitation Act (IX of 1908) s 5* Where a certified copy of the decree appealed from was filed in the High Court after the prescribed period of limitation without leave of the Court, in an analogous appeal, and where the main appeal had already been dismissed at the preliminary hearing under O XLI, r 11 of the Code of Civil Procedure, but was restored on review, without notice to the respondent, after the aforesaid analogous appeal had been admitted by another Divisional Bench, at the final hearing of both these appeals an objection being taken by the respondent *Held*, that the respondent was entitled to invoke the inherent powers of that Court *Tikait Ajant Singh v. Christien*, 17 C. W N 862, followed *Held*, also, that non compliance with r 4 of O XLVII of the Code rendered the granting of an (*ex parte*) application for review (by the appellant) a nullity, as it was prejudicial to the respondent, and previous notice was necessary. *Held*, further, that under r 1, O XLI of the Code, filing of the decree of the Appellate Court was imperative and an appeal could not be said to have been preferred until that decree was filed ABDUL HAKIM CHOWDHURY v. HEM CHANDRA DAS (1914) I L R 42 Calc ... 433

——*Suit to wind up partnership and for accounts—Preliminary decree referring suit to Assistant Referee—Question of disputed membership of firm—Report of Referee confirmed by final decree of Trial Judge—Omission to appeal from preliminary decree—Appeal from final decree raising question whether inquiry was rightly referred to Referee—Civil Procedure Code (Act V of (1908) s 97—Interest, liability for, of partner of firm after dissolution using assets of firm for business for his own benefit* In a

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suit to wind up a partnership and to have accounts taken the membership of the firm was in dispute certain persons being by the plaintiff alleged to be partners and by the defendants to have been only employees remunerated by a share of the profits An adjudication was made by the Trial Judge which declared that the partnership was dissolved as from 1st July 1907, and then ordered and decreed that "it is referred to the Assistant Referee of this Court to take the following account and make the following enquiries that is to say (*a*) to enquire who were the partners entitled to share in the assets and goodwill of the partnership business (*b*) to take an account of the dealings of the parties with the assets of the partnership business From that adjudication though it was appealable the appellants did not appeal The Referee made the enquiries directed and and took the account His report as to enquiry (*a*) was adverse to the appellants was excepted to by them and was confirmed by the Trial Judge in his final decree On an appeal by the appellants raising the question whether inquiry (*a*) was rightly included in the first adjudication or whether it was not one which should have been made by the Court itself — *Held* (affirming the decision of the Courts below) that the first adjudication of the Trial Judge which included inquiry (*a*) was a preliminary decree under section 97 of the Civil Procedure Code 1908 and that the appellants not having pre f— I

of a partnership one of the partners retains assets of the firm in his hands without any settlement of account, and applies them in continuing the business for his own benefit, he may be ordered to

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account for such assets with interest thereon, apart from fraud or misconduct in the nature of fraud AHMED MUSAJI SALEJI *v.* HASHIM EBRAHIM SALEJI (1915) I. L. R. 42 Calc 914

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Arbitration—*Bengal Chamber of Commerce arbitration by—Arbitration Act (IX of 1899), s 14—Arbitration clause in a contract—Reference to an Association—Rules of an Association for the conduct of arbitration proceedings referred to it, whether imported into the contract and binding on the parties thereto* Where a contract contains an arbitration clause by which it is agreed that any dispute arising out of the contract shall be referred to the arbitration of the Bengal Chamber of Commerce the rules of the Association are imported into the contract and are binding on the parties *Per* JENKINS C J The decision in *Ganges Manufacturing Company Ld* v *Indra Chand* I L R 33 Calc 1169 was binding on the learned Judge (of the Court below) and should have been followed by him CHAITRAM RAMBILAS *v* BRIDHICHAND KESRICHAND (1915) I L R 42 Calc . 1140

——— **Act (IX of 1899) s. 14** *See* ARBITRATION . .. 1140

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Arms Act (XI of 1878) ss. 4, 5, 14, 19 (a), (f), 20: *See* MISJOINDER OF CHARGES 1153

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Arrest of Ship—*Trespass—Absence of Malice—Cause of action—Admiralty jurisdiction—Letters Patent 1865 cl 32—Letters Patent, 1862, cl 31—Charter of the Supreme Court, 1774, cl 26—Admiralty Court Act, 1840, (3 & 4 Vict c 65)—Admiralty Court Act 1861 (24 Vict c 10), s. 5—Colonial Courts of Admiralty Act 1890, (53 & 54 Vict c 27) s (2) (3) (a), s 15—Interpretation Act 1889 (52 & 53 Vict c 63) s 18 (2)—Maritime necessaries—Action in rem—Wrongful seizure—Limitation Act (IX of 1908) Sch I Arts 29 36 49—Pleadings* On the 4th June 1910 the respondent company instituted a suit *in rem* against the *Clan Mackintosh* in this Court as a Colonial Court of Admiralty for an amount alleged to be due to them for maritime necessaries and obtained a warrant of arrest The ship was arrested on the same day, and remained under arrest until her release on the 31st January 1912, the action having been dismissed two days earlier on the ground of absence of jurisdiction The owners of the ship were the appellant Company who had their office in Burma On the 14th June 1912 the appellant company instituted the present suit in the ordinary original civil jurisdiction of this Court against the respondent company for the wrongful arrest of the ship The suit as framed was based on malice or its equivalent but at the hearing the appellant company proceeded on the footing of the suit being one for mere trespass *Held* that in the absence of proof of malice or its equivalent, a suit for simple trespass will not lie for the arrest of a ship *The Walter D Wallet* [1893] p 202 *Xenos* v *Aldersley The Evangelismos* 12 Moo P C 352 and *The Strathnaver* L R 1 A. C 58, referred to The arrestment of the ship was a judicial act of the Court, and an ordinary step in an

Arrest of Ship—*contd.*

action *in rem* Under the arrest, the custody and possession was with the Marshal as an officer of the Court and could not be regarded as a detention by the respondent company The damage if any, suffered from the continuance of the officer's custody, and possession was due not to the default of the respondent company but to the law's delay *Peruvian Guano Co* v *Dreyfus* [1892] A C 166 followed The foundation of the Admiralty jurisdiction of the High Court, more especially in respect of maritime necessaries discussed *The Two Ellens* L R 4 P C 161 *The Heinrich Bjorn* L R 11 A C 270, *Murray* v *Longford* 1 Fulton 95 *The Asia* 5 Bom H C (O C) 64, *The Portugal*, 6 B L R 323, *Bardot* v *The Augusta*, 10 Bom H C 110 referred to Assuming that the High Court in its Admiralty jurisdiction did not acquire jurisdiction over maritime necessaries by any previous enactment, such jurisdiction would now rest in the Colonial Courts of Admiralty Act, 1890, which vests in it the powers described in section 5 of the Admiralty Act, 1861 To oust the jurisdiction of this Court under section 5 it is not enough that the owners of the ship should be in fact domiciled in India or Burma the domicile has to be proved to the satisfaction of the Court *Ex parte Michael* L R 7 Q B 658 followed Inasmuch as such proof was not produced before the Court when the order for arrest was made the order for arrest cannot be treated as *coram non judice* or a nullity Assuming that an action would lie in the absence of proof of malice or its equivalent the action would be for wrongful seizure under legal process and would be barred by Art 29 of the Limitation Act It is imperative under Order VII rule 1 (*e*) of the Code of Civil Procedure that a

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plaint should contain "the facts constituting the cause of action and *when it arose*" MADRAS STEAM NAVIGATION, CO, LD. v. SHALIMAR WORKS, LD., (1914) I. L. R. 42 Calc 85. 85

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Bail—*Grounds of admission to bail—Confession of a co prisoner materially corroborated as to applicant—Relative powers of the High Court and Subordinate Courts to grant bail—Criminal Procedure Code (Act V of 1898) ss 497 and 498* Section 497 of the Criminal Procedure Code contains a rule found contrary. The extended powers given to the latter by s 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497 The High Court refused bail where a confession by a co-accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss 307 and 337 of the Penal Code —ASHRAF ALI v EMPEROR (1914) I. L. R. 42 CALC 25

Bailiff—*Writ or warrant authorising him to give possession of immoveable property—Use by bailiff of reasonable degree of force to effect removal of person refusing to vacate—Practice of bailiffs taking strangers as assistants—Time of delivery of writ of possession for*

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execution—Piecemeal trial of lengthy cases by Magistrates—Penal Code (Act XLV of 1860) s 323—Presidency Small Cause Courts Act XV of 1882, ss 43, 48—Civil Procedure Code (Act V of 1908), O. XXI, rr 35, 97, and First Schedule, App F Form No. 1—Practice A bailiff of the Presidency Small Cause Court in the execution of a writ, issued under s 43 of the Presidency Small Cause Courts Act, requiring or authorizing him "to give possession" of certain premises to the applicant, may use a reasonable degree of force in order to effect the removal of persons bound by the decree and refusing to vacate the same, notwithstanding the omission in the writ of words expressly authorizing their removal *Quare* Whether the English Common Law or the Civil Procedure Code applies to the writ or warrant in question In a writ of possession under the former, words expressly authorizing forcible removal are not inserted, but an order "to give possession" authorizes such removal, if need be, and, if the Code applies, the omission of such words is immaterial O XXI, r 97 of the Civil Procedure Code merely provides an additional or alternative remedy. Where the bailiff proceeded to the premises, and on the occupant's wife refusing to vacate pulled or dragged her out of the house, and the force used for the purpose caused her, when released, to fall on the ground whereby she received slight injuries —*Held*, that he was legally justified in the employment of such amount of force and could not be convicted therefor under s 323 of the Penal Code In such cases it is impossible to calculate or apply with the utmost nicety the degree of force necessary and yet not more than sufficient Observations as to the practice of bailiffs taking with

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them, as assistants persons unconnected with the Court, and as to the time of delivery to them of writs for execution. Piecemeal conduct of trials by Magistrates condemned. MEREDITH *v.* SANJIBANI DASI (1914) I. L. R. 42 CALC. .. 313

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Bonus, stipulation for: *See* PATNI LEASE 1029

Bought and Sold Notes: *See* SALE OF GOODS 1050

Broker, personal liability of: *See* SALE OF GOODS .. . 1050

Calcutta Municipal Act (Beng. III of 1899), ss. 223 228: *See* RATES AND TAXES 625

Capital Cases: *See* PUBLIC PROSECUTOR, DUTY OF 422

Cargo *See* CONFISCATION 334

Cause of Action: *See* ARREST OF SHIP 85

———————— HINDU LAW—WILL 561

Certified Copy, filing of: *See* APPEAL 433

Charge: *See* CO-OPERATIVE SOCIETY ... 377

———————— DEBT 849

———————— RATES AND TAXES ... 625

Charge—*Explosive Substances Act, 1883 (46 & 47 Vict. c. 3) s. 4—Explosive Substances Act (VI of 1908), s. 4 (b) —Charge, specifications of—Accused's right to know value thereof Penal Code (Act XLV of 1860 as amended by Act VIII of 1913) ss 120, 120A, 120B, 121A—Explosive substance —By means thereof —"Unlawfully and maliciously —'Criminal conspiracy" —Misjoinder of charges—Criminal Procedure Code (Act V of 1898), ss 196, 235, 312, 360 (1) 417—'Same transaction," limits of—Joinder of charges under s 4 (b) of Act VI of 1908 and s 120 B of the Penal Code—Co conspirators, separate trial of—Crown's right to prosecute irrespective of the question of ultimate design—'Presumption of innocence of accused, meaning of—Conspiracy charge of—Prosecution duty of—Explanation by accused want of, when fatal——Leading questions—Cross examination of its own witnesses by prosecution when permissible—Evidence Act (I of 1872) ss 10, 14, 15, 54, 135 143 154—Official witnesses for Crown whether privileged from disclosing source of information—Detective, whether so privileged regarding place of secretion—Written statements of accused—Examination of accused—Comparison of handwriting by Court, propriety of—Possession' meaning of—Deposition reading over of, daily in open Court* An accused is entitled to know with certainty and accuracy the exact value of the charge brought against him But where the accused fully understood the nature of the offence with which

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Charge —*contd*

they were charged, they had clearly not been prejudiced by the omission of the words 'unlawfully and maliciously' and 'in British India' occurring in section 4 (*b*) of Act VI of 1908. Such an omission can be cured by the verdict *The Queen* v *Hunslow* [1895] 1 Q B 758, referred to Where the illegal act charged under section 120 B is the unlawful and malicious possession of explosive substances within the meaning of section 4 of the Explosive Substances Act 1908, it is not essential to specify in the charge the explosive substance which the accused have conspired to have in their possession or under their control A person may be guilty of criminal conspiracy even though the illegal act which he has agreed to do has not been done for 'the crime of conspiracy consists only in the agreement or confederacy to do an illegal act by legal means or a legal Act by illegal means *Reg* v *Hibbert* 13 Cox 82 *Quinn* v *Leathem* [1901] A C 495 *The Queen* v *Most*, 7 Q B D 244 14 Cox 583 and *O Connell* v *The Queen* 11 Cl & F 155 1 Cox 413, 5 St Tr N S 1 referred to The indictment in all cases of conspiracy must in the first place charge the conspiracy, but in stating the object of the conspiracy the same degree of certainty is not required as in an indictment for the offence conspired to be committed *The King* v *Gill* 2 B & Ald 204, *The Queen* v *Kenrick* 5 Q B 49, *The Queen* v *Blake*, 6 Q B 126 *Sydserff* v *The Queen* 11 Q B 245, *The Queen* v. *Gompertz* 9 Q B 824, 2 Cox 145, *Aspinall* v *The Queen*, 2 Q B D 48, *Taylor* v *The Queen*, [1895] 1 Q B 25, *Reg* v *Parker*, 3 Q B 292 referred to It is a wholesome rule that the Court should adhere to the language of the statue, as far as practicable, when a charge is drawn up, as

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Charge—*contd*

nothing is gained by a paraphrase, while opportunity is afforded to the accused to take exception to the form of the charge The accused cannot be convicted on a conspiracy charge under section 120 B, Indian Penal Code unless the prosecution establishes that the accused were members of the conspiracy after the 27th March 1913 when Act VIII of 1913 became law A comprehensive formula of universal application cannot be framed regarding the question whether two or more acts constitute the 'same transaction', the circumstances which must bear on its determination in each individual case are proximity of time, unity or proximity of place, continuity of action and community of purpose or design. If A, B and C conspire to make or have in their possession or under their control, an explosive substance within the meaning of the Explosive Substances Act and, if in pursuance of such conspiracy A makes or has in his possession or under his control an explosive substance, they may, if the Court thinks fit be charged and tried together under section 120 B Indian Penal Code and section 4 (*b*) of Act VI of 1908 If all the *known* co conspirators named in the charge are not placed on their trial the trial of some (separately) without the other is not vitiated *Emperor* v *Lalit Mohan Chuckerbutty* I L R 38 Calc 559, 15 C W N 593 explained If the accused have committed an offence under section 4 (*b*) of the Explosive Substances Act, 1908 in pursuance of a criminal conspiracy it is open to the Crown to prosecute them for such offences irrespective of the question of the ultimate design of the alleged conspiracy coming under section 121 A, Indian Penal Code (which charge requires previous sanction under section 196, Criminal Procedure

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Charge—*contd*

Col) In order to justify the inference of guilt the inculpatory facts must be incompatible with the innocence of the accused and incapable of explanation upon any other reasonable hypothesis than that of his guilt *R* v *Hodge* 2 Lewin C C 227 referred to The presumption of innocence (in criminal cases) signifies no more than this that if the commission of a crime is directly in issue in any proceeding it must be proved beyond reasonable doubt The whole doctrine when drawn out is *first* That a person who is charged with a crime must be *proved* guilty that according to the ordinary rule of procedure and of legal reasoning, *presumitur pro reo* *the negante* so that the accused stands innocent until he is proved guilty and *second* that this proof of guilt must displace all reasonable doubt In a charge of conspiracy general evidence of the existence of the conspiracy may first be given before particular facts are proved to show that one or more of the accused took part in it *R* v *Sidney* 9 St Tr 817 *Queen Caroline's Case* 2 B & B 284 1 St Tr N S 1348 *R* v *Hunt* 3 B & Ald 566 followed Under the law in England facts similar but not part of the same transaction as the main fact are not in general admissible to prove either the occurrence of the main fact or the identity of its author except (after evidence *aliunde* on these points has been given) to show the state of mind of the parties with regard to such fact, *i e*, knowledge of its nature, or his intent In general whenever it is necessary to rebut, even by anticipation the defence of accident mistake, or other innocent condition of mind evidence that the accused has been concerned in a systematic course of conduct of the same specific kind as, and proximate in point of time to that

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Charge—*contd*

in question, may be given *R* v *Holt* (1860) Bell 280 8 Cox, 411, to the contrary is no longer authority *R* v *Smith* 20 Cox 804 92 L T 208 and *Emperor* v *Debendra Prosad* I L R 36 Calc 573 9 C L J 610 referred to Section 4 of Act VI of 1908 substantially reproduces the provisions of section 3 of 46 & 47 Vict Chap 3 (Explosive Substances Act 1883) consequently the expression unlawfully and maliciously may be interpreted in the sense in which it is familiarly used in the criminal law of England *Unlawfully* thus signifies not for a lawful object and 'maliciously signifies 'intentionally and without justification or excuse or claim of right *The Queen* v *Clemens* [1898] 1 Q B 556 19 Cox 18, *Miles* v *Hutchins* [1903] 2 K B 714 20 Cox 555 referred to *Reg* v *Ward* 12 Cox 123 1 C C R 3 6 *McPherson* v *Daniels* 10 B & C 272 *Bromage* v *Prosser* 4 B & C 247 *Clark* v *Molyneux* 3 Q B D 237 *Allen* v *Flood* [1898] A C 1 *Johnson* v *Emerson* L R 6 Ex Ch 373 *R* v *Pembleton* 2 C C R 119 12 Cox 607 *Mogul Steamship Co* v *McGregor* [1892] A C 25 23 Q B D 598 followed The term explosive substance as used in section 4 (*b*) of Act VI of 1908 includes *any part* of an apparatus machine, or implement intended to be used or adopted for causing or aiding in causing any explosive substance and "by means thereof does not mean by means thereof *alone* *R* v *Charles* 17 Cox 499 referred to The inference of fact may legitimately be drawn that the explosive substances made and possessed by Sasanka were intended for use in British India It is the duty of the prosecution not so much to secure a conviction as to place all the available evidence in the case fairly and fully before the

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Charge—*contd*

tribunal by which alone the guilt or innoc nce of the accused is to be determine l *Ram Ranjan Roy* v *King Emperor*, I L R 42 Calc 422 19 C W N 28 following *Regina* v *Holden* 8 C & P 606 referred to 'The proof of the case against the prisoner must depend for its support not upon the absence or want of any explanation on the part of the prisoner, but upon the po itive affirmative evi dence of his guilt tha is given by the Crown But if there is a certain appearance made out against a party, if he is involved by the evidence in a state of considerable suspici n he is called upon for his own sake and his own safety to state and to bring f rward the cir cumstances whatever they may be which might reconcile such suspi cious appearances w th perfect innocence *Regina* v *Frost* 4 St Tr N S 85 followed While it is not necessary to prove manual po session of the explosive sub tance by th accused it must be proved th at it wa in his power or control *possession* to be punish abl must also be possession with knowledge an l ass nt The mere fact that the other accused were in the room does not show they were in posses ion of all or any of the things contained ther in When the evide ice at the disposal of the prosecution is insufficient to secure a conviction for the crime committ d it is inexpe lient even though it may l lawt il to prose cute the accused for a conspiracy the proof whereof really rests o i th establishm nt of that very crime *Reg* v *Boulton* 12 Cox 87 and *Emp ror* v *Lalit Mohan* I L R 38 Calc 559 15 C W N 593 refer e l to A man s guilt is to be established by proof of the facts alleged and not by proof of his character s ich evidence might create a prejudic but not l ad a step towards sul stantiation of guilt In India as in England, the accused

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Charge—*contd*

are entitled in cross examination to elicit facts in support of their defence from the prosecution wit ness s wholly unconnected with the examination in chief In the course of cross examination of this charac ter the defence are entitled in view of the generality of sec ion 143 of the Indian Evidence Act, to ask l ading questions Under section 154 the Court has the discretion to p rmit the prosecution to test, by way of cross examination, the vera city of their own witnesses with regard to the (unconr ecte l) matters elicited by the defence in cross examinatio [While in the Unite l States a party has no right to cross examine any witness, ex cept as to circumst inces connecte l with matters stated in his examina tion in chief and if he wishes to examine him respecting other matters he must d so by making him his own witnsss and by calling him as such in the subsequent progress of the cause *Philadelphia and Trenton Railway Co* v *Stimpson* 14 Peter 448 referred to] The defence is not entitled to elic t from individual prosecution wit nesses whether he was a spy or an informer, or to discover from police officials the names of persons from whom they had received informa tion, but a detective cannot refuse, on grounds of public policy, to answer a qu stion as to where he was secreted *R* v *Watson* 32 St Tr 1 *R* v *Richardson* 3 Fos & Fin 693 *A G* v *Bryant* 15 M & W 169 71 R R 610 *Marks* v *Beyfus* 25 Q B D 494, *Webb* v *Catchlove* 3 T L R 159 referred to In strictly carrying out the provisions of section 360 (*1*) of the Criminal Procedure Code by the daily reading over in open Court of the deposition of each witness, the Court does not lay itself ope i to crit cism though that procedure sh uld occupy considerable time *Mohendr Nath* v *Emperor* 12 C W N 845 *Jyotish Chandra*

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Charge—*concld.*

Mukerjee v. Emperor, I. L. R. 36 Calc. 955, and *Kamitchinathan v. Emperor*, I. L. R. 28 Mad. 308 referred to. Though written statements may be accepted from the accused in accordance with the universal practice in the Courts under the Calcutta High Court they do not take the place of evidence nor of such examination of the accused as is contemplated by section 342 of the Code of Criminal Procedure. *Emperor v. Ansuiya* (1903) All. W. N. 1 dissented from. AMRITA LAL HAZRA v. EMPEROR (1915) I. L. R. 42 Calc. 957

Charter Act (24 & 25 Vic. c. 105) s. 15 See JURISDICTION . 926

Charter of the Supreme Court, 1774 cl. 26 See ARREST OF SHIP .. 85

Chattels See PALAS OR TURNS OF WORSHIP 455

Chaukidari Chakran Lands—*Village Chaukidari Act (Beng. VI of 1870) ss. 1, 48, 49, 50, 51, 52, 53—Power of resumption and assessment of chaukidari chakran lands—Zamindari estates in Orissa—Regulation XII of 1805 s. 33—Regulation XIII of 1805 s. 41—Regulation I of 1793 s. 8 cl. (4)—Onus of proof.* In these appeals the Judicial Committee (affirming the decision of the High Court) *held*, on a consideration of the history of Orissa and of the legislation applicable to its settlement and the nature of its zamindari estates that the Government were under *the circumstances not entitled to* resume and assess with revenue as being chaukidari chakran lands (the zamindars of Sukinda and Madhupur) in Orissa with whose ancestors settlement had been made in 1803, and sanads granted by which statutory confirmation was given by section 33 of Bengal Regulation XII of 1805, and in respect of which estates the revenue was settled in perpetuity. The history of chaukidari grants as set out in the judgment of Lord Kingsdown in the case of *Joykishen Mookerjee v. Collector of East Burdwan*, 10 Moo. I. A. 16 referred to. The respondents in discharge of the duties imposed on them by their sanads to maintain peace and order within their estates (the manner in which they were to carry out such duties being impliedly left by the Government to the zamindars as there was no machinery provided for the purpose in the legislation previous to 1870) retained in their service a large number of chaukidars whom according to the custom of the country, they remunerated by grants of land in lieu of wages. A register of these chaukidars was kept in the zamindari office, and in the appointment of the chaukidars in more than one instance, the Government Police Officer had a voice. But the record showed that the zamindars often changed the lands held by these men, and resumed what they considered to be in excess of their requirements. Bengal Act VI of 1870 was extended to Orissa in 1879. In suits by the respondents against the Secretary of State for a declaration that the Act did not apply to the lands in question:—*Held*, that the onus was on the appellants to show that when the zamindaries were confirmed to the respondents' ancestors such confirmation was subject to reservations in respect of any land which gave the Government the power of resuming and assessing it and that onus had not been discharged. The power of resumption was reserved by Government in the old Regulations in respect of lands which had been set apart by the zamindar with their permission or under their authority. In Regulation I of 1793 the word used is "appropriated", in Regulation

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Chaukidari Chakran Lands—*contd.*

XIII of 1805 the expression "assigned" is employed but in both statutes the characteristics of the grants under which the lands were held, depended on the implied authorisation of the Government which excluded them from consideration in the adjustment of the jama of the mahal In the present cases the appellant had failed to show that any parcel of land was not taken into account in fixing the rent respectively payable by the respondents nor that there was any obligation on the part of the respondents to make such grants The only obligation on them was to maintain peace and order within their zamindaries They entertained the services of chaukidars for whose maintenance they allotted from time to time certain lands of their own free will The mere fact that some appointments were made with the approval of a Government official could not alter the nature of the grants The word assigned in the definition section of Bengal Act VI of 1870 means land assigned by Government, or appropriated under their authority or with their permission Not only did the form of the transferring order in Schedule C of the Act clearly show that the expression assigned is applied to lands assigned by Government for the maintenance of the chaukidars and in respect of which they reserved the right to resume and transfer to the zamindar subject to an additional assessment but the resolution by which the Act was extended to Orissa leaves no possibility of doubt what the Government understood the Act to mean In the orders passed a distinction is made with regard to chaukidari holdings in the temporarily settled tracts and those situated in 'permanently settled estates' With regard to these it is declared that on resumption "the holdings should be included in

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Chaukidari Chakran Lands—*concld*

the estates within which they lie, and form part of its assets in the future" Nothing can be clearer that the Act was designed to deal with lands which, although lying within a mahal, did not form part of its assets which was not the case with the respondents zamindaries SECRETARY OF STATE FOR INDIA v. KIRTIBAS BHUPATI HARICHANDAN MAHAPATRA (1914) I L R 42 Calc . . . 710

Cheque, payment by—*Effect of such payment — Part payment—Limitation—Limitation Act (IX of 1908), s 20—Continuous account* If a cheque is delivered to a payee by way of payment and is received as such it operates as a payment subject to a condition subsequent that if upon due presentation the cheque is not paid the original debt revives Where such a cheque is signed by the debtor and paid in part payment of the principal of a debt, the cheque being subsequently honoured the proviso to s 20 of the Limitation Act has been complied with *Mackenzie* v *Tiruvengadathan* I L R 9 Mad 271, distinguished Where the dealings bet . . .

. . . NATH MITRA v DINABANDHU SAHA (1915) I L R 42 Calc 1043

Chota Nagpur Encumbered Estates Act (Beng. VI of 1876) s 17: *See* PATNI LEASE . 1029

Chukani Right—*Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—suit for rescission by purchaser—Transfer of Property Act IV of 1882 s 55—Duty of seller* A *chukani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months' notice, but a *raiyati* leasehold which may develop into occupancy right When the vendor

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Chukani Right—*concld*

is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object, mere silence will, in equity, be equivalent to misrepresentation. *Flight* v. *Bart n* 3 My & K 282, followed JOGENDRA NATH GOSWAMI v CHANDRA KUMAR MOZUMDAR (1914) I. L. R 42 Calc .. 28

Civil Courts Act (XII of 887) ss. 8, Sub-s. (2), 22, Sub s. (2): *See* TRANSFER 842

Civil Procedure Code (Act XIV of 1882), s. 244. *See* OCCUPANCY HOLDING 172

ss. 626, cl. (b) 629 *See* REVIEW .. 830

Civil Procedure Code (Act V of 1908), ss. 2 (2), 95, 104; O XLIII, r. 1: *See* EXECUTION OF DECREE . 440

s. 10: *See* JURISDICTION 926

s. 16: *See* JURISDICTION . 942

s. 47, O. XXI, rr. 58, 60: *See* EXECUTION OF DECREE—SHEBAIT 440

ss. 47, 73: *See* RATEABLE DISTRIBUTION . . 1

s. 73 · *See* CO OPERATIVE SOCIETY 377

s. 92, O. I, r. 3. *See* PARTIES 1135

s. 97: *See* APPEAL . 914

s 99: *See* HINDU LAW—RELIGIOUS ENDOWMENT .. . 536

s 102: *See* HOMESTEAD LAND . 638

s. 107, O. XLI, r. 4, application of: *See* COSTS 451

s 110 · *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

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Civil Procedure Code (Act V of 1908), s. 151 O. XLI, rr. 1 11: *See* APPEAL 433

O. V., rr. 15, 17, 27 *See* SUMMONS 67

O. XXI, rr. 35, 97 *See* BAILIFF ... 313

O. XXXIV, *See* PALAS OR TURNS OF WORSHIP . . . 455

O. XXXIV, r. 1: *See* HINDU LAW—MORTGAGE 1068

O. XXXIV, rr. 3, 6: *See* LIMITATION 291

O XXXIV, rr. 4, 5: *See* LIMITATION 776

O. XXXIV r. 14: *See* MORTGAGE 780

O. XXXVII, r. 2: *See* APPEAL 735

O. XLVII, r. 27 O XLVII, r. 1 675

O. XLVII rr. 4 7 *See* APPEAL 433

O. XLVII, rr. 4 (b) (2) (b) 7 (1) (b) *See* REVIEW . . 830

Co-conspirators, separate Trial of *See* CHARGE . . 957

Co operative Societies Act (II of 1912) ss. 19, 20 *See* CO OPERATIVE SOCIETY . 377

Co operative Society—*Charge—Priority—Co operative Societies Act (II of 1912), ss 19, 20—Attachment—Civil Procedure Code (Act V of 1908) s 73* Under s 73 of the Code of Civil Procedure the claim of a co operative society cannot be enforced unless they have a decree or charge under s 20 of the Co operative Societies Act (II of 1912) though under s 19 of that Act the society might have raised an objection to the attachment by reason of other sections of the Code of Civil Procedure ABDUL QUADIR v SHAHBAZPUR CO OPERATIVE BANK (1914) I L R 42 Calc 377

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Collector *See* INCOME TAX . 151

Colonial Courts of Admiralty Act, 1890 (53 & 54 Vict C. 27, ss. 2 (3) (a), 35: *See* ARREST OF SHIP .. 85

Commercial Intercourse with Enemies Ordinance (VI of 1914) s 3 *See* TRADING WITH THE ENEMY 1094

Commission · *See* PARDANASHIN EXAMINATION OF 19

Commitment: *See* APPROVER 850

——— *Duty of Magistrate to examine witnesses not produced but whom the accused is prepared to produce after process—Application to summon witnesses and for time to file documents made after the commitment order—Criminal Procedure Code (Act V of 1898) s 208—Practice* A Magistrate is bound, before passing an order of commitment to examine all the witnesses produced by the accused but not those whom he is prepared to produce after process obtained for their appearance *Queen Empress* v *Dhadi* I L R 21 All 264 referred to *Emperor* v *Muhammad Hadi* I L R 26 All. 177 dissented from A Magistrate does not act illegally under s 208 of the Criminal Procedure Code in refusing an application for summons on witnesses and for time to file documents made after the order of commitment has been passed EMPEROR v STRATH (1914) I L R 42 CALC 608

Company *See* PROVIDENT INSURANCE 300

Compensation for Wrong to Land *See* JURISDICTION 942

Complainant —*Absence of complainant—Cause called on by mistake on date not fixed for hearing—Order of acquittal—Effect of such order—Jurisdiction of Magistrate to proceed with trial thereafter—Criminal Procedure Code (Act V of 1898) s 247* An order of acquittal under s 247 of the Criminal Procedure Code passed by mistake on a date not fixed for the hearing of the case, for absence of the complainant, is a mere nullity, and does not debar the Magistrate from proceeding with the trial on the discovery of the error *H C Proceedings 17 Aug 1875, 2 Weir 307,* followed *Suresh Chandra Saha* v. *Banku Sadhukhan* 2 C L J 622 distinguished ACHAMBIT MANDAL v MAHATAB SINGH (1914) I L R 42 CALC . 36

Complaint—*Personal presentation of complaint—Complaint of defamation presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complaint before issue of process—Examination of pardanashin on commission—Criminal Procedure Code (Act V of 1898) ss 198, 200, 503—"At once"* The word "at once" in s 200 of the Criminal Procedure Code clearly indicates that a complaint must ordinarily be presented in person otherwise a Magistrate should be very loath to take cognizance, and should not accept a complaint not signed by the alleged complainant and not preferred by a person duly authorized to institute the specific complaint No process can be issued against the accused either by the Magistrate first taking cognisance or by the Magistrate to whom the case is transferred unless and until the Magistrate issuing it has first examined the complainant and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action When a *pardanashin* makes a complaint the Magistrate may take cognisance if satisfied that it is really her complaint, by whatever means it reaches him When it is presented on her behalf the Magistrate may, under s 503 of the Code, issue a commission for the examination required by s 200 Section 503 is very wide in its terms and

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Complaint—*concld*

refers not only to an inquiry or trial but to any other proceeding and authorises the examination of any "witness," which includes a complainant Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate and he issued process without examining the complainant *Held* that he had no power to issue process in such a case ABHAYESWARI DEBI *v* KISHORI MOHAN BANERJEE (1914) I L R 42 Calc 19

Compromise—*Compromise of suit relating to mortgages—Agreement of compromise not registered and not incorporated in decree—Suit for redemption of mortgages—Agreement for extinction of equity of redemption and for division of properties amongst the parties to mortgage deeds—Agreement of compromise given effect and carried out by acts and conduct of parties though document is ineffective to prove contract—Principle that Court will uphold a contract carried into effect by acts and conduct of parties* In this case the Judicial Committee (affirming the decision of the High Court) *held* in a suit for the redemption of two mortgages executed in 1848 and 1871 respectively between the predecessors in title of the parties that the equity of redemption had under the circumstances, been extinguished In 1870 an agreement was come to by the then representatives of the mortgagor and mortgagee in reference to the mortgage of 1848 Sums were fixed as being the principal and the interest due, and arrangements were made for payment by yearly instalments, and for the management of the property In 1873 differences arose between the parties to that agreement and the mortgagee brought a

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Compromise—*concld*

suit to enforce it which was compromised the terms of the agreement being in effect to pay off the mortgage debts and to divide the properties into specific shares which were to be legally conveyed by the mortgagor to the parties respectively entitled to them and a decree was made by the Court that "the suit be decided in pursuance of the terms of the compromise and the suit be struck off from the list of cases No conveyances were executed by the mortgagor in completion of the contract to that effect in the compromise nor was the agreement of compromise, registered nor its terms incorporated into the decree but it was acted upon and carried out by all the parties to it, and by their successors in title and for a period of 30 or 40 years prior to the present suit the rights of all the parties had been dealt with upon the same footing as if the mortgagor had made an express conveyance parties, with the equity of redemption and transferring allotted shares of the property itself to the mortgagees and reserving one share for herself *Held*, that if the agreement of compromise was defective as not being registered the decree had been obtained only on one footing namely that the parties to the suit had in fact arranged their rights in the property in terms of the compromise And even though the compromise and the decree taken together were considered to be defective or inchoate as documents making up a final and validly concluded agreement for the extinction of the equity of redemption the acts of the parties had been such as to supply all defects When the actions and conduct of the parties are founded upon, as in the performance or part performance of an agreement the *locus penitentiæ* which exists in a situation where the parties stand upon nothing but an engagement which

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Compromise—*concld*

is not final or complete is excluded For equity will support a transaction clothed imperfectly in those legal forms to which finality attaches after the bargain has been acted upon The principles laid down in *Maddison* v. *Alderson* L R 8 A C 467, Bells Commentaries, 10th Ed, section 26 and *Potter* v *Potter* 1 Ves Sen 437, followed There was nothing in the laws of India inconsistent with these principles, on the contrary, those laws followed the same rule

MOHAMED MUSA v AGHORE KUMAR GANGULI (1914) I L R 42 Calc 801

Computation of Time: *See* LEAVE TO APPEAL TO PRIVY COUNCIL 30

Conditional Order. *See* PUBLIC NUISANCE 702

Confession by Co accused *See* BAIL 25

Confessions of Accused: *See* JURY TRIALS . 789

Confiscation—*Cargo—Enemy ship—Cargo shipped by British subjects before declaration of war—War declared whilst cargo at sea—Cargoes consigned to German merchants (in one instance to British merchant)—Destination (Enemy Port)—Contracts C I F—Money advanced by British Banks against documents of title—Property in goods at the time of capture* On August 4th 1914 war was declared between Great Britain and Germany Before the declaration of war H S N C & Co, British subjects, had shipped some bales of jute by a German ship, the S S *Rappenfels* of the Hansa Line, and had consigned the goods to D C & Co, British merchants G & Co and G. W. & Co had also shipped goods by the same ship but had consigned the goods to German merchants The *Rappenfels* was captured at sea after the declaration of war and condemned as good and lawful prize at Colombo The *Rappenfels* was sent to Calcutta to have the

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Confiscation—*concld*

liability of the cargo to condemnation determined by the High Court at Fort William in Bengal Messrs H S N C & Co, G & Co, and G W & Co submitted claims for the release of their goods These claims were disputed by the Crown —*Held*, (i) that in determining the question of liability of the goods to confiscation, regard must be had to the property in the goods and not to the risk except so far as it may assist the Court in determining the answer to the question—"To whom did the goods belong at the time of capture"? (ii) that the sellers did not pass the property in the goods to the buyers at the time of appropriating the goods to the contract, and (iii) that in the circumstances the property in the goods was in the sellers and they were not liable to be confiscated RE CARGO ex S S "RAPPENFELS" (1914) I L R 42 CALC .. 334

Consent of Court: *See* MAHOMEDAN LAW—MARRIAGE . .. 351

Consent of Landlord: *See* TRANSFERABILITY 172

Consent of Parties: *See* JURISDICTION 116

Consolidated Rate: *See* RATES AND TAXES 625

Conspiracy: *See* CHARGE 957

Construction. *See* HINDU LAW—WILL 561

Constructive Notice *See* RATES AND TAXES 625

Contempt of Court—*Practice—Appeal—Assisting in contempt—Procedure* Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction *Held*, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived the proceedings against M, if any, should have been

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Contempt of Court—*concld*
for *assisting* in a contempt of Court. *Held* also (on the merits) that there had been no contempt or participation in contempt on M's part as all that he did had been done prior to the injunction MARSHALL v GRANDHI VENKATA RATNAM (1915) I L R 42 CALC 1119

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—— *See* COMPROMISE 801
—— *See* UNDUE INFLUENCE 286

Contract Act (IX of 1872) ss 16 19 *See* UNDUE INFLUENCE 286
——, **ss 16, 74, illus (*f*)** *See* INTEREST 652 690
——, **s 37** *See* DAMDUPAT RULE OF 8_(
——, **s. 72** *See* INCOME TAX 151
——, **s 230 (*°*)** *See* SALE OF GOODS 1050

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Conveyance by Executor *See* VENDOR AND PURCHASER 56

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Costs—*Partition—Civil Procedure Code (Act V of 1908) s 107, O XLI r 4 application of—Appellate Court power of* It is not necessary for the application of O XLI r 4 of the Code of Civil Procedure that the decree should proceed on every ground common to all the plaintiffs or defendants It is quite sufficient if it proceeds on any ground common to the party to which the appellant belongs Under s 107 of the Code the Appellate Court has the same power as the Court of first instance *Shama Soonduree Debia v Jardine Skinner & Co* 12 W R 160 *Dildar Ali Khan v*

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Bhagwan Sahai Singh, I L R 34 Calc 878 and *Ram Kamal Saha v Ahmad Ali* I L R 30 Calc 429 referred to AMBIKA PRASAD SINGH v PERDIP SINGH (1914) I L R 42 CALC 451

Court, duty of *See* INTEREST 690

Court fee —*Plaint—Valuation of Suit—Court Fees Act (VII of 1870) s 7 sub s (4) cl (c)* In a suit for a declaration that a decree for over 22 000 was bad and might be set aside the plaintiffs who were interested only in three annas share of the property which was valued at Rs 1000 were required to pay court fee for the whole of the decretal amount —*Held* that the plaintiffs must value their suit according to the extent of their claim and the court fee need therefore be paid only upon the amount *Phul Kumari v Ghanshyam Misra* I L R 35 Calc 202, and *Harihar Prasad Singh v Shyam Lal Singh*, I L R 40 Calc 615 referred to GANESH BHAGAT v SARADA PRASAD MUKHERJEE (1914) I L R 42 CALC 370

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—— : *See* PALAS OR TURNS OF WORSHIP	455
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—— **assessment of:** *See* PRACTICE	819
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Damdupat, rule of—*Mortgage between Hindus, whether the rule of Damdupat applies to—Transfer of Property Act (IV of 1882) s 4—Contract Act (IX of 1872) s 37.* There is nothing in the Transfer of Property Act (read with the Contract Act) to preclude the rule of Damdupat from applying to mortgages between Hindus *Ha dhwa Sidhanta Onahini Nidhi v Venkataramanjulu Naidu* I L R 26 Mad 662, not followed *In the matter of Hari Lall Mullick*, I L R 33 Calc 1269 *Nanda Lal Roy v. Dhirendra Nath Chakravarti*, I L R. 40 Calc. 710, *Jeevanbai v. Manordas Lachmandas*, I L R 35 Bom 199 and *Sundarabai v Jayavant* I L R 24 Bom 114, referred to KUNJA LAL BANERJI v NARSAMBA DEBI (1915) I L R 42 Calc . .	826
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Debt—*Charge—Assignment—Transfer of Property Act (IV of 1882, s 55 sub s (4)* There is no authority for the contention that a charge such as the one mentioned in s 55, sub s (4) of the Transfer of Property Act, is merely a personal right which cannot be transferred to an assignee The debt could undoubtedly be transferred and there is no reason why the security for the debt should not also be transferred with it *Hari Ram v Denaput Singh*, I L R 9 Calc 167 and *Moti Lal v Bhagwan Das*, I. L. R 31 All 443 distinguished SHEONANDAN LAL v ZAINAL ABDIN (1914) I L R 42 Calc ...	849
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Dispute concerning land—*Evidence not recorded according to law but memorandum taken down and signed by the Magistrate personally—Legality of final order—Criminal Procedure Code (Act V of 1898) ss 145, 356 (1) and (3)* The provisions of said section (1) of s 356 are mandatory Sub section (3) applies only where evidence has been recorded in accordance with sub-section (1) but not personally by the Magistrate Where the Magistrate did not take down the evidence himself nor was it taken down in his presence and hearing and under his personal direction and superintendence nor did he make a memorandum thereof and sign the same—*Held* that the provisions of s 356 had not been complied with and that the order declaring the opposite party to be in possession was bad in law SATANANDA MANDAL v KRISHNA MANDAL (1914) I L R 42 Calc	381
Dissolution of Partnership See APPEAL	914
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The single question in these cases was still that it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance, and the House of Lords in that case adopted that formulation of the law In the

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Easement—*concld*
judgment of the House of Lords in *Jolly* v *Kine*, [1907] A C 1, three

law as stated by Lord Davey is the law as laid down by that decision and that it accurately formulated the law on the subject In the High Court, in the present case, the Court of first instance adopted Lord Davey's opinion and applied it consistently to the findings of fact to which he came, and the appellate Court had substantially taken the same test Their Lordships therefore, affirmed the judgments of the Courts below and dismissed the appeal PATT v ROBSON (1914) I L R 42 Calc . 46

———*Prescriptive right to take water by means of definite mode of access—Whether owner of servient tenement may substitute some other means of access* When the owner of a dominant tenement has acquired a prescriptive right to take water from a tank on the servient tenement and has for this purpose used a particular means of access for the statutory period, he has acquired a right to reach the water by means of such definite mode of access the servient owner, at his own discretion may not substitute for his use some other means of access JIBANANDA CHAKRABARTY v KALIDAS MALIK, (1914) I L R 42 Calc 164

Embankment Act (Beng. II of 1882): *See* SALE FOR ARREARS OF REVENUE . 765

———**Charges:** *See* SALE FOR ARREARS OF REVENUE ... 765

Embarrassment of Debtor: *See* INTEREST 652

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———*See* HINDU LAW—RELIGIOUS ENDOWMENT 536

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——— ———*Disbelief of greater part of the evidence of the prosecution witnesses—Conviction on the residue —Propriety of the conviction—Practice* When the prosecution witnesses are found to be untruthful as to the greater part of their evidence, it would be dangerous to convict the accused on the residue without corroboration HARI KRISHNA v EMPEROR (1914) I L R 42 Calc 784

———**Act (I of 1872), ss 10, 14, 15, 54 135, 143, 154:** *See* CHARGE ... 957

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———**117:** *See* TRADE MARK . .. 262

Exclusion of Females: *See* HINDU LAW —INHERITANCE 1179

Execution of Decree—*Shebait—Claim preferred by successor in office of judgment debtor (adverse to his own interests) as the legal representative—Order made, whether under scope of Civil Procedure Code (Act V of 1908), s 47 or O XXI, rr. 58, 60—Appeal therefrom, competency of —Civil Procedure Code (Act V of 1908) s 2 sub s (2), ss 96, 104, O XLIII, r 1* Where X in execution of a decree for money against Y as shebait of a deity attached and proceeded to sell properties of which Y or his successor in office had alleged that he was in possession, not as shebait of the deity, but in his own right *Held*, that the case did not fall within the scope of section 47 of the Civil Procedure Code of 1908 as Y in his character of shebait, the only character in which he was a party to the suit, could not rightly

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Execution of Decree—*concld*

be deemed the same person in his character as a private individual *Kartick Chandra Ghose* v *Ashutosh Dhara*, I L R 39 Calc 298, followed That the order of the original Court must be taken to have been made under r 60 of O XXI, which recognised a broad distinction between the representative character and the personal character of the same individual and that in consequence, the appeal to the Subordinate Judge was incompetent *Punchanun* v *Rabia Bibi*, I L R 17 Calc 711 distinguished and explained *Per* MOOKERJEE J When X in execution of a decree for money against Y seeks to proceed against Z as the legal representative of Y who is liable only to the extent of the assets of Y in his hands, and a question arises whether a particular property does or does not, constitute such assets it must be determined by the Execution Court under section 47 of the Code *Per* BEACHCROFT J If the claim of the objector is really in his own interest as representative of the judgment debtor, the case will come under section 244 (of the Code of 1882) if the claim is adverse to his interest as representative, it will not UPENDRA NATH KALAMURI v KUSUM KUMARI DASI (1914) I L R 42 Calc . 440

Executor, conveyance by: *See* VENDOR AND PURCHASER 56

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Fishery—*contd*

434 per Garth C J and the rule in *Fitzwalter's Case* 3 Keble 242, that the evidence of a Government grant of an exclusive fishery in navigable waters ought to be conclusive and clear followed *Held* in the present case so far as such evidence can now be expected to be forthcoming as to particular grants more than a century old the evidence was sufficient to show that the competent authority—the Government of India in right of the Crown—did actually grant to the appellants predecessors in title or settle with them so as in effect to grant a jalkar right of several fishery in certain of the waters of the Ganges system in this suit *Held* also (following a numerous body of decisions in the Indian Courts) that it must now be taken as decided in Bengal that a Government grantee of a jalkar right can follow the shifting river to the enjoyment of his exclusive fishery so long as the waters of the river system within the upstream and downstream limits of his grant whether the Government owns the soil subjacent to such waters as being the long established bed or whether the soil is still in a riparian proprietor as being the site of the river's recent encroachment The whole series of decisions in Bengal on the subject from 1807 to 1905 reviewed and discussed The English common law admittedly does not apply to the mofussil of India yet the Indian Courts have in many respects followed the English law of waters, and their Lordships have given careful consideration to the arguments that principles established under and for English conditions afford a sound guide to the rules which should be enforced in India, though they would in any case be slow to disturb decisions by which rules have been established for Bengal governing exclusive and important rights such

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Fishery—*contd*

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Forfeiture *See* LAPTION 756 856

Forfeiture—*Press Act (I of 1910) s 4 (1)—Order ... by Local Government of Delhi—Jurisdiction—Delhi Laws Act (XIII of 1912)* Where an order was made under section 4(1) of the Indian Press Act 1910 by the Local Government of Delhi directing the forfeiture wherever found of all copies of a newspaper published for a certain date in Delhi on an application to set aside the order made by a person who had in his possession in Calcutta a particular copy —*Held* that this High Court had no jurisdiction to entertain the application *In re* ABUL KALAM AZAD (1915) I L R 42 Calc 730

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——— **for Marriage** *See* MAHOMEDAN LAW—MARRIAGE 351

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of a guardian of a minor the Court is bound to consider a will although probate has not been granted The fact that there is a contest as to the validity of the will may induce the Court to exercise its discretion one way or the other but it is not open to the Court to say it will refuse to take notice of the will *Sayad Shahu v Hajija Begam* I L R 17 Bom 560 *Chinnasami v Hari haribadra* I L R 16 Mad 380, and *Pathan Ili Khan Badlu Khan v Bai Panibai*, I L R 19 Bom 832 referred to. SARALA SUNDARI DEBI *v* HAZARI DASI DEBI (1915) I L R 42 Calc .. 953

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India), that the part taken by the reversioners with respect to the mortgages in question did not, under the circumstances, amount to a consent to bind their interests When a "stringent equity" arising out of an alleged consent by reversioners is sought to be enforced against them, such consent must be established by positive evidence that upon an intelligent understanding of the nature of the dealings they concurred in binding their interests and that such consent should not be inferred from ambiguous acts or be supported by dubious oral testimony such as appeared to have been relied upon in this case *Jiwan Singh* v *Misri Lal* I L R 18 All 146, L R 23 I A 1 per Lord Hobhouse refer red to HARI KISHEN BHAGAT v KASHI PERSHAD SINGH (1914) I L R 42 Calc . 876

———*Custom—Babuana and Sohag grants—Proof of Custom—Custom excluding females from succession in Darbhanga Raj family estate—Custom of exclusion not only from succession to Raj but extending to succession in collateral branches of family—Custom effective notwithstanding partition had taken place in family branch* In a suit by one of two brothers in a junior branch of the family of the Darbhanga Raj (an estate governed by the rule of male lineal primogeniture) against the widow of the other brother for possession of her deceased husband's property on the ground that widows were by the custom of the family wholly excluded from succession, not only to the Raj itself, but also in the [illegible] to which the parties belonged that widows did not inherit *babuana* properties and that the succession in the case of *sohag* grants was governed by the same custom as governed the succession in the case of *babuana* grants. The custom applied in this case notwithstanding a separation and partition of the property which had been effected between the plaintiff and his brother, and consequently on his brother's death the plaintiff became entitled to such of the estate of his deceased brother as consisted of *babuana* and *sohag* properties, together with accretions which had been made to the former property *Held*, also, that the custom was strongly supported by instances in the family of widows, who would otherwise have been entitled to a Hindu widow's interest having been excluded from, or not having claimed, possession of property on the death of the husbands, and that the custom being proved to be well established could not under the circumstances, be defeated by the fact that in one instance, as the evidence showed, it was not enforced Words used in the *babuana* and *sohag* grants "*auras putrapoutradi*," were held not be words of general inheritance which would include females as well as male heirs but words of limitation consistent with the custom which excluded females from succession under *babuana* and *sohag* grants which could not be made under the ordinary Hindu (in this case the Mithila) law *Ram Lall Mookerjee* v *Secretary of State for India*, I L R 7 Calc 304, L R 8 I A 46 EKRADESHWAR SINGH v JANESHWARI BAHUASIN (1914) I. L R 42 Calc 582

———*Inheritance—Right of bandhus to inherit—Bhinnagotra sapindas—Paternal grandfather's son's son's daughter's sons—Limitation of sapinda relationship—Same limitation, namely, 7 degrees on father's side and 5 degrees on mother's side in respect of marriage, affinity, impurity and exequial rites*

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and in cases of inheritance—Mitakshara, Ch II ss 5 and 6. The Hindu Law contains its own principles of exposition and questions arising under it cannot be determined on abstract reasoning, or on analogies borrowed from other systems of law, but must depend for their decision on the rules and doctrines enunciated by its own law givers and recognised expounders The word *bandhu* has in the system of the Mitakshara a distinctive and technical meaning in other words it signifies a *bhinna gotra sapinda* The appellants as being the paternal grandfather's son's son's daughter's daughter's sons of a deceased Hindu, claimed to succeed to his property as his next of kin or *bandhus* under the Mitakshara Law The respondents contended that the appellants had no heritable right in the property as they did not come within the category of *bandhus* entitled to succeed *Held*, (*a*) that the *sapinda* relationship on which the heritable right of collaterals is founded ceases in the case of the *bhinna gotra sapinda* with the fifth degree from the common ancestor and (*b*) that in order to entitle a man to succeed to the inheritance of another he must be so related to the latter that they are *sapindas* of each other The appellants therefore being sixth in descent from the common ancestor, and there being no *sapinda* relationship between them and the propositus, they came within neither (*a*) nor (*b*) and were not entitled to inherit The decision in the case of *Greedharee Lal Roy* v *Government of Bengal*, 12 Moo I A 448, does not warrant the contention that the three classes of *bandhus*, namely, *atma bandhus*, *pitri bandhus* and *matri bandhus* into which Vijnaneswara divides the *bandhus* in the Mitakshara, can be added to or extended

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Hindu Law—*contd*

The limitation of *sapinda* relationship laid down in the Mitakshara (Achara Kanda) *i e*, that it ceases after the 7th ancestor on the father's side and the 5th ancestor on the mother's side, is not confined to prohibition in respect of marriage, impurity, and exequial rites only, but applies also to inheritance *Lallubhai* v *Nankuvar bai*, I L R 2 Bom 388, per Westropp C J, *Umaid Bahadur* v *Udoi Chand*, I L R 6 Calc 119, and *Babu Lal* v *Nanku Ram*, I L R 22 Calc 339 referred to The value of the statement by Sastri Golap Chandra Sarkar in his work on Hindu law that "the word '*bandhu*' in the Mitakshara means and includes all cognate relations without any restriction or at any rate all cognates within 7 degrees on both the father's as well as the mother's side," is considerably discounted by his desire, in order to prevent the deceased's property becoming, so to speak, derelict, and thus escheating to the

does not seem to be supported by the definition of *sapinda* relationship in the Mitakshara itself The argument that the application of the *sapinda* relation in the case of *bandhus* should be extended beyond the 5th degree on the ground that it is not likely that Vijnaneswara would give a right of inheritance to a spiritual preceptor or *guru* before kinsmen, however remotely connected, ignores the peculiar and intimate relationship which exists in the Hindu system between the pupil and the *guru* who has to initiate him into the mysteries of the Vedic laws and rites, and under whose roof he has to pass so many years of his life, in which circumstances the mystical relationship between a spiritual preceptor and his pupil might well be regarded

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is creating a far closer tie than remote relationship of blood RAM CHANDRA MARTAND WAIKAR v. VINAYEK VENKATESH KOTHEKAR (1914) I L R 42 Calc . 384

——————*Succession to Impartible Estate governed by rule of primogeniture where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior members leaving family house and living in separate residence after obtaining grant for maintenance* The succession on the death of a holder without male issue to an impartible estate which descends by the rule of primogeniture the junior members of the family being entitled to grant for maintenance and where no custom excluding females existed depended on whether there had been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent reversioner On that question the Courts in India differed the Subordinate Judge finding that a separation had taken place and the High Court being of opinion that what had occurred did not in intention and fact amount to a complete separation *Held* (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner TARA KUMARI v. CHATURBHUJ NARAYAN SINGH (1915) I L R 42 Calc 1179

——————*Mortgage—Mitakshara—Mortgage by father to secure personal debt—Neither antecedent nor for family purposes nor immoral—Suit brought after his death—Limitation—Limitation Act (XV of 1877) Sch II, Arts 120 132—Transfer of Property Act (IV of 1882) s 85, Civil Procedure*

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Code (Act V of 1908) O XXXIV, r 1 The Full Bench decision in the case of *Luchmun Dass v. Giridhur Chowdhry* I L R 5 Calc 855 is still binding on this Court as no contrary rule has yet been laid down by the Judicial Committee of the Privy Council [either in *Nanomi Babuasin v. Modhun Mohun*, I L R 13 Calc 21, L R 13 I A 1 or *Bhagbut Pershad v. Girja Koer*, I L R 15 Calc 717, L R 15 I A 99] nor has it been superseded by subsequent legislation as s 85 of the Transfer of Property Act (now replaced by O XXXIV, r 1 of the Civil Procedure Code, 1908) cannot touch the question Where a suit upon a mortgage effected by a father governed by the Mitakshara Law for a debt which is neither antecedent nor for family purposes and not proved to be immoral had been brought (more than six years) after the death of the father against the sons some of whom were adult and some minors at the time of the mortgage —*Held* (without deciding when the right to sue accrues) that Art 132 of the Schedule to the Indian Limitation Act had no application as there was no charge on immovable property enforceable against the sons consequently, Art 120 governed the case *Luchmun Dass v. Giridhur Chowdhry*, I L R 5 Calc 855, affirmed *Kishun Pershad Chowdhury v. Tipan Pershad Singh*, I L R 34 Calc 735 approved *Mahesvar Dutt Tewari v. Kishun Singh*, I L R 34 Calc 184, *Biswanath Pershad Manata v. Jagdip Narain Singh* I L R 40 Calc 342, 17 C W N 1025, *Sheo Narain Ray v. Mokshoda Das Mittra*, 17 C W N 1022, overruled BRIJNANDAN SINGH v. BIDYA PRASAD SINGH (1915) I L R 42 Calc .. . 1068

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————*Religious endowments—Shebait—Nature of debutter grants where grantee is to enjoy properties from generation to generation on performance of sheba of the goddess—Permanent leases by grantee validity of—Civil Procedure Code (Act V of 1908) s 99—Ambiguity—Evidence* In the construction of ancient grants and deeds evidence is admissible as to the manner in which the thing granted has always been possessed and used for so the parties thereto must be supposed to have intended *Weld* v *Hornby*, 7 East 197 8 R P 608 *Fox* v *Osbourne*, 1 East 32 followed The Court may call in aid acts under the deed as a clue to the intention *Doe* v *Ries* 8 Bing 981 followed This principle does not apply unless there is an ambiguity *Attorney General* v *The Corporation of Rochester* 5 DeG M & G 882 followed Consequently while in a case of ambiguity the Court will uphold that construction of a deed which justifies a long usage as to the application of trust funds the Court will not where there is no ambiguity accept an erroneous interpretation though consistent with usage so as to sanction a manifest breach of trust *Drummond* v *Attorney General* 2 H L C 837 followed If there is a deed which says according to its true construction one thing you cannot say that the deed means something else, merely because the parties have gone on for a long time so understanding it *Sadlier* v *Biggs*, 4 H L C 435 followed Where two ancient *debutter* grants by one of the Maharajas of Pachete were held to be ambiguous, the properties having been given to the grantee *who was to enjoy them from generation to generation* on performance of the *sheba* of the goddess, and in 1829 the successors of the grantee gave two permanent leases to the predecessors in interest of the plaintiffs *Held*, that in those circumstances the Court might determine the true character of the endowment from the manner in which the dedicated properties had been held and enjoyed That the properties in dispute were not absolute *debutter* properties of the goddess, but were the personal properties of the grantees subject to the charge of the worship of the goddess *Ganga* v *Brindaban*, 3 W R 142 *Madan* v *Kamal*, 8 W R 42 referred to That the permanent leases had become indefeasible by lapse of time *Jagamba Goswamini* v *Ram Chandra Goswami* I L R 31 Calc 314, *Damodar Das* v *Lakhan Das*, I L R 37 Calc 885, L R 37 I A. 147 as explained in the case of *Madhu Sudan Mandal* v *Radhika Prasad Das* 16 C L J 349 followed KULADA PROSAD DEGHORIA v KALI DAS NAIK (1914) I L R 42 Calc ... 536

————*Will—Construction of will—Devise to widow—Gift over—Life interest—Absolute gift—Power of appointment—Alienation by gift or sale—Administration suit—Cause of action* A Hindu testator by his will provided for the performance of certain religious ceremonies and devised all his moveable and immoveable properties to his wife with power to alienate by gift or sale He also by the same will made a gift over to his daughter in the following terms — My daughter Hara Kumari, shall become entitled to and possessor of whatever property will remain after your death and she shall enjoy the same keeping up and maintaining the aforesaid *sheba* etc' The will then went on to say —' the said daughter shall

. . .

perties shall with possession [illegible] same and keeping up and maintain

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ing the *sheba* enjoy them At his death on the 11th March 1866 the testator left him surviving his widow and an only daughter, Hara Kumari The widow having obtained probate of the testator s will executed on the 19th May 1898 in

a deed of gift of certain properties acquired by her under the said will On the 30th September 1898 the widow died In October 1899 Mahim Chandra Sirkar the testator s nephew, dispossessed Hemangini and Nagendrabala of these properties and took possession of the same On the 8th March 1908 Hara Kumari in whose favour the High Court had decided a suit brought by Mahim Chandra Sarkar for the construction of the testator s will and for a declaration of the rights of the parties thereunder (11 C W N 412 7 C L J 540) executed a deed of gift in favour of her daughter Hemangini and on the 8th April 1908 she also executed a similar deed in favour of her other daughter Nagendrabala and a *kobala* in favour of Hemangini In suits brought for administration by Mahim Chandra Sarkar against Hara Kumari who died during its pendency, for recovery of arrears of rent and cesses in respect of a certain *darpatni* belonging to the estate of the testator by Mahim Chandra Sarkar against the *darpatnidar* and Hemangini and Nagendrabala and for recovery of possession of certain property acquired by virtue of the deed of gift from the testator s widow by Hemangini and Nagendrabala against Mahim Chandra Sarkar *Held* that Mahim Chandra Sarkar had no cause of action and could not maintain the suit for administration *Held*, also, that the testator could make an absolute gift to his daughter who

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was his reversionary heir in absolute estate and that the gift to her under her father s will was an absolute gift *Held* also, that there was no power of appointment to the daughter enjoining her to nominate an heir or successor to her father s estate *Held* also, that the provision for keeping up the *sheba* was merely a collateral charge on the property in whose ever s hands it might be and did not affect on the absolute character of the gift *Brij Lal* v *Suraj Bikram Singh*, I L R 34 All 405 distinguished *Kouli se Mahomed Shumsool Hooda* v *Shewukram*, L. R 2 I A 7, *Radha Prasad Mullick* v *Raneemoni Dassi* I L R 35 Calc 896 L R 35 I A 118, *Jatindra Mohan Tagore* v *Ganendra Mohan Tagore* 9 B L R 377, *Mussamat Kollany Kooer* v *Luchmee Pershad* 24 W R 395, *Thakur Singh* v *Nokhe Singh* I L R 23 All 309 and *Ramasami* v *Papayya* I L R 16 Mad 466, referred to *Held*, also, that the *patni* was vested in Hemangini and Nagendrabala by alienation during Hara Kumari s life that they were Hara Kumari s heirs the property being *stridhan* and that Mahim Chandra Sarkar had no title whatever to any of the properties left by Hara Kumari *Held*, also, that the widow had absolute power of alienation in derogation of the rights of the sole reversioner her daughter who was only entitled to the residue, that the gift by the widow to Hemangini and Nagendrabala was valid and that Mahim Chandra Sarkar could not plead his right as reversioner against a suit by the heirs of Hara Kumari to eject him as a trespasser, even though the gift should fail *Hara Kumari Dasi* v *Mahim Chandra Sarkar*, 12 C W N. 412, 7 C L J 540 referred to *Held*, further, that the power of alienation which though perhaps analogous to what

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was known as a power of appointment in English law could not be governed by the rules of English law relating to such appointments *Bai Motivahu* v *Bai Mamubai* I L R 21 Bom 709 referred to MAHIM CHANDRA SARKAR v HARA KUMARI DASSEE (1914) I L R 42 Calc . . 501

Hindu Widow: *See* GUARDIAN . 903

Homestead Land—*Suit for rent—Jurisdiction—Protected under tenure—Revenue Sale Act (XI of 1859) s 37 cl (4)—Garden—Incumbrances anulment of on sale of taluk for arrears of revenue—Provincial Small Cause Courts Act (IX of 1887) Sch II Art 8—Second appeal—Civil Procedure Code (Act V of 1908) s 102* Section 102 of the Civil Procedure Code is no bar to second appeals in suits for rent other than house rent although the value thereof does not exceed Rs 500 *vide* Art 8 of Schedule II of the Provincial Small Cause Courts Act *Soundaram Ayyar* v *Sennia Naickan* I L R 23 Mad 547, distinguished When land ceased to be garden land about a quarter of a century ago and tenants have been settled on the land since then, the tenure is not protected and does not fall within the 4th exception to section 37 of the Revenue Sale Act (XI of 1859) and is liable to be annulled The effect of a sale is not *ipso facto* to avoid under tenures, the purchaser has the option of avoiding them or keeping them intact *Titu Bibi* v *Mohesh Chandra Bagchi*, I L R 9 Calc 683, followed It is necessary, therefore that the purchaser must by some unequivocal act indicate his intention to avoid under tenures if he desires to do so and the election of the purchaser to avoid must be brought to the knowledge of the under tenure holder A formal written notice is not essential, *Dursan Singh* v *Bhawani Koer*, 17 C W N 984, followed and explained The facts that the purchaser demanded rents from the tenants to the knowledge of the under tenure holder, sued the tenants for *rent* took out warrants of attachment in execution of decrees and realized rents from the tenants in repudiation of the under tenure holder's title, go to show that the under tenure holder had not only notice of unequivocal acts on the part of the purchaser indicating his election to avoid the *mokarrari* but the purchaser had in fact obtained possession of the estate *Mir Waziruddin* v *Deoki Nandan* 6 C L J 472, distinguished *Per* N R CHATTERJEA J The mere fact that a garden was made on a piece of land a quarter of a century before the sale, would not make it land on which a garden has been made for all time to come *Per* BEACHCROFT, J No particular method of expressing that intention to the under tenure holder To afford protection the work must *still be in existence* or the land be used for the purpose of the work The perfect tense in "leases of land whereon . . gardens *have* been made" denotes a present state *Obiter* If the *busti* land is covered by the lease of the land on which the mill stands or if the *busti* is an integral part of the mill, and exists only for the purposes of the mill it is possible that it might be protected SAHADORA MUDIALI v NABIN CHAND BORAL (1914) I L R 42 Calc .. .. ..

Identity of Transaction: *See* MISJOINDER OF CHARGES .. ...

Ijmali Share: *See* SALE FOR ARREARS OF REVENUE .. ..

Illegal Composition: *See* UNDUE INFLUENCE ... ...

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Impartible Estate: *See* HINDU LAW—INHERITANCE 1179

Inadqeuacy of Price: *See* SALE FOR ARREARS OF REVENUE .. 897

Income Tax—*Executor's liability to income tax—Suit, maintainability of for declaration of non liability to tax—Collector jurisdiction of, to assess income tax—Income Tax Act (II of 1886)—Contract Act (IX of 1872) s 72* Income accruing to an executor under the will of a testator is 'income' as defined in s 3, clause (5) of the Income Tax Act, 1886, and is liable to be taxed under the Act It is the Collector's duty to determine what persons are chargeable in respect of sources of income other than salaries and pensions profits of companies and interest on securities A suit brought by an executor of an estate for a declaration that as executor he was not liable to pay income tax in respect of any income of the estate and that the collector, in realising the sums paid to him, acted without jurisdiction and for a decree for the amount so paid with interest does not lie Payment of income tax by the executor of an estate, under protest, on the ground that as executor no tax was payable by him, may be regarded as paid under coercion within the meaning of s 72 of the Contract Act *Kanhaya Lal* v *National Bank of India Ld*, I L R 40 Calc 598 L R 40 I A 56, referred to FORBES v SECRETARY OF STATE FOR INDIA (1914) I L R 42 Calc 151

Income Tax Act (II of 1886): *See* INCOME TAX 151

Incumbrance: *See* HOMESTEAD LAND .. 638

Indian Marine Ssrvice: *See* SERVICE OF SUMMONS 67

Infant: *See* MAHOMEDAN LAW—MARRIAGE 351

Inherent Power of High Court: *See* APPEAL 433

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Inheritance: *See* HINDU LAW ... 384

——— *See* HINDU LAW—INHERITANCE .. ... - ... 1179

——— *See* OCCUPANCY HOLDING 254

Injunction—*Limitation—Suit for damages ...*

lies for damages against a defendant for, maliciously and without reasonable or probable cause, obtaining a perpetual injunction which was subsequently dissolved on appeal *Nund Coomar Shaha* v *Gour Sunlar*, 13 W. R 305, doubted *Quartz Hill Mining Co.* v *Fyre*, 11 Q B D 690, *Smith* v. *Day*, 21 Ch. D 421, *Hari Nath Chatterjee* v *Mothur Mohun Goswami*, I L R 21 Calc 8, L R 20 I A 188, *Chander Cant Mookerjee* v *Ram Coomar Coondoo*, 22 W. R 138, *Cotterell* v *Jones* 11 C B. 713, *Turner* v. *Ambler*, 10 Q B 252, referred to Under Art 42 Sch I of the Limitation Act (IX of 1908) time begins to run from the date when the injunction ceases MOHINI MOHAN MISSER v. SURENDRA NARAYAN SINGH (1914) I L R 42 Calc 550

Insolvency: *See* MINOR 225

———*Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s 7 of Insolvency Act (11 & 12 Vict, c 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment creditor purchasing at sale in execution of his own decree—Notice* An attachment in execution of a money decree on a mortgage of land, followed by an order for sale of the interest of the judgment debtor does not create any charge on the land *Sarkies* v. *Bundoo Baee*, 1 N W. P. 172, referred to An attachment prevents and avoids any private alienation, but does not

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Insolvency—*contd*

invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict c 21) and an order for sale though it binds the parties does not confer title Previous to the 6th September 1904 a colliery leased to the judgment debtors was attached under a mortgage decree by the respondents (judgment creditors) and an order for sale on 5th September was made but at the request of the judgment debtors the sale was postponed until the 10th On 6th September the judgment debtors filed their petition in the Insolvency Court in Calcutta and the usual vesting order was made on the same day On 12th September the execution proceedings were stayed After issue of notice on the application of the respondents to the Official Assignee to show cause why he should not be substituted in the place of the judgment debtors the Subordinate Judge on 10th January 1905 finding that the notice had been duly served made the order for substitution and fixed the sale for 6th March 1905 on which day the property was sold and purchased by the respondents who in June were put into possession Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the

Assignee to show cause why he should not be substituted for the judgment debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882 A notice under that section should have called on him to show cause why the decree should not be

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Insolvency—*contd*

executed against him But assuming the notice to have been duly served (which was denied) the sale

wrong to allow the sale to proceed at all The judgment creditors had no charge on the land, and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents In the second place, no proper steps had been taken to bring the Official Assignee before the Court

debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property *Mallarjun* v. *Narhari*, I L R 25 Bom 337, L R 27 I A 216 distinguished. No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted. RAGHUNATH DAS *v* SUNDAR DAS KHETRI (1914) I L R 42 Calc . 72

——— *Interim Receiver—Insolvent's money, attachment of, before the adjudication order—Provincial Insolvency Act (III of 1907) s 13, cl (2) s 16, cl (6) s 34, cl (1)—Bankruptcy Act of 1883 (46 & 47 Vict c 52), s 40* An *interim receiver is appointed for the protection of the estate of the debtor for the benefit of the entire body of creditors* *Ex parte Fox*, L. R. 17 Q B D 4, referred to Clause (1) of s 34 of the Provincial Insolvency Act restricts the operation of s 16 clause (6) thereof A creditor, who had attached a sum of money due to the insolvent before his estate vested in the receiver appointed after the adjudication

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Insolvency—*concld*

order, is entitled to apply it exclusively in satisfaction of his debt MADHU SARDAR v KHITISH CHANDRA BANERJEE (1914) I L R 42 Calc . . . 289

———*Practice—Presidency Towns Insolvency Act (III of 1909) s 36 (4) (5) whether applicable to contentious matters* Section 36 (4) and (5) of the Presidency Towns Insolvency Act 1909 is intended to provide a summary procedure for ordering payment of debts due and delivery of property belonging to an insolvent, where there is no dispute it is not intended for contentious matters or for following property the subject of fraudulent preference or dishonest concealment *In re* J M LUCAS AND ANOTHER (1914) I L R 12 Calc 109

Insolvency Act (11 & 12 Vict c 21) s 7 See INSOLVENCY 72

Insolvency of Partner *See* MINOR 225

Intangible Property *See* PALAS OR TURNS OF WORSHIP 455

Interest *See* MORTGAGE 114

Interest *See* SLAVERY BOND . 742

———*Contract Act (IX of 1872), ss 16, 74—Undue influence presumption of—Penalty—Excessive and usurious interest—Duty of the Court* Where there is ample security, the exaction of excessive and usurious interest in itself raises a presumption of undue influence which it requires very little evidence to substantiate The attempt to conceal the real rate of interest, by describing it as one pice in the rupee per mensem or as in the present case, Rs 5 per mensem is evidence of an intention to get the better of the debtor The law lays down that there must be a footing of complete equality between debtor and creditor and they must be so to speak, at arm's length to make a bargain, which is in itself harsh and unconscionable enforcible at law *Carringtons, Ld*

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Interest—*contd*

v *Smith* [1906] I K B 79, *In re a Debtor* [1903] 1 K B 705, referred to Where there is ample security, an excessive rate of interest has been held to be anything over ten per cent. Where there is no security, no rate of interest can be considered excessive There can be no standard rate on personal loans, and where the parties are reasonably on terms of equality, a Judge cannot do better than adopt what they themselves have agreed on though of course, when that is not the case he has to judge what is reasonable, as best he can and under all the circumstances Where the contract is for a temporary accommodation, the stipulation that interest is to run at Rs 5 a month is one which necessitates the payment of interest not at 60 per cent per annum, but at Rs 5 in each month and a stipulation that in default of 12 months' instalments of interest, compound interest would begin to run is in the nature of a penalty However technical this may be it is the duty of the Courts in India to enforce the letter of the law against obviously harsh and unconscionable bargains of this nature The exploitation of the necessitous, of the careless and inexperienced, is a trade to be extirpated in the interest of the whole

lingam Pillai I L R 36 Mad 229, *Samuel* v *Newbold* [1906] A C 461, *Kesarulu Naidu* v *Arithulai Ammal* I L R 36 Mad 533 referred to ABDUL MAJEED v KHIRODE CHANDRA PAL (1914) I L R 42 Calc . . . 690

Interest—*Stipulation in mortgage bond or interest at 75 per cent per annum whether penalty—Liquidated damages—Undue Influence—Unconscionable bargain—Contract Act (IX of 1872) ss 16, 74, illus (f) as amended by Act VI of 1899, s 4*

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Interest—*contd*

(1)—*Act XXVIII of 1855, s 2* *Per* Mookerjee J (Beachcroft J agreeing to as to penalty) Notwithstanding the small group of cases where a restricted view was taken of the authority of the Court to relieve against a penalty the tide has turned back and the more modern cases repudiate the doctrine that any rate of interest however exorbitant, cannot be deemed penal *Motoji v Sheikh Husain* 6 Bom H C 8 *Para v Govind* 10 Bom H C 352 followed *Arjan Bibi v Asgar Ali* I L R 13 Calc 200 *Gokul Chand v Khaja Ali (1896)* Punj Rec 32 *Sankaranarayana Padhyar v Sankaranarayana Ayyar*, I L R 25 Mad 343 *Chinna v Pedda*, I L R 26 Mad 445 *Periaswami v Subramanian* 14 Mad L J 146 not followed This principle is fairly deducible from the modern decisions that the Court is competent to grant relief whenever the rate of interest appears to the Court to be penal *Mirajan Patari v Abdul Jubbar*, 10 C W N 1020 *Pelchand v Flagg* I L R 36 Bom 164 14 Bom L R 18 *Ganapathi v Sundara* 22 Mad L J 354 *Muthukrishna v Sankaralingam* I L R 36 Mad 229 followed Although s 74 of the Contract Act was originally framed to deal with the doctrine of penalty and liquidated damages as understood in the law of England it is in its present form comprehensive enough to include the type of cases before the Court, because it covers all cases where the contract contains ' *any stipulation by way of penalty* It is obvious that each case must be treated on its own circumstances The test is, was the agreement to pay damages for the breach of contract unconscionable and extravagant such as no Court ought to allow to be entered into *Webster* v. *Bosanquet* [1912] A C 394, referred to " You are to consider whether

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Interest—*contd*

it is extravagant, exorbitant, or unconscionable *at the time when* the

plation of the parties when they made the contract" *Clydebank Engineering Co* v *Don Jose Castaneda* [1905] A C 6 referred to A stipulation for merely accelerating payment of the whole debt in default of payment of one or more instalments is not by itself, by way of penalty *Ex parte Burden*, 16 Ch D 675, *Sterne v Beel*, 1 DeG J & S 595 *Wallingford v Mutual Society*, 5 App Cas 685 referred to But when the entire sum which the creditor had agreed to receive in instalments without interest, is not only repayable in one sum, but is also made to carry interest at an unusual rate, the Court may, in view of all the circumstances of the case, regard the stipulation for payment of interest at an exorbitant rate as penalty When (on an account originally made up very largely of interest at an exorbitant rate) the stipulation was made in the mortgage bond (no interest being payable up to due date) that upon default of payment of one or two instalments not only would the whole balance due become forthwith payable, but would carry interest at the rate of 75 per cent per annum *Held*, that the covenant for payment of interest at this rate was a *penalty*, i e, it did not represent the damages which the creditors were likely to suffer by reason of the default of the debtors, but was rather intended as an effective means to secure punctual performance of the contract. *Per* Mookerjee J. Where the facts make it clear that the creditors were in a position to take advantage of the embarrassment of their debtors and the bargain they made

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Interest—*concld*

was unconscionable there is a concurrence of the two elements which must combine to attract the operation of s 16 of the Contract Act *Davis* v *Maung Shwe Goh* I L R 38 Calc 805 L R 38 I A 155 *Kesarulu Naidu* v *Ittithulai Ammal* I L R 36 Mad 533 followed KHAGAPAM DAS *v* RAMSANKAR DAS PRAMANIK (1914) I L R 42 CALC 652

Interim Receiver *See* INSOLVENCY 283

Interlocutory Order *See* JURISDICTION 926

Irregularity *See* SALE FOR ARREARS OF REVENUE 765

Jaigir *Sanad construction of—Tenure created by document—Custom—Life estate—Use of the words putra poutradi — Absolute and heritable estate—Regulation XXXVII of 1793 s 15* A grant of a *jaigir* is a grant for life only but in the absence of any custom to the contrary the addition of the words '*putra poutradi*' in the grant implies an absolute and heritable estate and passes an estate of inheritance Under a *sanad patta* the ancestor of the plaintiff granted a *jagir* in the district of Hazaribagh to the grantee and his *putra poutradi* On the death of the grantee and of his sons without any male issue the plaintiff finding that the tenants of the *jaigir* stopped paying him the rents brought a suit for resumption of the *jaigir* on the ground that according to custom the grant was a service grant resumable by the grantor and his representatives on failure of male issue in the line of the grantee and obtained a decree On appeal to the High Court — *Held* that the original grantee took an absolute heritable and alienable estate and that all his heirs were capable of inheriting it *Rimlal Mookerjee* v *The Secretary of State for India* I L R 7 Calc 304 L R 8 I A 46 followed *Gulab*

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Jaigir—*concld*

das Jugjivandas v *The Collector of Surat* I L R 3 Bom 186, L R 6 I A 54, *Bhujanga Rau* v *Ramayamma*, I L R 7 Mad 387, and *Lalit Mohun Singh Roy* v *Chukkun Lal Roy* I L R 24 Calc 834 L R 24 I A 76, referred to *Perkash Lal* v *Rameshwar Nath Singh*, I L R 31 Calc 561, and *Roopnath Kowur* v *Juggunnath Suhee Deo* 6 S D A Sel Rep 158, distinguished RAM SARAN LALL *v* RAM NARAYAN SINGH (1914) I L R 42 Calc .. 305

Jalkar, right of *See* FISHERY . 489

Joint Trial *See* MISJOINDER OF CHARGES 1153

Judgment Creditor *See* INSOLVENCY 72

Judicial Enquiry *See* SURETY 706

Jurisdiction *See* FORFEITURE .. 730

——— *See* HOMESTEAD LAND . 638

——— *See* SANCTION FOR PROSECUTION 667

——— *Proceedings under s 10 Civil Procedure Code—High Court's Jurisdiction to interfere with interlocutory orders—Civil Procedure Code (Act V of 1908) s 10—Charter Act (24 & 25 Vict c 105) s 15* The jurisdiction of a Court in a proceeding under s 10 of the Code of Civil Procedure is limited to stopping a new suit if the circumstances mentioned in that section as conditions precedent to the passing of the order be found by the Court to exist Courts have no jurisdiction to decide the question of *res judicata* in such a proceeding Where a Court has jurisdiction to pass an order but it has been exercised in violation of the provisions of the law and under a misapprehension of the questions at issue, the Court must be held to have acted with material irregularity in the exercise of its jurisdiction *Venkubai* v *Lakshman Venkoba Khot* I L R 12 Bom 617, *Sew Bux Bogla* v *Shib Chunder Sen* I L R 13 Calc 225, *Jugobundhu*

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Jurisdiction—*contd*

Puttuck v *Jadu Ghose* I L R 15 Calc 47, *Tarini Charan Banerjee* v *Chandra Kumar Dey* 14 C W N 788, referred to The High Court is entitled to interfere under s 15 of the Charter Act if not under s 115 of the Code with interlocutory orders, when they might lead to failure of justice or irreparable injury. *Dhapi* v *Ram Pershad* I L R 14 Calc 768 *Gobinda Mohan Das* v *Kunja Behari Dass* 14 C W N 147 and *Amjad Ali* v *Ali Hussain Johar* 15 C W N 353 referred to SIVAPRASAD RAM v TRICOMDAS COVERJI BHOJA (1915) I L R 42 Calc 926

——— *Suit for land or other immoveable property construction of—Letters Patent 1865 cl 12—Trespass—Compensation for wrong to land—Wrongful cutting and removal of coal—Civil Procedure Code (Act V of 1908) s 16—Civil Procedure Code (Act VIII of 1859) s 5—Venue* The expression suits for land or other immoveable property" in clause 12 of the Charter of 1865 cannot be construed as being limited to suits for the recovery of land in its strict sense but must be construed as extending to a suit for compensation for wrong to land where the substantial question is the right to the land SUDAMDIH COAL CO LD v EMPIRE COAL CO LD (1915) I L R 42 Calc 942

———*Suit to enforce mortgage of land partly in Sonthal Parganas and partly in local jurisdiction of Bhagalpur Court—Jurisdiction of Bhagalpur Court—Sonthal Parganas Settlement Regulation (III of 1872), ss 5 and 6—Sonthal Parganas Act (XXXVII of 1855) s 2—Sonthal Parganas Justice Regulation (V of 1893) Part 2 and s 10—Consent of parties to jurisdiction of a Court—Usury provision relating to in s 6 Regulation III of 1872—Question of Jurisdiction not taken*

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Jurisdiction—*contd*

in High Court—Scheduled Districts Act (XIV of 1874) In a suit in the Court of the Subordinate Judge of Bhagalpur, to enforce a mortgage bond for principal and interest amounting to over 5 lakhs of rupees by far the greater portion of the mortgaged property was situated in the Sonthal Parganas and the mortgagors resided in that district the rest of the property being situated within the local jurisdiction of the Bhagalpur Court The mortgage bond was executed at Bhagalpur, and contained a stipulation that the mortgagees might enforce it in the Bhagalpur Court *The suit was instituted on* 20th June 1904 On an objection taken that the Bhagalpur Court had no jurisdiction to entertain the suit —*Held*, on an examination and consideration of the Acts and Regulations applicable to the Sonthal Parganas, that at the date the suit was commenced no suit would lie in any Court established under the Bengal Civil Courts Act (VI of 1871) or under the Bengal, United Provinces, and Assam Civil Courts Act (XII of 1887) which has taken its place in regard to any land, or any interest in or arising out of land but such suits must have been brought before Settlement Officers, or in Courts of Officers appointed under section 2 of the Sonthal Parganas Act (XXXVII of 1855), and the Sonthal Parganas Justice Regulation (V of 1893), Part 2, so long as the land had not been settled, and the settlement declared by a notification in the *Calcutta Gazette* to have been completed and concluded And, it being found that the land included in the mortgage in suit had not been wholly settled the suit came within the provisions of s 5 of the Sonthal Parganas Settlement Regulation (III of 1872) and was excluded from the jurisdiction of any but the special officers or Courts appointed

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Jurisdiction—*contd*
under s 2 of Act XXXVII of 1855 and therefore the Bhagalpur Court not being one of the special Courts had no jurisdiction to try it The stipulation in the mortgage bond to the effect that the mortgagees might enforce it in the Bhagalpur Court was of no effect As the suit was one with regard to land in the Sonthal Parganas which the Bhagalpur Court had no jurisdiction to entertain the parties could not by consent give the necessary jurisdiction to the Court To allow them to do so would be to nullify the express provisions of s 5 of Regulation III of 1872 which was binding on any Court having jurisdiction in the Sonthal Parganas in the exercise of such jurisdiction *Held* also that apart from the question of jurisdiction any Court dealing with the subject matter of the suit would be bound to give full force and effect to the provisions of s 6 of Regulation III of 1872 relating to usury and therefore to refuse to decree any compound interest arising from any intermediate adjustment of interest or a total amount of interest exceeding the principal of the original debt or loan This provision of section 6 was not one of procedure but of substance and so far as the Court having jurisdiction within the Sonthal Parganas are concerned, it places all contractual stipulations as to compound interest in a position of non enforceability and limits statutably the total interest which can be decreed on a loan or debt The question of jurisdiction which depended on no disputed facts was in issue in the suit and had been adjudicated upon in the first Court was one which their Lordships were of opinion they could not decline to entertain though not specifically raised on the appeal, especially as it necessarily presented itself in argument *Semble* The provisions of the

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Jurisdiction—*concld*
Scheduled Districts Act (XIV of 1874) have never been extended to the Sonthal Parganas MAHA PRASAD SINGH v RAMANI MOHAN SINGH (1914) I L R 42 Calc 116

Jury *See* PARDON 856

Jury Trials *See* REFERENCE 789

Kalighat Temple. *See* PALAS OR TURNS OF WORSHIP 455

King's Prerogative of Pardon *See* PRIVY COUNCIL PRACTICE OF 739

Knowledge *See* PROBATE 480

Land Acquisition Act (I of 1894) ss 18 30 *See* MORTGAGE 1146

Land Acquisition Judge *See* MORTGAGE 1146

Leading Questions: *See* CHARGE 957

Leave to appeal to Privy Council—*Application—Civil Procedure Code (Act V of 1908) s 110—Computation of time—Limitation Act IX of 1908, s 12 whether ultra vires—Legislative powers of the Governor General in Council—Order in Council 1838—Government of India Act 1858 (21 & 22 Vict c 106) s 64—Indian Councils Act, 1861 (24 & 25 Vict c 67)—Letters Patent 1865 ss 39 44* Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council Section 12, sub cl (2) which enacts that in computing the period of limitation prescribed for an application for leave to appeal the time requisite for obtaining a copy of the decree appealed from shall be excluded was within the legislative powers of the Governor General in Council not being in contravention of section 64 of the Government of India Act, 1858 and is not *ultra vires* *Eastern Mortgage and Agency Company Limited* v *Purna Chandra Sarbagna* I L R 39 Calc 510 *Lakshmanan* v *Peryasami* I L R 10 Mad 373, *Anderson* v *Periasami* I L R 15 Mad 169 *In re Sita Ram Kesho*, I L R 15 All

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Leave to appeal to Privy Council—*concld*

14, *Thurai Rajah* v. *Jamaldeen Rowthan*, I L R 18 Mad 484 *Morola Ramchandra* v *Ghanasham Nilkant Nadkarni*, I L R 19 Bom 301, *Motichand* v *Ganga Parshad Singh*, I L R 24 All 174; L. R 29 I A 40 referred to ABDULLAH HOSSEIN CHOWDHURI v ADMINISTRATOR GENERAL OF BENGAL (1914) I L R 42 Calc. 35

Legal Necessity: *See* HINDU LAW—ALIENATION 876

Letters Patent, 1865, s. 15: *See* APPEAL 735

——————ss. 39, 44: *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

——————cl. 12: *See* *JURISDICTION* 942

——————32: *See* ARREST OF SHIP 85

License: *See* TRADE MARK 262

Life Estate: *See* JAIGIR .. . 305

——**Interest:** *See* HINDU LAW—WILL 561

Light and Air: *See* EASEMENT . 46

Limitation: *See* CHEQUE, PAYMENT BY . 1043

————*See* HINDU LAW—INHERITANCE 384

————*See* HINDU LAW—MORTGAGE 1068

———— -*See* INJUNCTION 550

————*Limitation Act (IX of 1908), Sch I, Art. 124—(Act XV of 1877) Sch II, Art 124—Hereditary office of shebait—Successor of shebait when bound by decree against predecessor in shebaitship—Decree holder and purchaser at sale in execution who by reason of low caste is not competent to hold office of shebait—Adverse misappropriation of temple income by trespasser incompetent to be shebait—Wrongful possession not constituting wrongful holder shebait—Res Judicata* This was an appeal from the decision of the High Court in the case of *Jharula Das* v. *Jalandhar Thakur*,

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Limitation—*contd*

I L R 39 Calc 887, in which the widow of the shebait of a temple (the shebaits of which were Brahmin Pandas) who succeeded her deceased husband in that office, mortgaged land together with her interest in the income of the temple to the defendant (who was not a Brahmin) The defendant obtained a decree on his mortgage on 24th September 1880 in execution of which he put up for sale the share of the temple income purchased it himself, and got delivery of possession in 1892 The widow died in May 1900 In a suit brought on 28th January 1910 for the land and mesne profits and for a declaration that the plaintiff was entitled to receive the share of the temple income as it was inalienable, the defence was that the suit, so far as it related to the temple income, was barred as being *res judicata*, and by limitation *Held* by the Judicial Committee (reversing the decision of the High Court) that Art 124 of the Limitation Act was not applicable The suit was not one *for an hereditary office which could* not be held by a person who was not a Brahmin, and the defendant was therefore not competent to hold the office of shebait, and had not taken possession of it By adversely taking and appropriating to his own use a share of the surplus daily income from the offerings, the defendant acquired no title, and no right to a share of that income On each occasion on which he received and wrongfully appropriated to his own use a share of the income to which the shebait was entitled, the defendant committed a *fresh actionable wrong* in respect of which a suit could be brought against him by the shebait, but it did not constitute him the shebait for the time being or affect in any way the title to the office *Held* also that the defence (which had been upheld by the

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Limitation—*contd* High Court) that the suit was barred as *res judicata* by the decision in a former suit brought by the widow to set aside the sale of the temple income was not maintainable JALANDHAR THAKUR v JHARULA DAS (1914) I L R 42 Calc	244
———*Mortgage suit—Civil Procedure Code (Act V of 1908) O XXXIV rr 3 and 6—Limitation Act (IX of 1908) Sch I Art 181—Transfer of Property Act (IV of 1882) s 90—Personal covenant* The plaintiff in a mortgage suit who has his personal remedy at the date of the institution of the suit would not lose his personal right by reason of his not having made the application for personal decree under O XXXIV r 6 within three years of the date of the confirmation of the mortgage sale since applications under O XXXIV r 6 are not governed by Art 181 of the Limitation Act any more than an application for order absolute under O XXXIV r 3 *Rahmat Karim v Abdul Karim* I L R 34 Calc 672 and *Madhabmoni Dasi v Pamela Lambert* 12 C L J 328 referred to BISWAMBHAR SHAHA v RAM SUNDAR KAIBARTA (1914) I L R 42 Calc	294
———*Preliminary Mortgage decree—Limitation Act (IX of 1908) Sch I Arts 180 183—Application for sale of mortgaged property under decree—Transfer of Property Act (IV of 1882) ss 85 to 89—Civil Procedure Code (Act V of 1908) O XXXIV rr 4, 5* In this case their Lordships of the Judicial Committee affirmed the decision of the High Court in *Amlook Chand Parrack v Sarat Chunder Mukerjee* I L R 38 Calc 913 that an application for an order absolute for sale under a mortgage decree is an application to enforce a judgment or decree within the meaning of Art 183 of Sch I of the Limitation Act (IX of 1908) and is therefore barred if not made within the period prescribed by that article MUNNA LAL PARRACK v SARAT CHUNDER MUKERJI (1914) I L R 42 Calc	776
Limitation Act (XV of 1877) Sch II, Arts 120 132: *See* HINDU LAW—MORTGAGE	1008
Limitation Act (IX of 1908) s. 5 *See* APPEAL	433
———**s 12** *See* LEAVE TO APPEAL TO PRIVY COUNCIL	35
———**s 20** *See* CHEQUE PAYMENT BY	1043
———**Sch I Arts 29, 35 49** *See* ARREST OF SHIP	85
———**Sch I Art 42** *See* INJUNCTION	550
———**Sch I Art 124** *See* LIMITATION—SHEBAIT	244
———**Arts 180 183** *See* LIMITATION	776
———**Art 181** *See* LIMITATION	294
Limited Company *See* PATNI LEASE	1029
Liquidated Damages *See* INTEREST	652
Magistrate duty of *See* COMMITMENT	608
Mahomedan Law—*Gift made in lieu of dower—Nature of such gift* The provisions of the Mahomedan Law applicable to gifts made by persons labouring under a fatal disease, do not apply to a so called gift made in lieu of a dower debt which is really of the nature of a sale *Ghulam Mustafa v Hurmat* I L R 2 All 854 followed *Abbas Ali v Karim Bakhsh* 13 C W N 160 and *Bibi Janbi v Hazrath Saib* 21 Mad L J 958, referred to ISHAQ CHOWDHURY v ABEDUNNESSA BIBI (1914) I L R 42 Calc	361
———*Marriage—Minor—Guardian for marriage functions and position of—Marriage of minor*	

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Mahomedan Law—*contd*

uard, necessity of consent of Court fee—Functions of Court in such cases—Procedure to be followed by the guardian for Marriage of Mahomedan infant—Guardians and Wards Act (VIII of 1890), ss 4(2) 24, 25, 26, 41, sub s (1), cl (d) 43 sub s (1), 47 cl. (a)—Practice—Order of District Judge not appealable. In the case of Mahomedans the words "disposal in marriage" cannot be treated as included in the general words "such other matters as the law to which the ward is subject requires" occurring in s 24 of the Guardians and Wards Act In the absence of express statutory provision to this effect, it cannot reasonably be held that the Mahomedan law on the subject of guardianship in marriage has been abrogated by implication by s 24 of the Guardians and Wards Act Where the District Judge of Birbhum, in the matter of the disposal in marriage of a Mahomedan female minor in respect of whose person and property guardians had been appointed by him proceeded to select a suitable husband for the minor from the preliminary list of possible candidates prepared by his Hindu Nazir (the guardian of the property) in opposition to the selection of the guardian of the person (her mother), and of the guardian for marriage (her father's step brother) both of whom had initiated these proceedings *Held*, that the proceedings before the District Judge had been throughout irregular It was not the function of the District Judge to act as match maker But a ward of Court could not marry without the consent of the Court *Eyre* v *Shaftesbury* 2 P Wms 103 *Jeffreys* v *Vantes arsteworth*, Barn Ch 141 *Fombes* v *Peters* 1 Dick 88, *Subhadra Koer* v *Dhajadhari Goswami*, 15 C L J 147 followed *Bai Diwali* v *Moti Karson* I L R 22 Bom 509, disapproved *Held*, further, (after laying down the proper procedure to be followed in cases of this description) that the choice had to be made in the first instance by the guardian for marriage, and if on the materials before the District Judge he was satisfied that the marriage was not unsuitable he was to sanction it *Held* also that the order of the District Judge was not open to appeal as s 47, cl (a) of the Guardians and Wards Act read with s 43 sub s (1 and ss 24, 25 and 26 did not cover the case MONIJAN BIBI *v* DISTRICT JUDGE, BIRBHUM (1914) I L R 42 CALC. 351

—————— *Wakf—Constitution of wakf by deed of trust—Objects charitable and religious—Validity of wakf* Where with the object of dedicating a house to the service of the Imams, Hassan and Hussain, and for other religious purposes, the settlor had conveyed the house to his grand daughter and his grand son on trust for the proper observance of the objects mentioned in the deed —*Held* that there was a valid wakf. *Delross Banoo Begum* v *Ashgur Ally Khan*, 15 B L R 167, discussed *Phul Chand* v *Akbar Yar Khan* I L R 19 All 211 *Biba Jan* v *Kalb Hussain* I L R 31 All 136 *Mazhar Husain Khan* v *Abdul Hadi Khan* I L R 33 All 400, referred to RAM CHARAN LAW *v* FATIMA BEGAM (1915) I L R 42 CALC .. 933

Maritime Necessaries: *See* ARREST OF SHIP 85

Marriage *See* MAHOMEDAN LAW .. 351

Measure of Right *See* EASEMENT ... 46

Mineral Rights—*Moghali Brahmottar—Grant* Moghali Brahmottar

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Mineral Rights—*concld*
Coal Co, I L R 38 Calc 845 followed *Sonet Kooer* v *Himmut Bahadoor* I L R 1 Calc 391, distinguished KUNJA BEHARI SEAL *v* DURGA PRASAD SINGH (1914) I L R 42 Calc 346

Minor: *See* GUARDIAN 953

——*See* MAHOMEDAN LAW—MARRIAGE 351

——*Insolvency—Provincial Insolvency Act (III of 1907) ss 4 cls (b) (g) 16—Contract Act (IX of 1872) ss 11 247, 253 254—ruptcy Act 1883 (46 & 47 Vict c 52) ss 33 102—Insolvency of partner—Dissolution of partnership* In India as in England an infant partner of a firm cannot as such be adjudicated an insolvent *Lovell & Christmas* v *Gilbert Walter Beauchamp* [1894] A C 607, followed The creditors of the firm are not entitled to proceed against him personally being restricted only to his interest in the property of the firm (*vide* s 247 of the Indian Contract Act) There is no difference in principle between the nature of the liability of an infant admitted by *agreement* in a partnership business and that of another (*e g*, a Hindu) on whose behalf an *ancestral* trade is carried on by his guardian *Jotikristo* v *Nittyanand* I L R 3 Calc 738 *Ram Partab* v *Foolibai*, I L R 20 Bom 767 referred to It is not open to the Court to direct the receiver in insolvency to deal with assets other than those belonging to the persons who have been adjudicated insolvents *Lovell & Christmas* v *Gilbert Walter Beauchamp* [1894] A C 607 explained Whereas in England the bankruptcy of a partner works dissolution of the partnership without an order of the Court it is not so in India *Vide* ss 253 254 of the Indian

Minor—*concld*
Contract Act A receiver appointed under s 16 of the Provincial Insolvency Act merely replaces the insolvent partner in respect of the business of the firm The position of a receiver is the same both with regard to a Hindu joint family partnership assets and acquisitions therefrom SANYASI CHARAN MANDAL *v* ASUTOSH GHOSE (1914) I L R 42 Calc 225

Minor Widow. *See* GUARDIAN 953

Misappropriation *See* SHEBAIT 244

Misjoinder—*Wrongful confinement on one day wrongful confinement and assault of the same persons on a subsequent day—Identity of transaction—Unity of object—Criminal Procedure Code (Act V of 1898) s 239* Where in consequence of certain persons having killed a cow on a zamindar s estate contrary to practice and eaten its flesh they were taken to the *cutcherry* on the 14th December fined therefor and confined till they had furnished security for the payment of the fine within three days and on their failure to do so were again taken to the were parts of the same transaction, the object of the accused on both days being the same viz to punish the persons for a breach of the rule by extorting the fine and the assault on the second day being the conclusion of the transaction and that the joint trial of the accused for offences under s 347 of the Penal Code committed on the 14th and 18th and for that under s 352 on the latter date by them was legal *Emperor* v *Datto Hanmant Shahapurkar* I L R 30 Bom 49 and *Emperor* v *Sherufalli Allibhoy*, I L R 27 Bom 135 approved *Budhai Sheik* v *Emperor*, I L R 33

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Misjoinder—*concld*
Calc. 292, and *Gul Mahomed Sircar* v. *Cheharu Mandal*, 10 C W N. 53, distinguished DEPUTY LEGAL REMEMBRANCER v KAILASH CHANDRA GHOSE (1914) I L R 42 Calc. 760

Misjoinder of Charges *See* CHARGE ... 957

————————*Joint trial for offences under s 120B of the Penal Code and ss 19 (f), 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898) s 239—Joint possession of arms—Mere keeping of fire arms not an offence Fire arms whether inclusive of parts of the same—Arms Act (XI of 1878) ss 4, 5 14, 19 (a) (f) 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss 109, 116 120B* A charge of criminal conspiracy to manufacture arms, under s 120B of the Penal Code read with section 19 (a) of the Arms Act (XI of 1878) may be tried jointly with charges of offences under ss 19 (f) and 20 of the latter Act committed in pursuance of the object of the conspiracy As long as the conspiracy continues the transaction which began with the forming of the common intention continues and the offences under ss 19 (f) and 20 of the Arms Act are committed in the course of the same transaction *Legal Remembrancer Bengal* v *Mon Mohan Roy* 19 C W N 672, 21 C. L J 195 followed Where two persons rented a house and lived in it, and parts of arms were found in one of the rooms —*Held*, that both being in joint occupation of the house were in joint possession of the articles so found The word " fire arms in s 14 read with the meaning of ' arms ' in s 4 of the Arms Act includes parts of fire arms 'Fire arms' means only arms fired by gunpowder or other explosives *Ahmed Hossein* v *Queen Empress*, I L R 27 Calc 692, *Emperor* v *Dhan Singh*, 5 Cr L J 435, 3 N L R 53, followed The offence under ss 5 and 19 (a) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale In cases of conspiracy the agreement between the conspirators cannot generally be directly proved, but only inferred from the established facts of the case Where two persons took a house in which a considerable number of pieces of fire arms was found with tools and implements, and work had been actually done to some of the parts of fire arms, the Court may and ought to infer a conspiracy to manufacture arms. *Per* CURIAM Where there is only a conspiracy to manufacture arms, without an actual manufacture the sentence should be imposed under s 120B of the Penal Code read with s 19 (a) of the Arms Act and s 116 of the Penal Code and the maximum term of imprisonment awardable under these sections is 9 months rigorous imprisonment *Per* BEACHCROFT J The punishment awardable under s 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy If an offence has been committed, the punishment is that provided by s 109 of the Penal Code though, strictly speaking there should not be a conviction in such cases of conspiracy but of abetment If it has not been committed the punishment is governed by s 116 of the Penal Code HARSHA NATH CHATTERJEE v EMPEROR (1914) I L R 42 Calc . 1153

Misrepresentation *See* CHUKANI RIGHT . .. 28

Mitakshara *See* HINDU LAW—MORTGAGE . 1068

Mitakshara, Ch. II, ss. 5 6 *See* HINDU LAW—INHERITANCE 384

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Moghali Brahmottar: *See* MINERAL RIGHTS 346

Mortgage: *See* HINDU LAW—ALIENATION 875

———*See* HINDU LAW—MORTGAGE 1068

———*See* LIMITATION 294

———*See* PALAS OR TURNS OF WORSHIP 455

———*Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894) ss 18, 30*—If the mortgagee makes a demand for payment within the term and the mortgagor complies the mortgagee cannot insist upon payment of interest for the whole of the term *Letts* v *Hutchins* L R 13 Eq 176 *In re Moss* 31 Ch D 90 *Smith* v *Smith* [1891] 3 Ch 550 referred to Where the mortgagee has given notice requiring payment within the term he cannot withdraw it without the consent of the mortgagor *Sintley* v *Wilde*, [1899] 1 Ch 747, 2 Ch 474 followed Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term but *one of the properties given as security had been acquired* (the mortgagee probably having no knowledge thereof) and on the 11th October 1912 the mortgagor applied to the Land Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented *Held* that as the contract between the parties could not be performed according to its letter by reason of circumstances beyond their control, the mortgagor was not bound to pay interest beyond the period of one month (as admitted by him) *Bakhtawar Begam* v. *Husaini Khanam*, I L R 36 All 195, explained PROKASH CHANDRA GHOSE *v* HASAN BANU BIBI (1914) I L R 42 Calc 1146

———*Sale of mortgaged property for any claim of mortgagee unconnected with mortgage—Civil Procedure Code (Act V of 1908), O XXXIV, r 14—Transfer of Property Act (IV of 1882), s 99.* A mortgagee is competent, under the Civil Procedure Code of 1908, to have his mortgaged property sold in satisfaction of any claim which he may have against the mortgagor, though the claim may be unconnected with the mortgage TARAK NATH ADHIKARI *v* BHUBANESHWAR MITRA (1914) I L R 42 Calc ... 780

Mortgage between Hindus: *See* DAMDUPAT, RULE OF 826

Mortgage Bond *See* RECEIPT ... 546

———**Decree** *See* INSOLVENCY ... 72

———**Suit** *See* COMPROMISE ... 801

———*See* JURISDICTION ... 116

Navigable River: *See* FISHERY ... 489

Nepal whether a "Foreign State": *See* EXTRADITION WARRANT ... 793

New Case: *See* REMAND ... 888

Notice: *See* ARREST OF SHIP .. 85

———: *See* INSOLVENCY 72

Notification, defect in: *See* SALE FOR ARREARS OF REVENUE . 897

Nuisance. *See* EASEMENT 46

Occupancy Holding—*Non transferable occupancy holding whether devisable by will—Bengal Tenancy Act (VIII of 1885) ss 26, 178, sub s (3) cl (d)—Heir if estopped by testator's act from claiming inheritance under the statute* A non-transferable occupancy holding cannot be the subject of a valid

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Occupancy Holding—*contd*

testamentary disposition In the case of a testamentary devise of such a holding, the heir at law is not debarred by the doctrine of estoppel from questioning its validity *Hari Das Bairagi* v. *Udoy Chandra Das*, 12 C W N 1086, 8 C. L J. 261, not followed AMULYA RATAN SIRCAR v TARINI NATH DEY, (1914) I L R 42 Calc 254

————*Revenue Sale Law* (*Act XI of 1859*) *s 37—Occupancy raiyats at fixed rates—Purchaser—Doctrine of Protection—Its extension* The protection of occupancy raiyats at fixed rates referred to in s. 37 of the Revenue Sale Law (Act XI of 1859) is not one of the ordinary exceptions in that section It is a proviso expressing the determination of the Legislature that no purchaser shall disturb any of the permanent tenants on the land who are in actual occupation of the soil and are cultivating it This docrine of protection has recently been extended to ordinary occupancy raiyats *Sarat Chandra Roy* v *Asman Bibi* I L R 31 Calc 725 referred to *Bhut Nath Naskar* v *Surendra Nath Dutt* 13 C W N 1020 distinguished ABDUL GANI CHOWDHURY v MAKBUL ALI (1914) I L R 42 Calc 745

————*Transferability of part or whole—Consent of landlord—Operation of transfer as against raiyat landlord and other persons—Civil Procedure Code* (*Act XIV of 1882*) *s 244—Bengal Tenancy Act* (*VIII of 1885*) *s 87* In transfers for value of occupancy holdings *apart from custom or local usage* (i) The transfer of the whole or a part is operative against the raiyat —(a) Where it is made voluntarily (b) where it is made involuntarily and the raiyat with knowledge fails or omits to have the sale set aside A sale is made involuntarily where it is in execution of a money decree, but

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Occupancy Holding—*concld.*

not of a decree founded on a mortgage or charge voluntarily made (ii) The transfer is operative as against the landlord in all cases in which it is operative against the raiyat, provided the landlord has given his previous or subsequent consent Where the transfer is a sale of the whole holding, the landlord, in the absence of his consent, is ordinarily entitled to enter on the holding but where the transfer is of a part only of the holding, or not by way of sale, the landlord though he has not consented, is not ordinarily entitled to recover possession of the holding unless there has been (a) an abandonment within the meaning of s. 87 of the Bengal Tenancy Act, or (b) a relinquishment of the holding, or (c) a repudiation of the tenancy Whether there has been a relinquishment or repudiation or not depends on the substantial effect of what has been done in each case (iii) The transfer of the whole or a part is operative as against all other persons where it is operative against the raiyat. DAYAMAYI v ANANDA MOHAN ROY CHOWDHURY, (1914) I L R 42 Calc .. . 172

Occupancy Raiyats at fixed rates. *See* OCCUPANCY HOLDING ... 745

Official Assignee, sale by: *See* INSOLVENCY 72

Official Witness, privilege of: *See* CHARGE 957

Onus of Proof *See* CHAUKIDARI CHAKRAN LANDS 710

Ordinance, 1914—VI:—*See* COMMERCIAL INTERCOURSE WITH ENEMIES ORDINANCE . .. 1094

Orissa, Zemindari Estates in: *See* CHAUKIDARI CHAKRAN LANDS ... 710

Palas or turns of worship—*Mortgage—Transferability of palas—Custom—Kalighat Temple—Estoppel of mortgagor even if trustee—Essential attributes of valid custom—Public*

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Palas or turns of worship—*contd*

policy, contravention of Onus probandi—Civil Procedure Code (Act V of 1908), O XXXIV—Chattels—Intangible property, foreclosure of mortgage of—Pledge Per MOOKERJEE J (BEACHCROFT J reserving opinion) A mortgagor even when acting in a public capacity and not for his own benefit, is estopped to deny his title and cannot set up as a defence for himself against the mortgagee that the property so mortgaged is trust property which he had no right to mortgage *Doe v Horne*, L R 3 Q B 760 61 R R. 397, followed This principle is inapplicable where the mortgage is void as contrary to Statute *Barrow's Case* 14 Ch D 432 followed Trustees for a public purpose are not by the nature of their office protected from the operation of estoppel as against the assignees of the original parties to the deed in question *Doe v Horne* L R 3 Q B 760 61 R R 397 *Webb v Herne* L R 5 Q B 642, and *Higgs v Assam Tea Co* L R 4 Ex 387 referred to [View indicated by BANERJEE J in *Mallika v Ratanmani* 1 C W N 493, not accepted] *Per* MOOKERJEE and BEACHCROFT JJ "A custom to be valid must have four essential attributes (i) it must be immemorial (ii) it must be reasonable (iii) it must have continued without interruption since its immemorial origin and (iv) it must be certain in respect of its nature generally, as well as in respect of the locality where it is alleged to obtain and the persons whom it is alleged to affect *Tyson v Smith* 9 Ad & El 406, followed A custom cannot be enlarged by parity of reasoning *Arthur v Bokenham* 11 Mod 148, *Pradyote v Gopi Krishna* I L R 37 Calc 322 referred to A custom originating within time of memory, even though existing in fact, is void in law *Mayor of London v Cox*, L R 2 H L 239, followed Evidence showing exercise of a right in accordance with an alleged custom as far back as living testimony can go raises the presumption though only a rebuttable one, as to the immemorial existence of the custom *Bastard v Smith*, 2 Moo & R 129 *Mercer v Denne*, [1904] 2 Ch 534, followed If the existence of the custom has been proved for a long period, the *onus* lies on the person seeking to disprove the custom to demonstrate its impossibility If a custom be against reason (*i e* artificial and legal reason warranted by authority of law) it has no force in law When a custom is said to be void as being unreasonable, the unreasonable character of the alleged custom conclusively proves that the usage even though it may have existed from time immemorial, must have resulted from accident or indulgence and not from any rights conferred in ancient times *Salisbury v Gladstone*, 9 H L C 692 followed The period for ascertaining, whether a particular custom is reasonable or not, is the time of its possible inception *The Tanistry Case*, (1608) Davis 29, followed In practice, the Kalighat Temple *palas* have been transferred during at least 90 years though in a limited market which those alone can enter who are qualified to become shebait by birth or marriage, the time when this custom originated being unknown Proof of the existence of a custom need not be carried back by direct evidence to the year 1773 when the Supreme Court was established, or even to 1793 when the first Regulations were passed by the Indian Legislature The customary right to make a sale, mortgage gift or lease of a *pala* in favour of persons within a limited circle (the trans

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Palas or turns of worship—*concld*

feree being under precisely the same obligation to the endowment as the transferor himself), is closely associated with and possibly developed out of the heritable, devisable, and partible character of a *pala* *Jinolee* v *Gopaul* I L R 2 Calc 365, referred to A custom of this description clearly cannot be characterised on any rational grounds as unreasonable or opposed to public policy Foreclosure as a remedy of the mortgagee is not confined to mortgages of *land*, it is equally applicable to mortgages of *chattels* *Harrison* v *Hart* 1 Comyn 393 2 Eq Cas Abr 6 followed A mortgagee of *intangible* property is entitled to foreclose the mortgagor quite as much as a mortgagee of *chattels* MAHAMAYA DEBI v HARIDAS HALDAR (1914) I L R 42 Calc . 455

Pardanashin. *See* PRESENTATION OF COMPLAINT . 19

———, **examination of** · *See* COMPLAINT . . 19

Pardon—*Failure of approver to comply with terms of the pardon on examination at the preliminary enquiry—Forfeiture of pardon—Commitment of approver along with other accused—Joint trial of approver and others—Plea of pardon taken in the Sessions Court—Proper procedure thereon—Trial of question of forfeiture as a preliminary issue—Power of Jury to determine the point—Criminal Procedure Code (Act V of 1898) ss 298 (1) (c)* 37 Where an approver has forfeited his pardon on his examination at the preliminary enquiry the Magistrate may put him in the dock, recommence the enquiry and commit him for trial along with the other accused *Queen Empress* v *Natu* I L R 27 Calc 137, discussed *Queen Empress* v *Brij Narain Man* I L R 20 All 529, *Emperor* v *Budhan* I L R 29 All 24 *Sultan Khan* v *King Emperor*,

Pardon—*contd*

5 All L J 691, and *King Emperor* v *Bala*, I L R 25 Bom 675, followed When an approver has been committed to the Court of Session as an accused he may plead his pardon in bar at the trial, and the Judge must first try the issue of forfeiture and take the verdict of the Jury thereon and then proceed with the trial of accused for the offences charged *Emperor* v *Abani Bhushan Chuckerbutty* I L R 37 Calc 845 discussed *Kullan* v *Emperor* I L R 32 Mad 173, *Alagirisami Naicken* v *Emperor* I L R 33 Mad 514 *King Emperor* v *Bala* I L R 25 Bom 675 *Emperor* v *Kothia*, I L R 30 Bom 611, and *Emperor* v *Kalu* 31 Punj Rec, 1904 approved *Per* BEACHCROFT J Under the old law the pardon remained in force until its withdrawal, by the authority granting it in consequence of the approver failing to observe the conditions of the pardon but under the present law the result of such failure is that the approver may be put on trial without any formal order of withdrawal or cancellation of the pardon The plea should be taken at the commencement of the preliminary enquiry and considered by the Magistrate If he decides against it or it is not taken before him, the approver may raise the plea in the Sessions Court The Judge ought to try the question of forfeiture as a preliminary issue on evidence limited to the point, and take the verdict of the Jury on it before proceeding to try the general issue of the guilt of the accused The onus of proof of forfeiture is on the Crown *Queen Empress* v *Manick Chandra Sarkar*, I L R 24 Calc 492 declared obsolete Where however the Judge tried the question of forfeiture with the Jury after some evidence on the general issue had been recorded —

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Pardon—*concld.*

Held, that the irregularity had not prejudiced the approver or the other accused *Semble* When the approver deviates from the conditions of his pardon in the Sessions Court, he cannot be removed from the witness box and placed in the dock as an accused SHASHI RAJ BANSHI *v.* EMPEROR (1914) I L R 42 CALC. . . . 856

——— *Withdrawal by Magistrate not granting the pardon—Omission to state grounds of forfeiture—Necessity of formal withdrawal or declaration of forfeiture—Plea of pardon to be raised at the trial—Trial of issues of forfeiture of pardon and guilt of accused—Criminal Procedure Code (Act V of 1898) ss 337, 339.* Under the present law no formal withdrawal of pardon nor formal declaration of its forfeiture are required If the approver be subsequently proceeded against it is open to him to plead at his trial that the pardon has not in fact, been forfeited, that is, that he has not violated its conditions The two questions of forfeiture of pardon and of his guilt of the offence in respect of which he received the same, may be heard and determined together, under the circumstance *Emperor* v *Kothia*, I. L R 30 Bom 611, *Kullan* v *Emperor* I L R 32 Mad 173 and *Emperor* v *Hani Bhushan Chuckerbutty* I L R 37 Calc 815 referred to EMPEROR v SABAR AKUNJI (1914) I L R 42 Calc .. 756

Parties—*Civil Procedure Code (Act V of 1908) s 92, O I, r 3—Public Religious Trust—Suit to remove a trustee and to recover possession of trust property in the hands of a third party—Joinder of parties—Alienee of trustee* Where in a suit under s 92 of the Civil Procedure Code (Act V of 1908), the second defendant, who was the alienee of trust property, the subject of the suit, contended that the suit should be dismissed as against him on the

Parties—*concld.*

ground that he was not a necessary party to it —*Held*, that there is no reason why, having regard to the provisions of O. I r. 3 of the Civil Procedure Code, the second defendant should not be made a party to the suit, nor why, if the decision of the Court is against him, he should not be declared to be a trustee of the trust property and be directed to convey the property. *Budh Singh Dhudhuria* v. *Niradbaran Roy*, 2 C L J. 431, and *Budree Das Mukim* v. *Choony Lal Johurry*, I L R 33 Calc. 789, distinguished *Compania Sansinena de Carnes Congeladas* v *Houlder Brothers*, [1910] 2 K. B 354, referred to ALI HAFFIZ *v* ABDUR RAHAMAN (1915) I. L R. 42 Calc. 1135

Partition: *See* BABUANA GRANT ... 582

——— *See* COSTS 451

Partnership, dissolution of: *See* MINOR 225

——— **winding up of:** *See* APPEAL 914

Part-payment: *See* CHEQUE, PAYMENT BY 1043

Patni Lease—*Chota Nagpur Encumbered Estates Act (Bengal VI of 1876 as amended by Act I of 1884) s. 17—Rules under s 19 of Act, Rule 16—Patni lease executed by Deputy Commissioner as manager of Barabhum Estate under the Act—Sanction of Commissioner—Objection that patni lease had not been submitted to Commissioner after he had sanctioned all the details—Sanction granted for lease to a firm and lease given to a Limited Company—Stipulation for payment of bonus—Payment after time fixed* The grant of a patni lease under the Chota Nagpur Encumbered Estates Act (Bengal Act VI of 1876 as amended by Act V of 1884) s 17, and rule 16 of the rules made under the Act, necessitate the sanction of the Commissioner In a suit to have a patni lease executed

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Patni Lease—*contd*

ly the Deputy Commissioner as the manager under the Act of the Birbhum Estate on behalf of the proprietor, the father of the plaintiff (appellant) declared void and inoperative as not having received a valid sanction —*Held* that where it has been affirmatively established that a transaction itself in all its essential particular has obtained the sanction of the Commissioner and then it becomes requisite that the transaction be carried into effect by the preparation of an appropriate deed an objection merely on the ground that the document ultimately prepared has not been submitted for sanction, cannot be sustained In administrative and departmental action it must necessarily be the case that formal details may have to be entered upon in order to carry into effect, and put into legal shape the arrangement to which the sanction was given Where such a sanction was given for a patni lease to be granted to 'Robert Watson & Co' a firm of individual men and the actual lease was executed in favour of Robert Watson & Co Limited the firm having been converted into a Limited Company —*Held* on the facts of the case that when the negotiators in the course of the correspondence mentioned 'Robert Watson & Co', they did in fact mean and were perfectly understood to mean 'Robert Watson & Co Limited' the fact of the incorporation of the Limited concern being well known and that therefore the misdescription did not under the ordinary principle applicable to such matters affect the validity of the sanction or of the patni lease In this view it was unnecessary to decide as to the effect in law of the difference in the *persona* of the two descriptions *Held* also that the sanction of the Commissioner in this case was not merely a sanction of a proposal to grant a patni

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Patni Lease—*concld*

The proposal had been made, it had been accepted, a contract was accordingly completed on the subject, and it was that contract so completed that was sanctioned The patni lease stipulated for the payment of a *salami* or bonus and the letter granting the sanction contained the clause provided the amount be paid before the end of March 1890' Some delay occurred owing to an exchange of views being necessary as to the actual wording of the draft patni but the lease was finally settled by both parties, and the *salami* was paid on 25th June 1890 —*Held*, that the lease would not afterwards have been open to a challenge to be made by the Deputy Commissioner himself or for the Commissioner's sanction to be withdrawn and *a fortiori* there was no ground for sustaining such a challenge when put forward long afterwards on behalf of the debtor's successor by whom the suit was brought RAM KANAI SINGH DEB DARPASHAHA v MATHEWSON (1915) I L R 42 Calc 1029

Penal Code (Act XLV of 1860) ss 109, 116 120 B *See* MISJOINDER OF CHARGES 1153

———— ss 120, 120A 120B 121A *See* CHARGE 957

———— s 225 B *See* WARRANT VALIDITY OF 708

———— s 323 *See* BAILIFF 313

Penalty *See* INTEREST 652 690

Perjury—*Witness—Deposition not read over to witness in the hearing of accused or his pleader but read by witness himself—Inadmissibility of deposition in subsequent trial for giving false evidence—Proceeding against witness—Preliminary enquiry—Omission to record statements of witnesses examined thereat—Order for prosecution not containing assignment of the false statements—*

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Perjury—*concld*

Criminal Procedure Code (Act V of 1898 ss 360 (1) 476—Practice Section 360 (1) of the Criminal Procedure Code requires the evidence of a witness to be read over to him in the hearing of the accused or his pleader so as to enable the latter to correct any mistakes in it. The reading of the deposition by the witness himself is not a compliance with the section and renders the record of it inadmissible in a subsequent trial against him under s 193 of the Penal Code *Mahendra Nath Misser v Emperor* 17 C W N 845 and *Jyotish Chandra Mukerjee v Emperor* I L R 36 Cal 955 followed Although s 476 of the Criminal Procedure Code does not expressly provide for the manner in which the preliminary inquiry thereunder is to be recorded a summary of the statements of the witnesses examined thereat should be made An order under the same section

GHOSE (1904) I L R 42 Calc 240

Permanent Lease *See* HINDU LAW—RELIGIOUS ENDOWMENT 536

Permanent Settlement *See* FISHERY 489

Personal Covenant *See* LIMITATION 294

Piecemeal Trial *See* BAILIFF 313

Plaint *See* COURT FEE 370

Pleading *See* ARREST OF SUIT 85

Pledge *See* LAPAS OR TURNS OF WORSHIP 455

Police Report *See* SURETY 706

Possession writ of *See* BAILIFF 313

Power of Attorney *See* COMPLAINT 19

Practice *See* ACQUITTAL 612

——— *See* APPEAL 433

——— *See* APPEAL—CRIMINAL CASE 374

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Practice *See* BAILIFF 313

——— *See* CONTEMPT OF COURT 1169

——— *See* EVIDENCE 784

——— *See* INSOLVENCY 109

——— *See* MAHOMEDAN LAW—MARRIAGE 351

——— *See* PERJURY 240

——— *See* PUBLIC PROSECUTOR DUTY OF 422

——— *See* RATEABLE DISTRIBUTION 1

——— *Reference—Assessment of damages* A reference should be directed by the Court to assess damages only when the enquiry would involve questions of detail which it would be wasting the time of the Court to investigate *Wallis v Sayers* 6 T L R 356 referred to D N GHOSE & BROS v DOLAT NARAIN BROS (1915) I L R 42 Calc 819

Preliminary Decree *See* APPEAL 914

Preliminary Inquiry *See* PERJURY 240

Preliminary Mortgage decree *See* LIMITATION 776

Prescription *See* EASEMENT 164

Presentation *See* COMPLAINT 19

Presidency Magistrates *See* PIECEMEAL TRIAL 313

Presidency Small Cause Courts Act (XV of 1882, ss 43 48 *See* BAILIFF 313

Presidency Towns Insolvency Act (III of 1909) s. 36 (4) (5) *See* INSOLVENCY 109

Press Act (I of 1910) s 4 ( ) *See* FORFEITURE 730

Primogeniture *See* HINDU LAW—INHERITANCE 1179

Principal and Agent *See* SALE OF GOODS 1050

Priority *See* CO OPERATIVE SOCIETY 377

Privy Council, practice of—*Special leave to appeal in Criminal case application for—Petitioners sentenced to death—Stay of execution*

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Privy Council, practice of—*concld*

of sentences pending hearing of petition, refusal of—Tendering advice as to exercise of King's Prerogative of pardon On an application for special leave to appeal in a case in which the petitioners had been sentenced to death, their Lordships of the Judicial Committee not being a Court of Criminal Appeal declined *to interfere with regard* to staying execution of the sentences pending the hearing or to express any opinion as to whether they ought to be suspended The tendering of advice to His Majesty as to the exercise of His Prerogative of pardon is a matter for the Executive Government, and is outside their Lordships province BALMUKUND *v.* KING EMPEROR (1915) I L R 42 Calc . 739

Probate: *See* GUARDIAN . 953

Probate—*Revocation—Will, validity of—Proof in common form—Knowledge—Acquiescence—Delay—Probate and Administration Act (V of 1881) s 50* It does not matter by what facts knowledge of the grant of probate and acquiescence in it are established for neither knowledge nor acquiescence nor lapse of time are of themselves operative as a bar to the proceeding which every person interested in the estate of the testator has a right to bring, if he was not made a party in the probate proceeding His application must be *bonâ fide* and he must give some reasonable and true explanation of the delay *Hoffman* v *Norris*, 2 Phillim 230, *Merryweather* v *Turner* 3 Curt 802, and *Kunja Lal Choudhury* v *Kailash Chandra Choudhury* 14 C W N 1068 referred to MANORAMA CHOWDHURANI *v.* SHIVA SUNDARI MOZUMDAR (1914) I L R 42 CALC . 480

Probate and Administration Act (V of 1881) s. 50: *See* PROBATE . 480

Procedure: *See* CONTEMPT OF COURT ... 1169

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Procedure *See* MAHOMEDAN LAW—MARRIAGE 351

——— *See* RATEABLE DISTRIBUTION 1

Proof in common form: *See* PROBATE... 480

Prosecution: *See* EVIDENCE ... 784

Prosecution, duty of: *See* CHARGE ... 957

Protection, doctrine of: *See* OCCUPANCY HOLDING ... 745

Provident Insurance—*Company with share capital carrying on business of a provident insurance society—Liability to registration as such before receiving premiums—Provident Insurance Societies Act (V of 1912) ss 2 (8) 6, 7, 21.* A company having a share capital divided into shares must, if it intends to carry on the business of a provident insurance society, be *registered under the Provident* Insurance Societies Act (V of 1912) before it receives any premium or contribution *Oriental Government Security Life Assurance Co* v *Oriental Assurance Co*, I L R 40 Calc 570, explained DEPUTY LEGAL REMEMBRANCER *v* SITAL CHANDRA PAL (1914) I L R 42 Calc 300

Provident Insurance Societies Act (V of 1912) ss. 2 (8) 6, 7, 21: *See* PROVIDENT INSURANCE ... 300

Provincial Insolvency Act (III of 1907), ss 4 cls (b), (g), 16: *See* MINOR... 225

——— **ss. 13, 16, 34:** *See* INSOLVENCY ... 289

Provincial Small Cause Courts Act (IX of 1887), Sch. II, Art. 8: *See* HOMESTEAD LAND 638

Public Demands Recovery Act (Beng. I of 1895, 1897): *See* SALE FOR ARREARS OF REVENUE ... 765

Public Nuisance—*Encroachment on public pathway—Application to District Magistrate by letter—Reference of applicant by letter to Civil Court—Subsequent petition to*

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Public Nuisance—*contd*

the Subdivisional Magistrate regarding the same pathway—Issue of conditional order—Appearance of opposite party and claim of title to the path—Dropping proceedings without taking evidence—Criminal Procedure Code (Act V of 1898) ss 133, 137 When a Magistrate makes a conditional order under s 133 of the Criminal Procedure Code against a party who appears and shows cause he is bound under s 137, to take evidence as in a summons case It is open to him thereafter to consider whether there is a complete answer to the case, or whether it is not a proper one for reference to the Civil Court SAROJBASHINI DEBI v SRIPATI CHARAN CHOWDHRY (1914) I L R 42 Calc .. 702

———— *Unlawful obstruction to public way—Bona fide question of title—Duty of Magistrate to determine the question—Criminal Procedure Code (Act V of 1898) ss 133, 137* *Per* SHARFUDDIN J When a party against whom an order under s 133 of the Criminal Procedure Code is contemplated, appears and raises the question that a pathway, alleged to have been unlawfully obstructed, is not a public but a private one the Magistrate should not only decide whether it is public or private but he should determine whether the claim is bona *fide* or a mere pretence set up only to oust the jurisdiction of the Court If he finds that the claim is a mere pretence, he may proceed to pass a final order, but if he finds that the claim though not substantiated, has been raised *bona fide* he should stay his hand and refer the party to the Civil Court, and if the party does not have recourse to such Court within a reasonable time, the Magistrate may then proceed to make the order absolute *Belat Ali* v *Abdur Rahim*, 8 C W N 143, *Matukdhari Tewari* v. *Hari Madhab Das*, 9 C. W N. 72, *Luckhee Narain Banerjee* v *Ram Kumar Mukherjee*, I L R 15 Calc 564, and *Preonath Dey* v *Gobordhone Malo*, I L R 25 Calc 278, referred to. The provisions of s 133 of the Code should be sparingly used TEUNON J, in the circumstances of the case assented to the order proposed MANIPUR DEY v BIDHU BHUSHAN SARKAR (1914) I L R 42 Calc ... 158

Public Pathway, encroachment on: *See* PUBLIC NUISANCE . .. 702

Public Policy: *See* SLAVERY BOND . 742

————, **contravention of:** *See* PALAS OR TURNS OF WORSHIP . 455

Public Prosecutor, duty of —*Duty to produce all the evidence in his power bearing directly on the charge—Duty to call all the available eye witnesses in capital cases—Omission to examine material witnesses, effect of—Inference adverse to the prosecution arising therefrom—Practice* The purpose of a criminal trial is not to support at all costs a theory, but to investigate the offence and to determine the guilt or innocence of the accused, and the duty of a Public Prosecutor is to represent not the

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of the responsibility attaching to his position It is not his duty to call only witnesses who speak in his favour *Empress* v *Dhunno Kazi*, I L R 8 Calc 121, discussed and explained He should, in a capital case, place before the Court the testimony of all the available eye witnesses though brought to the Court by the defence, and though they give different accounts The rule is not a technical one, but founded on common sense and humanity *Reg* v *Holden*, 8 C & P 609,

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Public Prosecutor, duty of—*concld*

followed Where witnesses (who from their connection with the tran actions in question must be able to give important information) are not called without sufficient reasons being shown, the Court may properly draw an inference adver e to the pro ecution *Impress* v. *Dhunno Kazi*, I L R 8 Calc 421, ref rred to A con viction under s 114 of the Penal Code cannot stand where the abet ment charged necessarily requires the presence of th abettor To come within the section the abet ment must be complete apart form the presence of the abettor RAM PANJAN ROY v EMPEROR (1914) I L R 42 Calc . 422

Public Religious Trust. See PARTIES 1130

Public Way obstruction to. See PUBLIC NUISANCE . 158

Purchaser See O UIAN Y HOLDING 745

Railway Company liability of See REMAND . 888

Railways Act (IX of 1890) s. 75 See REMAND 888

Rateable Distribution—*Practice and Procedure—Decree—Civil Proce dure Code (Act V of 1908) ss 47 73—Civil Procedure Code (Act XIV of 1882) s 295—Appeal* An order refusing rateable distribu tion made under s 73 of th Code of Civil Procedure (Act V of 1908) between two rival decree holders which does not affect or interest *the judgment debtor, is an order* in execution proceedings but is not a *decree* as all the conditions enu merated in s 47 of that Code are not pre ent and consequently is not appealable *Jagadish Chandra Shaha* v *Kripanath Shaha* I L R 36 Calc 130 followed *Sorab jit Cootarji* v *Kala Raghunath* I L R 36 Bom 156 distinguish ed It is essential for the applica tion of s 73 of the Code of Civil Procedure that the decree should have been passed against the same

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Rateable Distribution—*concld*

judgment debtor BALMER LAWRIE & Co v. JADUNATH BANERJEE (1914) I L R 42 Calc

Rates and Taxes, arrears of—*Con solidated rate—Charge—Calcutta Municipal Act (Beng III of 1899), ss 223, 228—Arrear of consoli dated rates, whether a first charge on the land and building in respect of which it has accrued due—Charge and mortgage distinction between—Transfer of Property Act (IV of 1882) ss 55 58 100—Bengal Tenancy Act (VIII of 1885) s 171—Constructive notice—Bona fide purchaser for value without notice* Section 228 of the Calcutta Municipal Act is not con trolled by section 223 thereof, and makes the consolidated rate as it accrues due from time to time, a first charge on the premises (subject only to arrears of land revenue) A mortgage does where as a charge does not, involve a transfer of an interest in specific immoveable property *Narayana* v *Venkataramana* I L R 25 Mad 220 *Tancred* v *Delagoa Bay Co* 23 Q B D 239, *Burlinson* v *Hall* 12 Q B D 347 referred to Such a charge cannot be en forced against the property in the hands of a *bona fide* purcha er for value without notice *Kishen Lal* v *Ganga Ram* I L R 13 All 28 referred to The plea of pur chaser for value without notice is a single defence the onus of prov ing which is on the defendant *Attorney General* v *Biphosphated Guano Co* 11 Ch D 327 *Wilkes* v *Spooner* [1911] 2 K B 473 followed Where property with such a charge is foreclosed by the mortgagee constructive notice cannot be imputed to him to the same extent as to a purchaser at a private sale *Radha Madhab* v *Kalpataru* 17 C L J 209 *Brahma* v *Bholi Das* 19 C L J 352 referred to Still he should ascertain the true state of affairs

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Review—*concl l*

referred to AHID KHONDKAR v MAHENDRA LAL DE (1915) I L R 42 Calc 830

Revision. *See* ACQUITTAL 612

———*Extradition warrant issued by Resident in Nepal—Proceedings thereon by District Magistrate in British India, and order of surrender of fugitive—Power of High Court to interfere in revision with such order—Nepal whether a "Foreign State"—Criminal Procedure Code (Act V of 1898) ss 435 439, 491—Extradition Act (XV of 1903) ss 7 15* Nepal is now a Foreign State within the meaning of the Indian Extradition Act (XV of 1903) Where a warrant has been issued by the Political Agent, under s 7 of the Act its execution by the District Magistrate in British India in accordance with the Act is an executive act and the High Court cannot interfere in revision with the proceedings of the Magistrate and the order to surrender the fugitive criminal but if the latter considers himself aggrieved thereby he can invoke the action of the Government under s 15 The power of the High Court however to interfere under s 491 of the Criminal Procedure Code, which applies whatever be the occasion of the deprivation of the liberty of the subject remains untouched by the Extradition Act GEL v SAHU v EMPEROR (1915) I L R 42 Calc 793

Revocation *See* PROBATE 380

Royalty action for. *See* TRADE MARK 162

Sale *See* MORTGAGE 780

Sale contract of *See* CHUKANI LIGHT 28

Sale for Arrears of Revenue—*Setting aside sale—Irregularity—Arrears under Act XI of 1859 paid—Embankment charges due—Sale under Act XI of 1859 as for arrears of revenue in lieu of under Public Demands Recovery Act (Beng Act I of 1895 as amended by Beng Act I of 1897)—Embankment Act (Beng Act II of 1882)* In this case the High Court set aside a sale for arrears of revenue holding that where the Collector had acknowledged payment in full of the arrears of land revenue for which the sale had been advertised, and had elected to proceed by certificate procedure against an arrear of different character and had already directed a sale under that procedure, he could not turn round and treat the arrear under the certificate as an arrear of land revenue without any notice to the parties under section 5, and proceed to sell under the land revenue proclamation or the mere ground that no special exemption had been passed The embankment charges ordered to be levied under the Certificate Act (Beng Act I of 1895 as amended by Beng Act I of 1897) were taken out of the purview of Act XI of 1859 unless and until fresh notices were issued under section 5 and they could not be treated as arrears of land revenue The sale therefore, not being for an arrear of land revenue, was liable to be set aside An appeal from that decision was dismissed by their Lordships of the Judicial Committee who said they saw no reason to interfere with it DHIRAJ CHANDRA BOSE v HARI DASI DEBI (1914) I L R 42 Calc 765

———*Setting aside sale—Defect in specification of property to be sold in notification of sale—Ijmali share in property where there are many separate accounts opened—Revenue Sale Law (Act XI of 1859) ss 6, 10 11, 13, 33—Inadequacy of price caused by want of proper specification of the property for sale* The ijmali or joint share in a mahal in which 148 of the owners of specific but undivided shares had obtained

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Sale for Arrears of Revenue—*contd*

from the Collector separation of accounts under sections 10 and 11 of Act XI of 1859 was put up to sale for arrears of revenue, and purchased by the respondent In the notification under sections 6 and 13 of the Act, the specification of the share to be sold was in the following terms — *Ijmali* share which cannot be specified excluding the separate accounts, number— Then followed a list of the 148 separate accounts referred to and at the end it was stated that 'All other shares besides that specified are excluded from the sale And the entry in column 5 (the specification column) was 'The *ijmali* share cannot be particularised owing to separate accounts having been opened The shares to be sold are those given in a separate sheet after excluding the shares in respect of which the separate accounts have been opened In a suit to set aside the sale —*Held* (reversing the decision of the High Court) that the notification of sale was insufficient and irregular and not in compliance with the requirements of the law Each case must depend on its own particular facts and what had to be considered was whether having regard to all the circumstances the specification was sufficiently clear to induce likely buyers to appear and bid at the sale It was not enough that they might go and obtain the requisite information from the Collector's office the particulars in the notice should be sufficient in themselves to tell purchasers what they were invited to bid for *Held* also on the evidence, that the property had been sold at an inadequate price, and that the lowness of the price was due to the defectiveness of the specification of the property to be sold in the notification of sale which was not merely an irregularity but a defect that rendered the

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Sale for Arrears of Revenue—*concld*

sale void RAVANESHWAR PRASAD SINGH *v* BAIJNATH RAM GOENKA (1915), I L R 42 Calc . 897

Sale of Goods—*Bought and sold notes—'Bought by your order and for your account from our principals"—Principal and Agent—Personal liability of brokers—Contract Act (IX of 1872) s 230 (2)—Broker, an intermediary—Contract of employment—Award* Where a

your order and for your account from our principals 250 bales of jute (name) Brokers,' and a corresponding sold note was signed and sent by the broker to another party, the names of the principals being disclosed to each other, by the broker, at a subsequent date —*Held*, in proceedings taken by the buyer, that the broker was merely an intermediary and not an agent for sale, and was not liable under section 230 (2) of the Contract Act The contract (if any) between the broker and the buyer was a contract of employment the employment being to negotiate and not to sell on behalf of another *Southwell v Bowditch* I R 1 C P 374 followed *Gibbon v Breton*, I L R 17 Calc 449, distinguished PATIRAM BANERJEE *v* KANKNARRAH CO LD (1915) I L R 42 Calc 1050

Sanad, construction of. *See* JAGIR 305

Sanction *See* PATNI LEASE ... 1025

Sanction for Prosecution—*Offences committed in the Court of a Deputy Magistrate Transfer of same from the subdivision—Successor in office—Application for sanction to another Deputy Magistrate subsequently posted to the subdivision—Power of latter to grant sanction—Criminal Procedure Code (Act V of 1898) s 195* Where there are several

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Sanction for Prosecution—*concld*

Deputy Magistrates at a place, and one of them is transferred, the Deputy Magistrate who comes to fill the gap is not the successor in office of the outgoing Magistrate *Mohesh Chandra Saha* v *Emperor* I. L. R 35 Calc 457, referred to Where a proceeding under s 107 of the Code during the course of which a forged pottah was filed and evidence given in support thereof, was disposed of by H K G, a Deputy Magistrate, who became afterwards the officer next senior to the Subdivisional Magistrate, and on the transfer of the former, two other Deputy Magistrates became successively the next senior officers and ultimately K L M, a Deputy Magistrate joined the subdivision as the next senior officer, and an application was made to him for sanction to prosecute the petitioners for offences, under ss 471 and 193 of the Penal Code committed in the Court of H K G —*Held* that K. L M was not the successor in office of H K G and had no power to grant sanction under the circumstances GIRISH CHANDRA RAY *v* SARAT CHANDRA SINGH (1914) I L R 42 Calc ... 667

Sapinda Relationship: *See* HINDU LAW—INHERITANCE ... 394

Scheduled Districts Act (XIV of 1874: *See* JURISDICTION 116

Second Appeal: *See* HOMESTEAD LAND 638

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Seller, duty of: *See* CHUKANI RIGHT ... 28

Separation, evidence of: *See* HINDU LAW—INHERITANCE ... 1179

Service of Summons. *See* SUMMONS ... 67

Servient Tenement: *See* EASEMENT ... 164

Setting aside Sale: *See* SALE FOR ARREARS OF REVENUE 765

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Shebait: *See* EXECUTION OF DECREE ... 440

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———— *See* LIMITATION ... 244

Simple Interest: *See* RECEIPT ... 546

Single Judge, order by: *See* APPEAL ... 735

Slavery Bond. *See* BOND ... 742

Sohag Grant *See* HINDU LAW—CUSTOM 582

Sonthal Parganas. *See* JURISDICTION ... 116

Sonthal Parganas Act (XXXVII of 1855), s 2. *See* JURISDICTION ... 116

Sonthal Parganas Justice Regulation (V of 1893), Part 2, s. 10: *See* JURISDICTION ... 116

Sonthal Parganas Settlement Regulation (III of 1872) ss. 5, 6. *See* JURISDICTION ... 116

Stay of Execution. *See* PRIVY COUNCIL, PRACTICE OF ... 739

Succession. *See* BABUANA GRANT ... 582

Succession Certificate—*Succession Certificate Act (VII of 1889) s 4—'Debt', meaning of—Part of debt, if certificate can be granted in respect of—Appeal* A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased The word 'debt' is a comprehensive term, which should receive a liberal construction *Re Ghansham Das*, (1893) All W N 84, and *Mahomed Abdul Hossain* v *Sarifan*, 16 C W N 231 approved and followed *Akbar Khan* v *Bilkisara Begam*, (1901) All W N. 125, considered *Bibee Boodhun* v *Jan Khan*, 13 W R 265, *Muhammed Ali Khan* v *Pattan Bibi*, I L R 19 All 129, *Bismilla Begam* v *Tawassul Husain*, I L R 32 All 335 and *Ghafur Khan* v *Kalandari Begam* I L R 33 All 327 not followed ANNAPURNA DASEE *v* NALINI MOHAN DAS (1914) I. L R 42 Calc ... 10

Succession Certificate Act (VII of 1889) s. 4: *See* SUCCESSION CERTIFICATE 10

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Suit for Land: *See* JURISDICTION .. 942

Summons—*Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O V, rr 15, 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine* Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons They come within the operation of rules 15 and 17 of Order V of the Code of Civil Procedure INTU MEAH MISTRY v DARBUKSH BHUIYAN (1914) I L R 42 Calc 67

Surety—*Rejection of sureties only on Police report without judicial enquiry into their fitness—Inquiry to be held by the Magistrate passing the order for security—Criminal Procedure Code (Act V of 1898) ss 118 122* Sureties tendered by a party bound down under s 118 of the Criminal Procedure Code should not be rejected on a police report as to their fitness but only after a judicial enquiry under s 122 and by the Magistrate who has passed the order for security AKBAR ALI MAHOMED v EMPEROR (1914) I L R 42 Calc 706

Tenure *See* JAGIR 305

Tidal River *See* FISHERY 489

Time, computation of *See* LEAVE TO APPEAL TO PRIVY COUNCIL 35

Title *See* TRADE MARK 262

Title, proof of *See* FISHERY 489

Title, question of *See* PUBLIC NUISANCE 156

Trade mark—*Title—Assignment—Trade mark in selection of natural products as indicating quality—Goodwill—License to use trade mark—Action for royalty—Estoppel—Licensee estopped from questioning validity of license—Evidence Act (I of 1872) s 117—Damages action for* In India the law of trade marks is not governed by statute, there being no statutory system of registration Rights and liabilities in connection with trade marks are determined by reference to the principles of the common Law of England *British American Tobacco Co, Ld* v *Mahboob Buksh* I. L R 38 Calc 110, referred to A trade mark cannot be transferred or descend in gross but only together with the goodwill of the business to which it relates A trade mark represents the origin of the goods to which it is attached or their trade association the truth of the representation is essential By usage successors in business may use their predecessors' trade marks where the representation still continues to be substantially true A selector of natural products like jute may have a trade mark in connection with such selection as indicating good quality *Major Brothers* v *Franklin & Son* [1908] 1 K B 712, followed Meaning of 'goodwill' explained *Inland Revenue Commissioners* v *Muller & Co's Margarine Ld*, [1901] A C 217, referred to In a suit for royalty brought by the licensors of certain jute trade mark against the licensees the defence taken was that the plaintiffs had no title to the marks in question, and that the license was void —*Held* that by virtue of s 117 of the Evidence Act the licensees were estopped from questioning their licensors title or the validity of the license At any rate s 117 cast on the defendants the burden of proving that the goodwill of the business had not passed to the plaintiffs to support the transfer of the trade marks and the defendants having failed to do so the plaintiffs were entitled to the royalty claimed Claim to damages by the licensors for depreciation in the value of the trade marks due to the default of the licensees, refused on the facts of the case The

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Trade-mark—*concld*

decision of IMAM J in *Jagarnath & Co v Cresswell and Others* I L R, 40 Calc 814 affirmed HANNAH v JUGGERNATH & Co (1914) I L R 42 CALC 262

Trading with the Enemy—*Acts done and directions given before date of the Ordinance relevancy of—Subsequent ratification—"Trading" meaning of—Directions to an agent to take delivery of goods lying in London, and to sell to German firm against payment—Supply of goods to agent and sale by him to German firm—"Destined," meaning of—Legal and actual destination—Goods shipped to enemy country before the war but taken up by English firm in London—Exportation of goods to accused's agent in Italy refused by such firm because of Royal Proclamation—Abetment of supply to or of trading by, the agent—Power of Appellate Court to alter conviction of principal offence to one of abetment—Discretion of Court—Commercial Intercourse with Enemies Ordinance (VI of 1914) s 3—Trading with the Enemy Proclamation No 2 cls 5(7) (9)—Royal Proclamation of 15th October 1914—Criminal Procedure Code (Act V of 1898) s 423* Where a case of mica was shipped by the accused to a German firm before the war but arrived in London after its outbreak and was taken up by an English firm whereupon he wrote before the date of the Ordinance VI of 1914, viz 14th October 1914 to a Bank in London to make over the case to the English firm, and also to the latter to take it up and send the same to his agent at Genoa on application by such agent which however the English firm refused to do by reason of the prohibition of the export of mica to Italy by Royal Proclamation and further wrote to the agent to apply to the English firm for the mica and to deliver it to a German purchaser

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Trading with the Enemy—*contd*

against payment and where, after the date of the Ordinance the accused again wrote to his agent informing him of his aforesaid letters and instructions to the Bank and the English firm, and directing the agent to apply for the case of mica to the latter and to deliver it to the German purchaser against payment which directions were not in fact carried out on account of the refusal by the English firm to export the mica to Italy —*Held* that as the Ordinance was not retrospective the only acts and directions which the Court could take into consideration, to establish the offence of trading with the enemy were such as were done or given after the date of its enactment unless the previous acts and directions were ratified thereby *Quære* Whether mere directions to an agent to apply for goods in the possession of a third person and to deliver the same to an enemy against payment amount to "trading" within the meaning of the Trading with the Enemy Proclamation No 2 cl 5 (7) The word "destined" when used with the term "trading" in the same sub-clause, means "intended for" and not "on the way to" *Legal* destination must not be confused with *actual* destination The Court must determine whether the goods were actually destined for an enemy and with reference only to acts done and directions given after the date of the Ordinance VI of 1914 If the English firm had really purchased the goods outright, they were not in existence, so far as any disposition of them by the accused was concerned, after the date they were taken up and paid for, and could not be destined for an enemy But assuming that the said firm had merely taken over the goods on behalf of the accused and subject to his further instructions, a direction to the agent to apply

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Trading with the Enemy—*concld*

for and deliver them to a German purchaser against payment was in sufficient to give the goods an enemy destination in fact, as such direction had no operation on receipt thereof by reason of the refusal of the English firm to export the goods to the agent at Genoa. *Held*, also, that, as the point was not free from doubt, *the accused was entitled to the* benefit of it It is not a universal rule that in no case can an Appellate Court convict an accused of abetment, when he was charged only with the principal offence But it is discretionary with the Appellate Court to allow such fresh charge being tried on appeal The Court refused, under the circumstances of the case, to alter the conviction to one of abetment of supply to, or of trading by, the agent. Where the agent of the accused sold and delivered some cases of mica, and handed over the shipping documents for certain other cases lying in London, to a German firm or its agent in Genoa —*Held*, *per* BEACHCROFT AND GREAVES JJ, that the accused was guilty of the offence of supplying goods to the enemy within cl 5 (7) of the Trading with the Enemy Ordinance No 2 INDAR CHAND v EMPEROR (1915) I L R 42 Calc 1094

Trading with the Enemy Proclamation No. 2 cls (7) (9): *See* TRADING WITH THE ENEMY .. . 1094

Transfer: *See* SANCTION FOR PROSECUTION 667

———*Transfer by District Judge of particular case to Additional Judge —Civil Courts Act (XII of 1887), ss 8, sub s (2) 22, sub s (2)—Probate and Administration Act (V of 1881), ss 3 51, 53* It is competent to a District Judge to transfer a particular case to an Additional Judge under the provisions of sub s (2) of s 8 of the Civil Courts Act of 1887. RUP KISHORE LAL v NEMAN BIBI (1915) I L R 42 Calc ... 842

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s. 4: *See* DAMDUPAT, RULE OF 826

s. 55: *See* CHUKANI RIGHT . 28

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s. 85. *See* HINDU LAW—MORTGAGE 1068

ss. 85 to 89: *See* LIMITATION 776

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Under raiyati Holding—*concld*

from the Transfer of Property Act, is not transferable, it cannot become so unless it is expressly made so by some other statute If it had been intended to make holdings transferable which were before non transferable, the Legislature in framing the Bengal Tenancy Act would have said so Section 117 of the Transfer of Property Act excludes agricultural land from the operation of the rule which makes leasehold property transferable *Hiramoti Dassya v Annoda Prosad Ghose* 7 C L J 555, followed AMINNESSA *v* JINNAT ALI (1914) I L R 42 Calc 751

Under Tenure *See* HOMESTEAD LAND 638

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——————*Contract—Illegal composition of non compoundable offence—Stifling prosecution—Suit for refund—Contract Act (IX of 1872) ss 16 19* No refund of money or return of security given under agreement not to prosecute a criminal case, will be allowed unless circumstances disclose pressure or undue influence Mere fear of punishment in a criminal case does not constitute undue influence *Jones* v *Merionethshire Building Society*, [1892] I Ch 173 referred to AMJATENNESSA BIBI *v* RAHIM BUKSH SHIKDAR (1914) I L R 42 Calc 286

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Vendor and Purchaser—*Conveyance by executor as beneficial owner—Construction of deed of sale—Inconsistency between recitals and operative part of deed—Omission to state expressly that he was conveying the property sold in his capacity of executor* *Held* (reversing the appellate decision of the High Court, and restoring that of the first

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Court), that on the construction of a deed of sale, and on the evidence in, and under the circumstances of the case, the title vested in an executor passed to the appellants under the deed, by which he together with other vendors purported to convey "all his estate, right title, claim, and demand whatsoever in the property sold, although he did not expressly state therein that he was conveying the property in his capacity as executor The plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution The deed stated plainly that whatever right or title the vendors possessed was to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in a natural sense BIJRAJ NOPANI *v* PURA SUNDARY DASEI (1914) I L R 42 Calc 56

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INDIAN LAW REPORTS,

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CIVIL RULE.

Before Mookerjee and Beachcroft JJ

BALMER LAWRIE & Co

v

JADUNATH BANERJEE *

1914
April 6

Rateable Distribution—Practice and Procedure—Decree—Civil Procedure Code (Act V of 1908) ss 47 73—Civil Procedure Code (Act XIV of 1882) s 295—Appeal

An order refusing rateable distribution made under s 73 of the Code of Civil Procedure (Act V of 1908) between two rival decree holders which does not affect or interest the judgment debtor is an *order* in execution proceedings but is not a *decree* as all the conditions enumerated in s 47 of that Code are not present and consequently is not appealable

Jagadish Chandra Shaha v *Kripanath Shaha* (1) followed

Sorabji Coovarji v *Kala Raghunath* (2) distinguished

It is essential for the application of s 73 of the Code of Civil Procedure that the decrees should have been *passed* against the *same* judgment debtor

RULE obtained by Messrs Balmer Lawrie & Co the petitioners

The petitioners had got a decree against D Mukherjee & Co in the Small Cause Court, Calcutta,

* Civil Rule No 132 of 1914, against the order of Latu Behari Bose Subordinate Judge of 24 Parganas dated Jan 27 1914.

(1) (1908) I L R 36 Calc 130 (2) (1911) I L R 36 Bom 156

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for a sum of Rs 1 505 including costs And in execution thereof in that Court got satisfaction to the extent of Rs 500 only, rateably along with other creditors from a sum of Rs 1 200 sent to the Small Cause Court Calcutta by the Chairman of the Calcutta Municipal Corporation alleging that that was the only sum payable by the said Municipality to D Mukherjee & Co

Thereafter it appears that Jadunath Banerjee, the decree holder opposite party executed his decree against D Mukherjee & Co in the 3rd Court of the Subordinate Judge Alipore in execution case No 79 of 1913 and attached two Government promissory notes Nos 039497 and 131160 of the 3½ per cent loan of 1842 43 for Rs 500 and Rs 200 respectively and also any money due from the said Corporation to D Mukherjee & Co The said Chairman then sent to the Subordinate Judge the aforesaid Government promissory notes and a cheque for Rs 523 7 8 representing the judgment-debtor s dues from the said Corporation on accounts subsequently taken, all of which were still lying with him unrealised, and also mentioned the fact of there having been previous attachments from the Small Cause Court Calcutta of D Mukherjee & Co s dues by a number of creditors as well as the fact that the said Chairman had *sent Rs 1 200 to the Small Cause Court Calcutta*

Thereupon the 3rd Court of the Subordinate Judge, Alipore sent to the petitioner notice of the execution case No 79 of 1913 And they entered appearance, took time and finally on the 15th January 1914 after having transferred the decree from the Small Cause Court Calcutta to the 3rd Court of the Subordinate Judge Alipore filed a petition for execution praying for attachment of the aforesaid Government promissory notes and cheque and rateable distribution along

with other creditors after realisation. On the 27th January 1914, the learned Subordinate Judge, after hearing the parties, rejected the petitioner's application holding that they were not entitled to get rateable distribution. Hence they moved the High Court and obtained this Rule.

Babu Biraj Mohan Majumdar, for the opposite party. I have a preliminary objection to take, namely, that as there is an appeal from an order refusing rateable distribution, no Rule should have been granted under s. 115 of the Code of Civil Procedure: vide *Sorabji Coovarji* v. *Kala Raghunath* (1).

[MOOKERJEE J. How do you say there is an appeal?]

As the question is between parties to the suit, the order should fall under s. 47 of the Civil Procedure Code, and hence there s an appeal.

"Assets" in the present section has the ordinary meaning attached to the word and therefore the "assets" of the judgment-debtor in the present case were received by the executing Court on the day on which the promissory notes and the cheque for Rs. 523 were sent by the Secretary, Municipal Corporation, to the Court. This was long before the petitioners applied for rateable distribution, and hence they are out of time.

[BEACHCROFT J. Have the promissory notes been endorsed over to the opposite party, and has the cheque been cashed?]

[*Babu Sajani Kanta Sinha*, for the petitioner. No, the cheque has not been cashed, but the Government promissory notes have been endorsed over to the opposite party Jadunath on the very day on which this rule was issued by your Lordships. There appears to have been an undue haste about it.]

(1) (1911) I. L. R. 36 Bom. 156.

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They are entitled to the money and they have taken it At any rate the order for rateable distribution was passed in December

[BEACHCROFT J How could that be? How could the Court have distributed the Government promissory notes without selling them? Suppose the property was immoveable property instead of Government promissory notes]

At any rate, the decree was not against the same judgment-debtors One was against the firm and the other against Dasarathi Mukherjee

Babu Sajani Kanta Sinha, in support of the Rule The Rule is in order No appeal lies from an order under section 73 refusing rateable distribution It is not an order under section 47, the question not being between the decree-holder and the judgment-debtor but between different decree-holders against the same judgment-debtor The case of *Sorabji Coovarji* v *Kala Raghunath*(1) is distinguishable There the question was whether the sale held of the properties of the judgment-debtor in spite of the payment of the whole of the decretal amount for which the properties had been attached, was valid or not This was a question undoubtedly between the judgment-debtor and the executing creditor The case here is entirely different Hence the ruling is quite inapplicable

Assets' to be held by a Court must be realised before they are assets within the meaning of section 73 of the new Code or section 295 of the old Code. There can be no distribution of the properties of a judgment-debtor amongst creditors before they are "realised," and "realisation" has been held to mean 'converted into cash or such form as to be available for immediate distribution" *Ramanathan Chettiar*

(1) (1905) I L R 30 Bom 156

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v. *Subramania Sastrial* (1), *Hafiz Mahomed* v *Damodar Pramanick* (2)

[MOOKERJEE J But the old section 295 has been considerably changed In the old Code, the words were, when "assets are *realised*", whereas in the new Code, they are, "assets are *held*" Therefore the real question is about the meaning of "assets"]

No doubt "assets" in the broad sense of the word would mean property of a person that can be made liable for his debts, but this must be taken with the word *held*, *i e*, held in such a form as can immediately be distributed to the creditors in satisfaction of a decree for money

[MOOKERJEE J Your contention is that it must be converted into cash]

Yes, or some form which is equivalent to cash

[MOOKERJEE J What is that ?]

Currency notes or some such thing

[MOOKERJEE J Suppose the assets brought into Court are paddy Is that something available for immediate distribution ?]

No, the decree sought to be executed must be one for money and therefore the satisfaction must be in money This is the import of the decisions in *Ramanatham* v *Subramania* (1) and *Hafiz* v *Damodar* (2)

[MOOKERJEE J Those are cases under the old Code Have you got any case decided after the passing of the new Act ?]

Yes *Arimuthu Chetty* v *Vyapuripandaram* (3) It is a decision of a single Judge of the Madras High Court and shows that Mr Justice Abdur Rahim thought that 'assets' under the new Code must be realised before they can be held by a Court The

(1) (1902) I L R 26 Mad 179 (2) (1891) I L R 18 Calc 242
(3) (1911) I L R 35 Mad 588

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Government promissory notes and the cheque are negotiable instruments and there are special provisions in the Civil Procedure Code for their realisation: see Order XXI, rules 51 and 76. The Government promissory notes and the cheque were brought into Court but there was something more to be done under Order XXI, rule 76. The endorsement of the Government promissory notes over to one of the decree-holders is illegal, at any rate irregular. Hence the Court below never realised the property brought into Court under attachment. So it did not hold the assets within the meaning of section 73 before the application for execution and rateable distribution by my client. Therefore the order complained of is wrong.

As for the decrees not being against the same judgment-debtor: Dasarathi Mukherjee is the sole partner of D. Mukherjee & Co., at any rate is a partner who is personally liable for the debts of the Company; therefore the contention of my learned friend is groundless. The real test is whether the person whose money is sought by different creditors under different decrees for money is liable under each of the decrees: *Gonesh Das Bagria* v. *Shiva Lakshman Bhaiat* (1).

[MOOKERJEE J. But the word "passed" is an addition in the new Code.]

No doubt, but it is an addition necessary under the new framing of the section. It does not affect the sense of the old section 295 with regard to the judgment-debtor. A decree against A, B and C jointly and severally is a decree passed equally against A, B and C. Therefore a decree against D. Mukherjee and Co. is a decree passed against Dasarathi Mukherjee as well as against any other member of the firm, if any.

(1) (1903) I. L. R. 30 Calc. 583.

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MOOKERJEE AND BEACHCROFT JJ. This Rule is directed against an order by which the Subordinate Judge has refused an application for rateable distribution under section 73 of the Code of Civil Procedure of 1908. The opposite party obtained a decree for money against his judgment-debtor by name Dasarathi Mukherjee, while the petitioner obtained a decree for money against D Mukherjee & Company, a firm of which Dasarathi Mukherjee was a partner At the instance of the decree-holder opposite party, the Municipal Corporation of Calcutta, which held two Government securities and a sum of money payable to Dasarathi Mukherjee, placed the properties at the disposal of the lower Court for satisfaction of the decree held by him During the pendency of a proceeding for rateable distribution as between the opposite party and the other execution creditors of Dasarathi Mukherjee, at whose instance the properties in the custody of the Corporation had been attached through the Calcutta Small Cause Court, the present petitioner, on the 15th January 1914, made an application for rateable distribution. This application has been refused by the Subordinate Judge on the ground that it was made after the receipt of the assets by the Court The question for consideration is, whether this order has been rightly made.

A preliminary objection has been taken to the Rule on the ground that the order of the Subordinate Judge was in essence made under section 47 of the Code and was appealable as a decree. In support of this view, reference has been made to the case of *Sorabji Coovarji* v *Kala Raghunath* (1). That case, however, is clearly distinguishable There the decree-holders had attached the property of their common

(1) (1911) I L R 36 Bom 156

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judgment-debtor. Other execution creditors of the judgment-debtor applied for rateable distribution of the assets which might be realised by sale of the property. The judgment-debtor brought into Court a sum sufficient to satisfy the two decree-holders at whose instance the property had been attached. Thereupon the other decree-holder applied for rateable distribution of the sum so deposited, and the Court, without notice to the judgment-debtor, allowed this application. The result was that there was not a sufficient sum left to the credit of the decree-holders, at whose instance the attachment had been effected, to satisfy their dues, and the Court accordingly directed that the property attached be sold in order that their decrees might be satisfied in full. The judgment-debtor appealed against this order, on the ground that no rateable distribution was permissible under the law in respect of the money brought by him into Court, and that as the sum deposited was sufficient to satisfy the decrees held by the two execution creditors who had taken out processes of attachment, their decrees must be deemed in law to have been satisfied, so that there was no execution proceeding left in which an order for rateable distribution might be made. An objection that the appeal was incompetent as the question raised was not within the scope of section 47, was overruled on the ground that the question did arise between parties to the decree. It is not necessary for our present purpose to decide whether, in circumstances like these, the question which arose not merely between the rival decree-holders but also between the judgment-debtor on the one hand and the decree-holders on the other, could be deemed to fall within the scope of section 47. But it is plain that, in the case before us, the question which calls for decision is not within the scope of

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that section This is not a question which arises between the parties to the suit in which the decree under execution was passed, it is on the other hand a question between two rival decree-holders, which does not affect or interest the judgment-debtor An order made under section 73 is an order in execution proceedings but is not a decree unless all the conditions enumerated in section 47 are present · *Jagadish* v. *Kripa Nath*(1). We must consequently hold that the order of the Subordinate Judge is not appealable and overrule the preliminary objection

As regards the merits, it is plain that the petitioner is not entitled to succeed Section 73 provides that where assets are held by a Court and more persons than one have, before the receipt of such assets, made application to the Court for the execution of decrees for the payment of money passed against the same judgment-debtor and have not obtained satisfaction thereof, the assets, after deducting the costs of realisation, shall be rateably distributed among all such persons It is essential for the application of the section that the decrees should have been passed against the same judgment-debtor This has been made clear beyond possibility of dispute by the introduction of the word ' passed " which did not find a place in section 295 of the Code of 1882 But, as already stated, the decree held by the opposite party, in execution of which the properties have been brought into Court, was passed against Dasarathi Mukherjee, while the decree held by the petitioner was obtained against the firm of which Dasarathi Mukherjee was a partner, and is not shown to be capable of execution against him individually Consequently, the two decrees cannot be deemed to have been passed against the same judgment-debtor, and it

(1) (1908) I L R 36 Calc 130

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is thus needless to consider whether *Gonesh Das* v. *Shiva Lakshman* (1) has been affected by section 73 of the Code of 1908 which reproduces section 295 of the Code of 1882 in an altered form. In this view, it is also unnecessary to discuss the question whether the application for rateable distribution by the petitioners was made *before the assets had been received* by the Court below.

The result is that the Rule is discharged with costs to the decree-holder (and not to the judgment-debtor) opposite party.

G. S. *Rule discharged.*

(1) (1903) I. L. R. 30 Calc. 583.

APPELLATE CIVIL.

Before Woodroffe and Carnduff JJ.

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April 8.

ANNAPURNA DASEE

v.

NALINI MOHAN DAS.*

Succession Certificate—Succession Certificate Act (VII of 1889) s. 4—Debt, meaning of—Part of debt, if certificate can be granted in respect of—Appeal.

A certificate under the Succession Certificate Act can be granted in respect of a part only of a debt due to the deceased.

The word "debt" is a comprehensive term which should receive a liberal construction.

Re Ghansham Das (1) and *Mahomed Abdul Hossain* v. *Sarifan* (2), approved and followed.

Akbar Khan v. *Bilkisara Begam* (3) considered.

* Appeal from Order No. 328 of 1913, from the order of M. Sutler, District Judge of Dacca, dated June 23, 1913.

(1) (1893) All. W. N. 84. (2) (1911) 15 C. W. N. 231.

(3) (1901) All. W. N. 127.

Bibee Boodhun v *Jan Khan* (1), *Muhammed Ali Khan* v. *Pattan Bibi* (2) *Bismilla Begam* v *Tawassul Husain* (3) and *Ghafur Khan* v. *Kalandari Begam* (4) not followed

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ANNAPURNA DASEE v. NALINI MOHAN DAS

APPEAL by Annapurna Dasee from an order of the District Judge of Dacca dismissing the petition of the appellant for a certificate under the Succession Certificate Act empowering her to receive the interest on certain Government promissory notes and the dividends on certain Bank of Bengal shares.

The appellant was the widow and heiress of one Sanatan Das, who died on February 24th, 1902. Part of the estate of the deceased consisted of certain Government promissory notes and Bank of Bengal shares, and upon these there was due, by way of interest and dividends at the date of the death of the deceased, a sum of Rs. 4,963-10-4. On April 25th, 1913, the appellant presented a petition for a succession certificate in respect of this sum without asking either for payment of interest and dividends accruing between the date of the deceased's death and the date of the petition or that the promissory notes and shares should be made over to her. The District Judge dismissed the petition. Hence this appeal

Mr S P Sinha, *Dr Rash Behary Ghose*, and *Babu Upendra Lal Roy*, for the appellant

Mr. B. Chakravarti, *Mr. B. C Mitter*, *Babu Bepin Chandra Mullick* and *Babu Suresh Chandra Das*, for the respondents

Cur. adv. vult.

WOODROFFE J. This appeal arises in connection with an application which has been made for a succession certificate.

(1) (1870) 13 W R 265
(2) (1896) I L R 19 All 129
(3) (1910) I L R 32 All 335
(4) (1910) I L R 33 All 327

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The deceased Sanatan Das died leaving Government promissory notes and Bank of Bengal shares on which Rs. 4,000 odd were due for interest at the time of his death, and since his death over Rs. 75,000 as further interest have fallen due. The application is by his widow for a certificate which will enable her to realise interest and dividends due up to the date of her husband's death but not the interest and dividends falling due after his death, or the principal. The object of the application apparently is that the applicant may thereby be exempted from finding a large security which she would have to find if a certificate were applied for in order to recover the principal, interest and dividends accruing both before and after the death of her husband.

The learned Judge was of opinion that the certificate, as asked for could not be granted. He says: "The law intends that in fit cases security should be taken to protect such claims. The present peculiar limitation is intended to evade the giving of any such security. I am not prepared to make the limited grant prayed for. In the absence of any valid objection by the objector, whom I have not yet heard, I am prepared to make a grant in the ordinary way of power to realise dividends and interest, not limited to a particular date, but generally such as fall due on proper security being given. I find nothing to indicate that it was intended that power should be given to realise dividends for a very short period only, the provisions are for granting power to realise dividends: and practically apart from the question of law there is no good reason for so limiting a grant. I decline to make the limited grant prayed for in all the circumstances. Subject to what I may hear from the other side, I will make a grant in the ordinary way on proper security being given, and not one to enable the applicant to

draw Rs 4,000 odd with security and Rs. 75,000 odd at present and more in the future without security."

A preliminary objection has been taken by the respondent that no appeal lies on the ground that the order which I have just read was not a final order from which an appeal would lie. In my opinion, however, there is no force in this contention There was a final order namely, that portion of the order in which the Judge says that he declines to make the grant prayed for It is true that he went further and said that he would be prepared to make another grant different from that which he had refused, but that was an expression of opinion as to what he was prepared to do under different circumstances and did not affect the finality of the order which was passed He refused to grant the application prayed for merely adding as a rider, which in effect was unnecessary that if another application was made in a different form he would consider it In my opinion, therefore, the preliminary objection fails and an appeal lies The question we have to consider is as to the merits of this application There is a ground which has been taken in appeal that the learned District Judge should have held that Act VII of 1889 had no application to the interest and dividends falling due after the death of the appellant's husband, it being contended *in such grounds* that such interest and dividends were a debt not due to the deceased but due to his widow, the present applicant, and that therefore the petitioner was not bound to include the interest and dividends in the present application On the other hand, it has been contended that the principal sum was a debt due to the deceased even though it may have been payable after his death and that the rule governing the grant of a certificate to recover such principal applies not only in respect of the interest earned by

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WOODROFFE J

such principal before the death of the deceased but also after his death It is however unnecessary in the present case to consider this point because I think that the appeal may be dealt with upon the other grounds to which I am now about to refer

The question which we have to decide is whether a certificate can be granted for the recovery of a part of a debt It appears to be well established that a separate certificate may be granted in respect of separate debts and that there is nothing in law which compels the applicant for such a certificate to apply for a certificate in respect of all the debts due to the deceased But the question which is now before us is this whether assuming that to be so we can go further and hold that as regards a single debt, a certificate can or cannot be granted for the purpose of enabling the applicant to recover a portion of that debt The word debt is a comprehensive term which I think should receive a liberal construction The object of the Act is to protect the debtors of a deceased person but there is nothing in law which prevents a debtor from making payment of his debt without the production of a certificate if he so chooses Now, the first point from which the matter may be looked at is that of authority, it being contended by both sides in this appeal that the Case law supports the respective contentions which they have placed before us and there are decisions which may be cited in support of either of these contentions

The earliest decision to which we have been referred is *Mussamat Bibee Boodhun* v *Jan Khan* (1) In that case Mussamat appealed against an order granting Jan Ali a certificate to collect five sixths of the debts due to the estate of Zuhur Ali and the learned Judges say " Now we observe at the outset of the

(1) (1870) 13 W R 267

case that this order is irregular. Act XXVII of 1860—that is the old Succession Certificate Act—does not contemplate a division of a certificate or a power to collect fractional shares of debts" This passage favours the respondent's contention and indeed goes the whole way which he desires us to go; but the statement there made was a mere expression of opinion. It does not appear to have been the subject of discussion or argument and was unnecessary seeing that the suit in which it was given was not heard but was compromised

In the case of *Muhammad Ali Khan v Puttan Bibi* (1), it was held by Sir John Edge C J. and Burkitt, J. that a certificate for collection of debts under Act VII of 1889 may be given for the collection of any one or more separate debts of the deceased, but not for the collection of part only of a debt The ground upon which the learned Judges appear to have based their decision was that a contrary view might lead to a multiplicity of suits and the harassment of debtors

This case was followed by that of *Bismilla Begam v Tawassul Husain* (2) in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady who had died leaving a dower debt unrealised for collection merely of a part of the dower debt of the deceased It was also followed by the decision in *Ghafur Khan v Kalandari Begam* (3), in which it was held that no certificate could be granted to one of the heirs of a Mahomedan lady, who had died leaving her dower debt unrealised, for collection merely of a part of the dower debt of the deceased There again, the decision was based on the ground that a debtor is not to be harassed more than once for one debt and a multiplicity of

(1) (1896) I L R 19 All 129 (2) (1910) I L R 32 All 335
(3) (1910) I L R 33 All 327

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suits in respect of one cause of action should be discouraged and on the ground that the word ' debt must be taken to mean the whole of the debt due to the deceased and not a portion or share of such debt It was considered that the latter view was opposed to the scheme of the Act which had been enacted to afford protection to debtors and had nothing to do with the convenience of the applicant or his right to or share in the debt

Previous however to this there appears to have been a conflict even in the Allahabad High Court on this point, for in the case of *Akbar Khan* v *Bilkisara Begam* (1) Chamier J doubted the correctness of the decision in *Muhammad Ali Khan* v *Putlan Bibi* (2) and was of opinion that the word debts in section 6 (*f*) of the Succession Certificate Act means debts due, *i e* alleged to be due from debtors to the person applying for the certificate

Further *In re Ghansham Das* (3) Blair J gave a decision which directly supports the contention of the appellant before us holding that there was nothing in the Succession Certificate Act of 1889 to preclude a Judge from granting a certificate for partial collection of the debts of a deceased person security being furnished by the applicant of proportionate amount He therefore says there seems to be no practical objection to the issue of a certificate for partial collection inasmuch as the Act itself contemplates the addition to a certificate of debts to which it did not originally apply

Further the latest case and it is one in our Court supports the view which we have been asked to accept by the appellant That case is *Mahomed Abdul Hossain* v *Sarifa* (1) and was decided by

(1) (1901) All W N 1?5
(3) (1893) All W N 84
( ) (18?) I L R 19 All 129
(4) (1911) 16 C W N 231

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Mookerjee and Carnduff, JJ. There the Court dissented from the decision in *Ghafur Khan* v. *Kalandari Begam* (1) and held that section 4 of the Succession Certificate Act does not require that the certificate should cover the whole of the debt, if the heirs do not seek to realise the whole This was a case in which one of several heirs of a deceased Mahomedan lady sued her husband for a portion of the share of the deferred dower due by the defendant to the deceased relinquishing the balance It was held that in respect of the deferred dower, each of the heirs of the deceased had a distinct right enforceable by himself, though all might jointly sue and that it was open to each to relinquish a portion of the claim It was also held that an application by the plaintiff for a succession certificate in respect of the amount claimed by her in the suit was properly granted No doubt, the circumstances of that case were not exactly the same as those before us, but the principle upon which the decision proceeds seems applicable to the present circumstances, for the debt due to the deceased was one debt and yet it was held that a partial certificate might be granted to one of several of the heirs to recover the portion of that debt which he claimed And if this may be done, I do not see in principle why a person may not, as in this case apply for a certificate to enable him to recover a portion of a debt due to the deceased. The matter appears to be one which rather affects the question of revenue than anything else But there does not appear to me to be as Blair J points out, any practical objection to the grant of such a certificate which may be, as in the present case, a distinct convenience to the applicant

As regards the objection which has been taken that such a procedure may lead to a multiplicity of

(1) (1910) I L R. 33 All 327

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suits the answer appears to me to be two-fold. In the first place if the debt be due and the debtor be honest and solvent he will pay on the production of the certificate for the grantee of the certificate can give him a valid discharge to the extent indicated by the instrument. There will then be no necessity for a suit and the question of multiplicity upon which the learned Judges of the Allahabad High Court proceed, will not arise at all. Nextly, if there is such a suit it by no means follows that, because a certificate may be given to recover a fractional share of a debt, the principle of law which prohibits multiplicity of suits, is in any way affected. We must distinguish between two separate things, one is the grant of a certificate and the other is the institution of the suit. We are not here concerned with the frame of a suit but whether a certificate should be granted, and it may well be that though a certificate may be granted to recover a fractional share of a debt yet if the person to whom the certificate was granted were to sue for a portion of a debt which he might have sued for in a previous suit his claim would be barred under the provisions of the Civil Procedure Code.

I am of opinion therefore that both on the ground of principle and of the authorities to which I have referred and which support the contention of the appellant this appeal should succeed, I therefore would reverse the order of the District Judge rejecting the application for a certificate in the terms prayed for by the appellant and remand the case to him for a rehearing.

The respondents will pay the appellant's costs of this appeal.

CARNDUFF J. I agree.

Appeal allowed, case remanded.

H. R. P.

CRIMINAL REFERENCE.

1914
April 21

Before Sharfuddin and Coxe JJ.

ABHAYESWARI DEBI

v.

KISHORI MOHAN BANERJEE.*

Complaint—Personal presentation of complaint—Complaint of defamation presented by alleged agent of pardanashin but not signed by her—Power of attorney not filed in Court—Necessity of examination of complainant before issue of process—Examination of pardanashin on commission—Criminal Procedure Code (Act V of 1898) ss. 198, 200, 503—"At once"

The words 'at once' in s. 200 of the Criminal Procedure Code clearly indicate that a complaint must ordinarily be presented in person otherwise a Magistrate should be very loath to take cognisance and should not accept a complaint not signed by the alleged complainant, and not preferred by a person duly authorized to institute the specific complaint.

No process can be issued against the accused, either by the Magistrate first taking cognisance or by the Magistrate to whom the case is transferred, unless and until the Magistrate issuing it has first examined the complainant, and this course is the more necessary in the case of a *pardanashin* to enable the Magistrate to satisfy himself that the complaint is really her action.

When a *pardanashin* makes a complaint the Magistrate may take cognisance, if satisfied that it is really her complaint by whatever means it reaches him.

When it is presented on her behalf, the Magistrate may, under s. 503 of the Code, issue a commission for the examination required by s. 200. Section 503 is very wide in its terms and refers not only to an inquiry or trial but to any other proceeding and authorises the examination of any "witness" which includes a complainant.

* Criminal Reference No. 1 of 1914 by R. D. Chatterjee, 4th Presidency Magistrate, Calcutta, dated March 25, 1914.

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ABHAYES-WARI DEBI v. KISHORI MOHAN BANERJEE.

Where a written complaint of defamation was presented by an alleged agent on behalf of a *pardanashin*, but it was not signed by her, nor was any power of attorney filed before the Magistrate, and he issued process without examining the complainant

Held that he had no power to issue process in such a case.

THERE appeared in a weekly newspaper called the "*Indian Empire*" printed and published in the town of Calcutta a series of articles reflecting on the management of the Bijni Raj under the present *Rani*, Abhayeswari Debi who resided in the Goalpara district in Assam. On the 6th November 1913, one Bhuban Mohan Chatterjee, Assistant Superintendent of the Bijni estate, presented a complaint before the Chief Presidency Magistrate, purporting to be made on behalf of the *Rani*, and as her constituted agent, against Kishori Mohan Banerjee and others, the editor and the printer of the said newspaper, charging them with defamation under s. 500 of the Penal Code. The petition of complaint was signed by Bhuban but not the *Rani* and no power of attorney was filed in Court. The Magistrate issued process, without examining the lady, and transferred the case thereafter to the Second Presidency Magistrate who examined several prosecution witnesses, but refused to issue a commission for her examination. On application by her to the High Court, the case was transferred to the Chief Presidency Magistrate who sent it to Babu R. D. Chatterjee for disposal.

On the 24th March 1914 when the case was called on for hearing the counsel for the accused objected to the trial proceeding on the ground that, under s. 198 of the Criminal Procedure Code, a complaint by the *Rani* was necessary, and that there was nothing to show that the petition presented by Bhuban was her complaint, there being no power of attorney on the record. The Magistrate thereupon referred the

case, under s. 432 of the Code, to the High Court, through the Registrar, in the following terms —

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ABHAYESWARI DEBI v. KISHORI MOHAN BANERJEE

"Under section 432, Criminal Procedure Code, I beg to refer the following point of law to you for submission to the Hon'ble Judges of the High Court for decision A case of defamation (section 500, I P C) was instituted in the Court of the Chief Presidency Magistrate of Calcutta on the 6th November 1913 on behalf of Rani Abhayeswari Debi, Rani of Bijni, through her constituted attorney Bhuban Mohan Chatterjee Assistant Superintendent, Bijni Raj against Kishori Mohan Banerjee and others The petition was signed by Bhuban Mohan Chatterjee on behalf of Rani Abhayeswari Debi of Bijni and not signed by the Rani No power of attorney has yet been filed in this matter On the case being called up to day (24th March 1914) the defence counsel wanted *de novo* trial and contended that as the Rani who is alleged to have been defamed, did not lodge the complaint herself but did so through one Bhuban Mohan Chatterjee who was represented in the petition as her constituted agent, the complaint could not be said to have been made by the party aggrieved and as such, under section 198 Cr P C, the case cannot go on As this point is not free from difficulty, I submit the record of the case to you for laying before the Hon'ble Judges of the High Court for their decision on the following point — Whether the Rani can institute the case of defamation through her agent Bhuban Mohan Chatterjee, and whether by doing so the requirements of section 198 Cr P C, have been met with

The whole record of the case including the petition of complaint is submitted for their Lordships decision

Mr B N Sen (with him *Babu Tarkeswar Pal Chowdhury*), for the accused The Chief Presidency Magistrate has no jurisdiction, by reason of s 198 of the Code, to take cognisance, except on the complaint of the person aggrieved viz, the *Rani* see s 345 The petition of complaint was not signed by her nor was any power of attorney filed by Bhuban Refers to *Chhotalal Lallubhai* v *Nathabhai Bechar* (1), *Thakur Das Sar* v *Adhar Chandra Missri* (2), *Satya Charan Ghose* v *Chairman of the Utterpara Municipality* (3), *Kesri* v *Muhammed Bakhsh* (4) and

(1) (1900) I L R 25 Bom 151
(2) (1904) I L R 32 Calc 425
(3) (1897) 3 C W N 17
(4) (1896) I L R 18 All 221

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ABHAYESWARI DEBI v. KISHORI MOHAN BANERJEE

Rangasawmi Gounden v. *Sabapathy Gounden* (1). There is no evidence of Bhuban's authority to file the present complaint: *Kali Kinkar Sett* v. *Nritya Gopal Roy* (2). The power of attorney must show not general authority to prosecute, but authority to file the particular complaint: Mackenzie on Powers of Attorney, p. 33. There is nothing to show that that complaint was really the act of the lady and not that of others acting under the colour of her name

Mr. J. N. Roy (with him *Babu Manmatha Nath Mukerjee*), for the complainant. As the Magistrate has already issued process and transfered the case, the accused cannot now complain of the want of jurisdiction. The person presenting the complaint has a general power of attorney to institute criminal prosecutions. The lady ought to be examined on commission.

COXE J This proceeding arises out of a complaint, purporting to be made on the part of Rani Abhayeswari Debi against the petitioners, accusing them of committing defamation The complaint is not signed by the *Rani*, but by one Bhuban Mohan Chatterjee on behalf of the *Rani* We are informed that there is no power of attorney on the record, and that there is no power of attorney authorizing the presentation of this specific complaint, although there is a general power of attorney authorizing the presentation of criminal complaints The document was presented to the Chief Presidency Magistrate, who issued process against the accused; and thereafter the case was transferred. The Magistrate, to whom it has ultimately come, has referred for our decision the following point—"Whether the *Rani* can institute the case of defamation through her agent, Bhuban Mohan Chatterjee, and whether by

(1) (1868) 4 Mad H C R 102 (2) (1904) I L R 32 Calc. 469

doing so the requirements of section 198 of the Criminal Procedure Code have been met with

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ABHAYES-WAR DEBI v. KISHORI MOHAN BANERJEE

If the *Rani* made a complaint to a Magistrate the Magistrate is entitled to take cognizance of it But before he takes cognizance he must be satisfied that it is her complaint It is comparatively unimportant by what means the complaint reaches the Magistrate if really it is her own complaint.

But I hold that the Magistrate should be very loath to take cognisance of any complaint which is not presented in person The words "at once" in section 200 of the Code clearly indicate that ordinarily a complaint must be presented in person And I do not think that a complaint should ever be accepted which is not signed by the complainant and is not preferred by a person duly authorized to prefer that specific complaint

It is perfectly clear to me that the Magistrate in the Court below had no right to issue process against the accused persons in this case It has been argued that when a case is transferred under section 192 of the Criminal Procedure Code before the complainant has been examined process can issue without the examination of the complainant That argument really has no application to the present case because as a matter of fact process had been issued before the case was transferred But in any case it is perfectly well settled that a process cannot be issued against an accused person either by the Magistrate first taking cognizance of an offence or by the Magistrate to whom the case is transferred under the proviso to section 200 of the Criminal Procedure Code unless and until the Magistrate issuing process has first examined the complainant and this is perhaps more necessary in the case of a *pardanashin* lady than in other cases to enable the Magistrate to satisfy himself that the

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complaint is really her own action. In the present case if the complaint is ill-founded, it would be difficult, if not impossible, to fix the *Rani* with any responsibility for the proceeding.

I see no reason, however, why the complainant should not be examined under section 503 of the Criminal Procedure Code The terms of that section are very wide They refer not only to an enquiry and a trial but to any other proceeding The section authorizes the examination of any witness, and a complainant is certainly, in my opinion, a witness There is, indeed, less objection to the first examination of a complainant than to the examination of a witness under this section, inasmuch as, on the examination of a complainant before process is issued, the accused is not entitled to be present or to cross examine

It seems to me therefore, that the proper course to adopt in this case is to say that, if the complaint on the record is the complaint of the *Rani*, a point on which we have no materials for a decision, the requirements of section 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons In these circumstances it is best to quash the whole proceedings, giving liberty to the *Rani* to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under Chapter XVI of the Code may be made by a commission, which should be directed to a Magistrate

SHARFUDDIN J I agree.

E H M

CRIMINAL REVISION.

Before Holmwood and Sharfuddin JJ

1914

April 23

ASHRAF ALI

v.

EMPEROR *

Bail—Grounds of admission to bail—Confession of a co prisoner materially corroborated as to applicant—Relative powers of the High Court and Subordinate Courts to grant bail Criminal Procedure Code (Act V of 1898) ss 497 and 498

Section 497 of the Criminal Procedure Code contains a rule founded on justice and equity and should be followed by the High Court, unless anything appears to the contrary The extended powers given to the latter by s 498 are not to be used to get rid of the reasonable and proper provision of the law laid down in s 497

The High Court refused bail where a confession by a co accused implicating himself and the petitioners was materially corroborated as to the latter by other evidence taken at the preliminary enquiry into offences under ss 307 and 337 of the Penal Code

ON the night of the 25th January 1914, the house of F.W Higgins, a tea-planter who lived with his son in the interior, about 19 miles from the town of Chittagong, was raided by 13 men with the object of plundering a safe containing Rs 2,000 One of them, named Niyamat Ali, was seized on the spot and made a confession implicating himself and the present petitioners, Ashraf Ali and others Warrants were issued against them and they surrendered in the early part of February The charge-sheet in the case was submitted on the 6th March, and the preliminary enquiry commenced on the same day The

* Criminal Miscellaneous No 60 of 1914 against the order of the Sessions Judge of Chittagong, dated March 21, 1914

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ABHAYESWARI DEBI v. KISHORI MOHAN BANERJEE

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It seems to me therefore that the proper course to adopt in this case is to say that if the complaint on the record is the complaint of the *Rani*, a point on which we have no materials for a decision, the requirements of section 198 have been satisfied. But the Magistrate was wrong in issuing process against the accused persons. In these circumstances it is best to quash the whole proceedings, giving liberty to the *Rani* to make such further complaint as she may be advised. If such complaint is made, the examination of the complainant under Chapter XVI of the Code may be made by a commission which should be directed to a Magistrate.

SHARFUDDIN J. I agree.

E. H. M.

CRIMINAL REVISION.

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[illegible] Ali v. Emperor.

whole of the evidence had been recorded except that of Higgins who was under treatment in the Presidency General Hospital for the injuries he received from the assailants but who was expected to be present in the Magistrate's Court within a fortnight. The confession was corroborated materially by the evidence on the record as to the present applicants who were charged under ss. 307 and 537 of the Penal Code. The enquiring Magistrate refused bail and his order was upheld by the Sessions Judge of Chittagong. The petitioners thereupon moved the High Court and obtained the present Rule.

Mr. E. P. Ghose and *Babu Chandra Sekhar Sen* for the petitioners.

The Deputy Legal Remembrancer (Mr. Orr) for the Crown.

HOLMWOOD AND SHARFUDDIN JJ. This was a Rule calling upon the District Magistrate of Chittagong to show cause why the petitioners should not be admitted to bail. It is opposed by the Crown represented by the learned Deputy Legal Remembrancer and the District Magistrate has submitted an explanation in which he points out that one of the accused who was captured at the time has made a long confession implicating himself and the other persons who are now praying for bail before this Court; that the confession has been corroborated to a certain extent by evidence which has been recorded by the Magistrate who was enquiring into the case; and in a few days time Mr. Higgins the complainant who was assaulted will be in a position to give his evidence and we do not know what light it may throw on the matter. But what we have to consider in this case is whether the corroboration is in the nature

of material corroboration at law and from the account which has been placed before us by the learned counsel appearing in support of the Rule we must say that so far as it goes it is what the law considers material corroboration Of course we do not and we should not think of throwing out any opinion as to whether this evidence is to be believed We do not desire to prejudice the case in any way We merely state that the evidence which is put before us through the learned counsel is if believed evidence which in law amounts to material corroboration and we think that the rule laid down in section 497 for the guidance of Courts other than the High Court is a rule founded upon justice and equity and one which should be followed by us as well as by every other Court unless anything appears to the contrary The extended powers given to the High Court under section 498 are certainly not to be used to get rid of this very reasonable and proper provision of the law

For these reasons we think that at the present stage of the case bail should not be given It will of course be within the competence of the lower Courts to admit the petitioners to bail at any time after Mr Higgins is examined or whenever it should appear that the *primâ facie* case against them has in any way been weakened

The Rule is discharged

E H M *Bail refused*

APPELLATE CIVIL.

Before Holmwood and Chapman JJ.

1914

April 20.

JOGENDRA NATH GOSWAMI

v.

CHANDRA KUMAR MOZUMDAR.*

Chukani Right—Contract of sale of a chukani tenure—Misrepresentation by non-disclosure of facts—Suit for rescission by purchaser—Transfer of Property Act (IV of 1882) s. 55—Duty of seller.

A *chukani* tenure in the District of Rungpur is not a temporary tenure under the Transfer of Property Act terminable at six months' notice but a *raiyati* leasehold which may develop into occupancy right.

When the vendor is informed by the purchaser of his object in buying certain property and the lease contains covenants which will defeat that object, mere silence will in equity be equivalent to misrepresentation.

Flight v. *Barton* followed (1).

SECOND appeal by Jogendra Nath Goswami, the plaintiff.

This appeal arose out of a suit for recovery of the halves of currency notes of the value of Rs. 1,400 given by the plaintiff to the defendant for a plot of land which the plaintiff contracted with the defendant to buy for Rs. 1,400.

Plaintiff informed the defendant that he was buying the land to settle his grand-nephew permanently thereon and enquired if it would answer the purpose. Plaintiff subsequently found that the defendant did not possess a transferable *chukani* right in the land.

* Appeal from Appellate Decree, No. 2827 of 1911, against the decree of Prankrishna Biswas, District Judge of Rungpur, dated July 26, 1911, affirming the decree of Ali Ahmed, Subordinate Judge of Rungpur, dated Sept. 30, 1910.

(1) (1832) 3 My. & K. 282.

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JOGENDRA NATH GOSWAMI v. CHANDRA KUMAR MOZUMDAR

Hence the suit for refund of the half notes The learned Subordinate Judge held that the defendant had a transferable right to the land and he accordingly directed the defendant to execute a *kabala* on receipt of the other halves of the notes Plaintiff, thereupon, appealed to the District Judge of Rungpur and contended that the defendant had given him to understand that he had a permanent right to the land which he had not, and the plaintiff was therefore entitled to rescind the contract He also contended that the defendant had no transferable rights

The learned District Judge held that there was no misrepresentation and dismissed the appeal Hence the second appeal

Babu Mahendra Nath Roy (with him *Babu Hira Lal Sanyal*), for the appellant The suit has been dismissed on one of the issues but the material questions have been overlooked It has been found that the seller has a transferable interest but has he such interest as he professed to transfer (Transfer of Property Act, s 55 2) If he had no such interest, plaintiff should succeed

It is also necessary to determine what was it exactly that the plaintiff understood he was buying and whether the defendant by his conduct, induced him to believe that he held a permanent interest Defendant knew plaintiff's object in buying the land His silence amounted to misrepresentation Darts' Vendors and Purchasers, 7th Ed , 103-04, *Flight* v *Barton* (1) If the defendant is innocent of wilful misrepresentation, even then if the plaintiff was under a wrong impression and the defendant was aware of it, the contract could not stand

(1) (1832) 3 My & K 282

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J[illegible] NATH CO[illegible]ARY v. CHANDRA KUMAR MO[illegible]AR

Babu Kishori Lall Sircar (with him *Babu Harish Chandra Roy*) for the respondent Plaintiff knew the nature of his right He was a sub tenant on the land for years He entered into the contract with his eyes open

Rescission can only be allowed under circumstances specified in s 35 of the Specific Relief Act

Even if there was any misrepresentation the contract is not voidable for the plaintiff had the means of discovering the truth with ordinary diligence S 19 of the Contract Act (Exception) The plaintiff could have discovered the truth if he was so minded

Babu Hira Lal Sanyal in reply

HOLMWOOD AND CHAPMAN JJ This second appeal arises out of a suit brought by the plaintiff for rescission of a contract and for return of half notes to the value of 1,400 rupees in the alternative if it be found by the Court that the defendant had transferable *chakran* right in the land in suit and if it be held that the plaintiff is bound according to law to purchase the said land from the defendant then the defendant may be directed to execute a conveyance in respect of the said land containing lawful and proper terms

The case in the first Court was considered on six issues that were framed and it is a curious circumstance that in both the Courts below this case has been decided exclusively on a consideration of the 6th issue which carefully avoids all the real points which arise in the case That issue is whether the defendant has got any interest in the property proposed to be sold, and if so whether that interest is transferable Now without framing that issue at all it is obvious both upon the pleadings and upon the facts that the defendant has got an interest in the property and that that interest is transferable But the question which

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JOGENDRA NATH GOSWAMI v. CHANDRA KUMAR MOZUMDAR

arises in this case is whether he had represented that interest to be other than it really was and whether he thereby had deceived the plaintiff into buying what he had no intention of buying

The simple questions which the Subordinate Judge says are immaterial raised in the 2nd 3rd 4th and 5th issues really entitle the plaintiff to have this question of misrepresentation discussed because if he was deceived he is entitled to receive back the other halves of the currency notes and the defendant is not entitled to receive the remainder of the consideration and the plaintiff could not be barred by estoppel from rescinding the contract if the contract was based on misrepresentation

The question whether the plaintiff was deceived is one which largely rests upon the question of the *chukani* right This the Subordinate Judge in the first Court has clearly decided erroneously He says chukani right is not equivalent to occupancy right nor to *mokarari istemrari* it always denotes a temporary right But we have been asked to hold he was right on the authority of certain passages in Dr W W Hunter's Gazetteer for the district of Rungpur Unfortunately these passages are self contradictory and carry with them their own refutation Dr Hunter says *chukanidars* are under tenants who hold their lands from cultivators of a higher class and can be ejected at the will of the superior tenant He gives no authority for the statement In another passage he speaks of *chukanidars* as *mokarraridars* We prefer to follow a far higher authority Dr Field who went into the matter extremely carefully collected a most valuable table of all the various tenures in Bengal and specially dealt with the rights of *jotedars* and *chukanidars* under them in the district of Rungpur from which this case comes Citing the

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J[illegible] Nath [illegible] v. [illegible] K[illegible]ar Mo[illegible]al

report of the Rent Commission in 1876 it is said that a large majority of jotedars have small holdings and are raiyats proper But a large number of jotedars have raiyats under them who are called either *chukandars* or *korfa projas* The *chukandars* too have often raiyats under them and in some cases especially in the larger jotes there are four or more degrees before you get to the actual cultivators Jotes are saleable quite irrespective of the term during which they have been held whether jotes held direct from the zamindar or *chukani jotes* which are held from a jotedar There is therefore a permanent element in these *chukani* rights which may develop into an occupancy right and they are freely saleable even before they develop into occupancy rights In this case if the defendant had such a right it must have already matured into an occupancy right inasmuch as he had held this *chukani* or so called *chukani* for more than 12 years

The learned Judge in appeal says nothing about *chukani* rights but he finds as a fact that the defendant never had anything but a yearly tenancy created for one year for the purpose of building temporary dwelling houses and carrying on jute business and that lease stood in the name of the defendants brother who is dead and the defendant is his heir The defendant continued to hold it after the expiration of the lease and no new lease was ever granted The plaintiff appears to have held this land or a portion of it on a sub lease for 9 years But on this finding it is clear that the tenancy is a precarious one and that under the Transfer of Property Act the defendant and his vendee would be liable to be ejected on six months notice at the end of any year of tenancy This certainly is not a *chukani* right It is urged that the defendant's own pottah describes it as *chukani* right and that the plaintiff cannot have been deceived and

with due diligence he could have discovered what the real right was.

The question which really arises in this case is, did the defendant deceive the plaintiff by holding out to him according to the words of his own written statement that he had a *chukani* right for sale, which he was willing to let the plaintiff purchase for the purpose of permanently settling his nephew on the land, when he had in reality nothing but a leasehold from year to year transferable only under the Transfer of Property Act It is clear from the written statement that the defendant knew that the plaintiffs' intention was to permanently settle his nephew upon this land after the purchase, and it has always been held as laid down in the case of *Flight* v *Barton* (1), that if the vendor be informed by the purchaser of his object in buying and the lease contains covenants which will defeat that object, mere silence will in equity be equivalent to misrepresentation, in other words the defendant was bound to disclose to the plaintiff that the word *chukani* in his lease had no meaning or at any rate not the meaning which persons residing in the Rungpur district are entitled to attach to it But this question can only be decided by a consideration of the various documents in the case which we are surprised to see the lower Courts do not appear to have taken any notice of with the exception of the defendant's pottah These documents are the title-deeds of the Shahs, the defendant's title-deeds the kabala itself and the correspondence between the parties These documents have not been printed in the paper-book probably because the lower Courts did not refer to them But it is obvious that the question whether the defendant deceived the plaintiff cannot

(1) (1832) 3 My & K 282

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be decided without further reference to all these matters

The case therefore must go back for consideration of this point If it be found that the defendant had nothing but a leasehold right from year to year under the Transfer of Property Act, and if the kabala and the correspondence show that he purported to sell the *chukani* right and not merely the right he acquired from the Shahs whatever that right might be, then the defendant must be held to be guilty of fraudulent concealment and the plaintiff is entitled to have his half-notes back and cancel the contract If on the other hand it be held that the defendant has *chukani* right as defined by Dr Field and as generally recognised in the Rungpur district, or that the plaintiff had full knowledge that what is described as *chukani* right in the pottah of the defendant was nothing more than a transferable yearly tenancy for non-agricultural purposes, then the plaintiff cannot succeed As regards the contention that the plaintiff had the means to discover the truth with ordinary diligence we may again point out that if the use of the word *chukani* in the defendant's title-deeds misled the plaintiff or if as the plaintiff says, the defendant refused to show him his title-deeds, then the exception to section 19 of the Contract Act does not apply.

The case will go back to the lower Court to be decided with reference to the directions we have given in this judgment The lower Court will not take any further evidence but will consider the evidence and the documents that are already on the record. The costs will abide the result

S. K. B. *Case remanded.*

APPELLATE CIVIL.

Before Jenkins C J and Woodroffe J

1914
May 5

ABDULLAH HOSSEIN CHOWDHURY
v
ADMINISTRATOR-GENERAL OF BENGAL *

Leave to appeal to Privy Council—Application—Civil Procedure Code (Act V of 1908) s 110—Computation of time—Limitation Act (IX of 1908) s 12 whether ultra vires—Legislative powers of the Governor General in Council—Order in Council 1838—Government of India Act 1858 (21 & 22 Vict c 106) s 64—Indian Councils Act 1861 (24 & 25 Vict c 67)—Letters Patent 1865 ss 39 44

Section 12 of the Limitation Act of 1908 applies to applications for leave to appeal to His Majesty in Council

Section 12 sub cl (2) which enacts that in computing the period of limitation prescribed for an application for leave to appeal the time requisite for obtaining a copy of the decree appealed from shall be excluded was within the legislative powers of the Governor General in Council not being in contravention of section 64 of the Government of India Act 1858 and is not *ultra vires*

Eastern Mortgage and Agency Company Limited v *Purna Chandra Sarbajna* (1) *Lakshmanan* v *Peryasami* (2) *Anderson* v *Periasami* (3) *In re Sita Ram Kesho* (4) *Thuras Rajah* v *Jainilabdeen Rowthan* (5) *Moroba Ramchandra* v *Ghanasham Nilkant Nadkarni* (6) *Motichand* v *Ganga Parshad Singh* (7) referred to

APPLICATION by the plaintiff, Abdullah Hossein Chowdhury, for leave to appeal to His Majesty in Council from the judgment of Coxe and Ray JJ (8)

* Application for leave to appeal to His Majesty in Council No 85 of 1913

(1) (1912) I L R 39 Calc 510
(2) (1887) I L R 10 Mad 373
(3) (1891) I L R 15 Mad 169
(4) (1892) I L R 15 All 14
(5) (1895) I L R 18 Mad 484
(6) (1894) I L R 19 Bom 301
(7) (1901) I L R 24 All 174 L R 29 I A 40 42
(8) (1913) I L R 41 Calc 148

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ABDULLAH HOSSEIN CHOWDHURY v. ADMINISTRATOR GENERAL OF BENGAL

It was conceded that if the application was within time a certificate should issue. The only question was whether the application was within time. By an order in Council, dated the 10th April 1838, it was declared "that from and after the 31st day of December next, no appeal to Her Majesty, her heirs and successors in Council shall be allowed by any of Her Majesty's Supreme Courts of Judicature at Fort William in Bengal . . . unless the petition for that purpose be presented within six calendar months from the day of the date of the judgment, decree or decretal order complained of and unless the value of the matter in dispute shall amount to the sum of ten thousand Company's rupees at least . . ." See Safford and Wheeler's Privy Council Practice, p. 191.

By section 12, sub cl. (2) of the Limitation Act of 1908 it was provided that "in computing the period of limitation prescribed for . . . an application for leave to appeal . . . the time requisite for obtaining a copy of the decree . . . appealed from . . . shall be excluded."

The petition for leave was presented more than six calendar months from the date of the decree, but if in computing the period of limitation, the time requisite for obtaining a copy of the decree was excluded, the application was within time. The question was, should such time be excluded in computing the period of limitation and resolved itself into the consideration of whether section 12, sub cl. (2) of the Limitation Act of 1908 as set out above was *ultra vires* having regard to the declaration contained in the Order in Council of 1838.

Babu Gunada Charan Sen, for the petitioner, applied for leave to appeal to His Majesty in Council.

Mr B Chakravarti (with him *Babu Upendra Lal Roy* and *Babu Bhupendra Chandra Guha*) for the opposite party The application for leave is out of time and ought to be refused Sections 5 and 12 of the Limitation Act 1908 which purport to extend the time during which such an application must be made are to that extent *ultra vires* See Safford and Wheeler's Privy Council Practice pp 465 466 p 476 note (s) The order in Council of the 10th April 1838 is definite in its prohibition The provisions of the Order in Council of 1838 were revived and confirmed by section 64 of the Government of India Act, 1858 (21 and 22 Vict c 106) and by section 22 of the Indian Councils Act 1861 (24 & 25 Vict c 67), it it was provided that the Governor General in Council shall not have the power of making any laws or regulations which shall repeal or in any way affect any of the provisions of 21 & 22 Vict, c 106 entitled An Act for the Better Government of India Cf Ilbert's Government of India 2nd edition p 199 It follows that sections 5 and 12 of the Limitation Act (which was passed by the Governor General in Council) are *ultra vires* so far as they are in conflict with the order in Council of 1838 It cannot be said that the prohibition is an interference with the prerogative of the Crown to receive any petition The order prohibits the presentation of an application to the High Court for leave to appeal to His Majesty in Council—it leaves His Majesty *in Council* unfettered This distinction is recognised in section 112 of the Code of Civil Procedure

1914

ABDULLAH HOSSEIN CHOWDHURY v ADMINISTRATOR GENERAL OF BENGAL

The Indian Legislature has powers expressly limited by the Act of the Imperial Parliament which created it and it can of course do nothing beyond the limits which circumscribe these powers *The Queen*

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v *Burah* (1) The very point involved in this matter was raised in *Gajadhur Pershad* v *The Widows of Imam Ali Beg* (2) Under the Limitation Act of 1877, the time within which the application for leave to appeal to the Privy Council, had to be made was six months from the decree *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni* (3), *In the matter of petition of Sita Ram Kesho* (4) *Jawahir Lal* v *Narain Das* (5) The following authorities were also referred to *Kirkland* v *Modee Pestonjee Khoorsedjee* (6), *The East India Company* v *Syed Ally* (7), *In the matter of the petition of Feda Hossein* (8), *Alter Caufman* v *Government of Bombay* (9) It is clear from the authorities that section 5 of the Limitation Act of 1877 does not apply to applications for leave to appeal to the Privy Council The decision in *Eastern Mortgage Agency Co Ld* v *Purna Chandra Sarbagna* (10) which was under section 12 of the Limitation Act of 1908, cannot be taken as binding, as the present argument was not advanced or considered in that case There is no reason why the time requisite for obtaining a copy of the decree should be excluded as it is not necessary to file a copy of the judgment of the High Court at the time of presenting the petition It is true it has been the practice to exclude such time, in computing the period of limitation but the present objection has never before been urged and the matter is one of first impression The amendments introduced in sections 5 and 12 by the Limitation Act of 1908 have given rise to the present question Field's Regulations of the Bengal Code p 189 and Morley's Digest Vol I p cxxxv, were also referred to

(1) (1878) L R 5 I A 178 193
(2) (1875) 15 B L R 221
(3) (1894) I L R 19 Bom 311
(4) (1892) I L R 15 All 14
(5) (1878) I L R 1 All 644
(6) (1843) 3 Moo I A 220
(7) (1827) 7 Moo E I A 555
(8) (1876) I L R 1 Calc 431
(9) (1894) I L R 18 Bom 636
(10) (1912) I L R 39 Calc 510

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Babu Gunada Charan Sen, for the petitioner. The Indian Legislature was entirely competent to pass section 12, sub-section (2) of the Limitation Act of 1908. The legislative powers of the Indian Legislature are defined by section 22 of the Indian Councils Act, 1861 (24 & 25 Vict, c. 67) It is true that one of the exceptions provided by that section is the Government of India Act 1858 (21 & 22 Vict, c 106). But that exception does not operate to affect the matter in issue in the present application The object of the Government of India Act 1858, as appears from the title, the preamble and the various provisions of the Act, was to regulate the administrative government of India and not to regulate the procedure of the Courts The object was in particular to provide for the transfer of the government of this country from the East India Company to the Crown and to make the necessary administrative changes for that purpose. Section 64 refers to the Charter granted to the East India Company and the executive and administrative government of India and does not purport to fetter the absolute right of the Indian Legislature to pass any Act relating to the administration of justice, or the procedure of the Courts The matter is placed beyond doubt by section 11 of the Charter Act of 1861 (24 & 25 Vict, c 104) which was *passed in the same year as the Indian Councils* Act which authorised the establishment of the High Courts in India and defined their jurisdiction By section 11 "all provisions then in force in India of Acts of Parliament, or of any orders of Her Majesty in Council or shall be taken to be applicable to the said High Courts so far as may be consistent with the provisions of this Act and the Letters Patent to be issued in pursuance thereof, and subject to the legislative powers in relation to

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the matters aforesaid of the Governor-General of India in Council ' *See* also section 9 The Letters Patent of the Calcutta High Court issued in 1865 in pursuance of the Charter Act, by section 39 provides for appeals to the Privy Council and by section 44 provides that "all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council" Notwithstanding the Order in Council of 1838 variations have been introduced in respect of cases falling within the second clause of section 110 of the Code of Civil Procedure This has presumably been done by virtue of the authority of the Charter Act 1861

[JENKINS C J What is the history of Art 179 of the Limitation Act of 1908 ?]

The provision originally appeared in the Privy Council Appeals Act (VI of 1874) section 8 was as follows ' Such application must ordinarily be made within six months from the date of such decree But if that period expires when the Court is closed, the application may be made on the day that the Court re-opens" This Act was repealed by the Code (Act X of 1877) but section 599 of the Code of 1877 reproduced that provision *verbatim* Section 599 was repealed by the Limitation Act (XV of 1877), but the same period of limitation namely, six months from the date of the decree appealed against is prescribed by Art 177 of the Limitation Act of 1877—and the same period is prescribed by Art 179 of the Limitation Act of 1908 It is to be observed if section 12 of the Limitation Act of 1908 be *ultra vires*, so must section 8 of the Privy Councils Act of 1874 have been *ultra vires* I rely on *Eastern Mortgage & Agency Co, Ld* v *Purna Chandra Sarbagna* (1) which was a decision under section 12 of the Limitation

(1) (1912) I L R 39 Calc 510

Act of 1908. Although the point involved in the present application was raised in argument in *Gajadhur Pershad* v. *The Widows of Emam Ali Beg* (1), no decision was come to. The case turned on a question of irregularity. The other authorities cited by the opposite party were decisions under the Limitation Act of 1877 and hence inapplicable.

Mr. Chakravarti, in reply.

Cur. adv. vult.

JENKINS C. J. This is an application by one who desires to appeal to His Majesty in Council for a certificate that as regards amount or value and nature the case fulfils the requirements of section 110 of the Civil Procedure Code.

It is conceded that if the application is within time a certificate ought to issue : it is however contended that the appeal is not within the period of six calendar months prescribed by the Order in Council of 1838. To this it is answered that the application is within six months from the date of the decree appealed from, if, in computing the period of limitation the time requisite for obtaining a copy of the decree is excluded

The Order in Council does not expressly allow this exclusion, but the Limitation Act of 1908, section 12, purports to direct it The question for our decision is whether it was within the competence of the Indian Legislature to enact this provision. The Governor-General in Council has power at legislative meetings to make laws for all Courts within British India subject to certain exceptions, and among them is this that he cannot make any law repealing or affecting any provision of the Government of India Act 1858. (*See* the Indian Councils Act 24 & 25 Vict., c. 67, s 22.)

(1) (1875) 15 B. L. R. 221

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Section 64 of the Government of India Act, 1858, provides that all Acts and provisions now in force under Charter or otherwise concerning India shall subject to the provisions of this Act continue in force and be construed as referring to the Secretary of State in Council in the place of the said Company and the Court of Directors and Court of Proprietors thereof.

Therefore, it is contended, section 12 of the Limitation Act so far as it relates to an application for leave to appeal to His Majesty in Council was beyond the powers of the Indian Legislature

This section is not the first instance in which the Indian Legislature has made provisions which purport to modify the absolute terms of the order of 1838. Thus by the Privy Council Appeals Act, 1874, it was provided that applications by any one desiring to appeal to Her Majesty in Council must *ordinarily* be made within six months from the date of the decree, but if that period expired when the Court was closed the application might be made on the day the Court re-opened (*see* section 8) The Bill which afterwards became this Act is said to have been submitted to and approved by the Judicial Committee (*see* note in Whitley Stoke's Anglo-Indian Codes, Vol. II, page 135)

I have looked further into this, and found a statement by Mr Arthur Hobhouse, as he then was, which fully bears out this note Addressing the Governor-General's Council he said, " the Bill was now put into a shape which was acceptable to the Judicial Committee of the Privy Council The Secretary of State had been in correspondence with the Judicial Committee at our desire and they had approved of the Bill as it stood "

This provision was repeated in the Codes of 1877 and 1882 (*see* section 599), and though the section ?

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the Code of 1882 was repealed in 1888 that was not, as I understand, by reason of any doubt as to the competence of the Indian Legislature.

By the Limitation Act of 1877 it was provided that an application for the admission of an appeal to Her Majesty in Council should be presented within six months from the date of the decree appealed against (Article 177).

Though an opinion was once expressed that this provision was repealed by the Code of 1882, *Fazul-un-nissa* v. *Mulo* (1) no doubt seems ever to have been entertained as to the power of the Indian Legislature to deal with this subject: *Lakshmanan* v. *Peryasami* (2), *Anderson* v. *Periasami* (3), *In re Sita Ram Kesho* (4), *Thurai Raiah* v. *Jainilabdeen Rowthan* (5), *Moroba Ramchandra* v. *Ghanasham Nilkant Nadkarni* (6). Prior to 1874 the more general view in this Court seems to have been that when the time for appealing expired in vacation the petition could not be presented on the day the Court re-opened [*Tamvaco* v. *Skinner* (7)]. But I find that it has now become the established practice to receive an application made on the day the Court re-opens though beyond the prescribed six months, and this has been in reliance on section 8 of the Privy Council Appeals Act 1874 and of the provisions that have taken its place in the Code and the Limitation Acts.

It is true that neither the 2nd clause of section 5 nor the 2nd para. of section 12 of the Limitation Act of 1877 has been applied to an application for leave to appeal to His Majesty in Council, but that is because an application for that purpose did not come

(1) (1884) I. L. R. 6 All. 250.
(2) (1887) I. L. R. 10 Mad. 373.
(3) (1891) I. L. R. 15 Mad. 169.
(4) (1892) I. L. R. 15 All. 14.
(5) (1895) I. L. R. 18 Mad. 484.
(6) (1894) I. L. R. 19 Bom. 301.
(7) (1867) I. B. L. R. (O. C.) 39.

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within the terms of either section The Limitation Act of 1908 has been extended to such an application. I do not rely on the decision in *Eastern Mortgage and Agency Co Ld v Purna Chandra Sarbagna* (1), as showing that this extension was valid as the objection to the powers of the Indian Legislature was not advanced in that case This is the first occasion on which the point has been taken But if section 8 of the Privy Council Act of 1874 was within the competence of the Indian Legislature, I think section 12 of the Limitation Act of 1908 must equally have been within its powers And I have shown that there is strong reason for thinking that section 8 was valid legislation

The Court's power to deal with applications for leave to appeal rests primarily on clause 39 of the Letters Patent, which ordains that any person may appeal to the Privy Council in the cases there mentioned "Subject always to such rules and orders as are now in force or may from time to time be made respecting appeals to Ourselves in Council from the Courts of the said Presidency, except so far as the said existing rules and orders are hereby varied and subject also to such further rules and orders as We may with the advice of Our Privy Council hereafter make in that behalf"

Clause 44 of the Letters Patent is in these terms — "And We do further ordain and declare that all the provisions of these Our Letters Patent are subject to the legislative powers of the Governor-General in Council, exercised at meetings for the purpose of making laws and regulations, . and may be in all respects amended and altered thereby"

Apart from section 64 of the Government of India Act 1858 there would seem to be no bar to the

(1) (1912) I L R 39 Calc 510

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legislation under consideration Even if it be that legislation regarding the admission of appeals affects the prerogative of the Crown [see *Moti Chand* v *Ganga Parshad Singh* (1)], still it would not be deemed invalid by reason of that only though subject to the power of disallowance by the Crown Nor do I think the enactment of section 12 of the Limitation Act, 1908, so far as it relates to applications for leave to appeal to His Majesty in Council, is forbidden by section 64 of the Government of India Act, 1858 The whole section must be read and it must be borne in mind that it is a part of an Act dealing with the transfer to the Crown of the Government of India

The conclusion then to which I come is that section 12 of the Limitation Act of 1908 was within the legislative powers of the Government of India, and that the present application is within time A certificate, must, therefore, issue that as regards amount or value and nature the case fulfils the requirements of section 110 of the Code

The respondent must bear the costs of this application

WOODROFFE J I agree

J C *Certificate granted*

(1) (1901) I L R 24 All 174 L R 29 I A 40 42

PRIVY COUNCIL.

* P C
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April 20,
May 11.

PAUL
v
ROBSON.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Easement—Light and Air—Ancient light, infringement of—Nuisance—Measure of right—Requirement of light for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind—Concurrent findings of fact—Grounds of appeal relating not to fact, but to pure question of law

In this case which was an appeal in an action for damages for the infringement of the appellants alleged rights of light and air, the Judicial Committee held that though there were concurrent findings of fact in the Courts below yet the grounds of appeal did not relate to those findings but to the question whether the Courts below had taken the proper view of the legal rights of the appellants, and whether, accordingly, the test which they had applied on the question of the infringement of the appellants rights was the correct one That was a pure question of law which admittedly turned upon the interpretation to be given to the decision of the House of Lords in *Colls* v *The Home and Colonial Stores* (1), when considered in connection with the late decision of the House of Lords in *Jolly* v *Kine* (2)

Held, further, that in *Colls' Case* (1) the legal test in such an action was formulated by Lord Davey as being that "the owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance' And the House of Lords in that case adopted that formulation of the law.

* *Present* LORD DUNEDIN LORD MOULTON, SIR JOHN EDGE, AND MR. AMEER ALI

(1) [1904] A C 179 (2) [1907] A C 1.

In the judgment of the House of the Lords in *Jolly* v *Kine* (1) there was an authoritative exposition of the decision in *Colls' Case* (2) and it was established that the law as stated by Lord Davey is the law as laid down by that decision, and that it accurately formulated the law on the subject In the High Court, in the present case the Court of first instance adopted Lord Davey's opinion, and applied it consistently to the findings of fact to which he came and the Appellate Court had substantially taken the same test Their Lordships, therefore, affirmed the judgments of the Courts below, and dismissed the appeal

APPEAL 17 of 1913 from a judgment and decree (1st August 1911) of the High Court at Calcutta in its Appellate Civil Jurisdiction, which affirmed a judgment and decree (29th March 1911) of Stephen J a Judge of the same Court in its ordinary original jurisdiction

The plaintiffs were appellants to His Majesty in Council

The main question for determination in this appeal was to the whether the appellants were entitled to relief by injunction or damages for an alleged interference with their rights to access of light and air to their house and premises 7, Esplanade East, in Calcutta

The facts are fully stated, and the judgments of the Courts are set out in the report of the hearing of the case on appeal to the High Court (SIR LAWRENCE JENKINS C J and WOODROFFE J) which will be found in I L R 39 Calc 59

On this appeal,

De Gruyther K C and *A M Dunne*, for the respondents, took a preliminary objection to the hearing of the appeal on the ground that the Appellate Court had affirmed the decision of the first Court, and there were concurrent findings of fact by both Courts that no actionable nuisance had been proved, and that no damage had been sustained by the appellants by

(1) [1907] A C 1 (2) [1904] A C 179

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reason of the depreciation in value of their house and premises, and there was no substantial question of law, it was submitted, therefore, that no appeal lay Reference was made to the Civil Procedure Code (Act V of 1908) section 110, *Sajjad Husain* v *Wazir Ali Khan* (1), and *Karuppanan Servai* v *Srinivasan Chetti* (2) Reference was made on the merits of the case to *Colls* v *Home and Colonial Stores* (3), *Higgins* v *Betts* (4) and *Jolly* v *Kine* (5), it being contended that the principles of law applicable to the present case which were laid down in those cases had been rightly applied by the High Court and that the appellants had failed to establish any ground for the relief sought by them

Upjohn K C Hudson K C and *W E Vernon* for the appellants contended that the evidence in the case clearly proved that the respondents' new building caused a nuisance or illegal obstruction to the appellants' ancient windows, that by reason of the erection of the building the appellants' premises had been, to a substantial degree, rendered less fit for the purpose of business or occupation, that such erection had sensibly interfered, according to the ordinary notions of mankind, with the comfort and convenience of the appellants' building as a residence, and its usefulness as a place of business, and that the question whether sufficient light was left for the purposes of a dwelling house and place of business was not the test to be applied in order to ascertain whether the respondents' buildings constituted an actionable nuisance, but the test was whether there had been a diminution of light caused sufficient to amount to a nuisance The

(1) (1912) I L R 34 All 455 L R 39 I A 157
(2) (1901) I L R 25 Mad 215 L R 29 I A 38
(3) [1904] A C 179
(4) [1905] 2 Ch 210
(5) [1907] A C 1

arguments were based on *Colls* v *Home and Colonial Stores* (1) and *Kine* v *Jolly* (2) and, on appeal, *Jolly* v. *Kine* (3), and it was contended that as to what was the proper test the Judges in those cases had differed in opinion, and that the decision on the question in the former case had not been altogether supported by the Court of Appeal or in the latter case on appeal. The proper test had not been applied to the present case by the High Court, which had therefore not taken a proper view of the appellants' rights *Griffiths* v *Richard Clay and Sons, Limited*(4) was also referred to The appellants, it was submitted, had a cause of action against the respondents and were entitled to damages for the injury caused to their rights.

The respondents were not further heard

The judgment of their Lordships was delivered by

LORD MOULTON The action in which the present appeal is brought is an action in which the appellants sued the respondents for infringement of certain rights of light possessed by them in connection with premises known as 7 Esplanade East Calcutta, of which they owned the freehold The respondents had erected a building known as 8 Esplanade East, Calcutta, lying to the east of the appellant s premises and so situated that the western walls of the respondents' buildings were parallel to and at a distance of 17 feet from the eastern wall of the appellants' building The ground on which the respondents' building was erected had for more than 20 years previously been occupied by much lower buildings, and it is conceded that the appellants had acquired rights of light thereby for the windows on ths east side of their *May* 11

(1) [1904] A.C 179
(2) [1905] 1 Ch 480 481, 493
(3) [1907] A C 1
(4) [1912] 2 Ch 291 298

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premises The new buildings of the respondents greatly exceed in height the former buildings upon the site and decreased the amount of light coming to the eastern windows of the appellants, and it is in respect of this interference with the access of light to their windows that the appellants brought the action

The action came on for trial with witnesses before the Hon Mr Justice Stephen sitting as a Judge of the High Court of Judicature at Fort William in Bengal, in its ordinary civil jurisdiction, and on the 29th day of March 1911 he gave judgment dismissing the action An appeal was brought from that judgment to the High Court of Judicature at Fort William in Bengal in its appellate jurisdiction, and on the 1st day of August 1911 judgment was delivered by that Court dismissing the appeal It is from this judgment that the present appeal is brought

Both in the Court of first instance and in the Court of Appeal the facts of the case are dealt with in detail, and clear findings are given on all relevant points of fact Their Lordships can find no material difference between the views taken by the two Courts on these points of fact though the expressions used may not be in all cases identical Their Lordships therefore would feel justified in holding, if it were necessary, that this is a case of concurrent findings of fact But in truth the grounds of appeal do not relate to these findings of fact, but to the question whether the Courts below have taken the proper view of the legal rights of the appellants and whether accordingly, the test which they applied as to whether those rights had been infringed was the correct one This is a pure question of law, and it was admitted by counsel for the appellants that it practically turns upon the interpretation to be given to the well-known decision of the House of Lords in the case of *Colls* v

The Home and Colonial Stores (1), when considered in connection with the later decision of the House of Lords in *Jolly v Kine* (2).

Their Lordships do not consider that it is either necessary or profitable to go into the history of the divergent views in respect of the nature and extent of rights of light acquired by prescription that prevailed in the Courts prior to the decision in *Colls s Case* (1). It suffices to say that one stream of authorities gave countenance to the view that by the enjoyment of light for a period of 20 years, there could be acquired an indefeasible right to the enjoyment of a like amount of light in the future The conflicting stream of authorities countenanced the view that nothing constituted an infringement of rights of light which did not amount to an actionable nuisance, so that the amplitude of previous enjoyment was no measure of the rights acquired thereby This conflict of views was fully recognised by the noble Lords who took part in the decision of *Colls's Case* (1), and there can be no doubt that it was their intention to decide between them and to lay down the law in such a manner as to prevent uncertainty in the future

Mr Justice Stephen takes as expressing the law laid down by this decision the following quotation from the opinion of Lord Davey in that case —

"The owner of the dominant tenement is entitled to the uninterrupted access through his ancient windows of a quantity of light, the measure of which is what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind The single question in these cases is still what it was in the days of Lord Hardwicke and Lord Eldon—whether the obstruction complained of is a nuisance?

And the Court of Appeal although they do not so directly base their judgment on the above passage in Lord Davey's opinion, appear to their Lordships to

(1) [1904] A C 179 (2) [1907] A C 1

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have substantially taken the same test But in their Lordships' opinion it is not necessary to examine minutely the verbal differences between the expressions used in the Court of Appeal and by the Judge of first instance They accept in full the findings on fact of the Judge of first instance, and they are of opinion that he has consistently applied to them the legal test above formulated The only question therefore is whether it accurately formulates the law on the subject

It is evident on reading the opinion of Lord Davey that he intended the passage to be a precise formulation of the rights of a dominant tenement in respect of ancient lights, and his opinion was formally accepted by Lord Robertson who also took part in the decision The opinion of the Lord Chancellor in that case is equally clear on the essential points that the easement acquired by ancient lights is not measured by the amount of light enjoyed during the period of prescription and that there is no infringement unless that which is done amounts to a nuisance It has been suggested that a different view is to be found in the opinions of Lord Macnaghten and Lord Lindley, but although there are passages in these opinions which might if they stood alone indicate that those noble Lords considered that to some extent the amount of light enjoyed in the past might influence the rights acquired for the future, there is no reason to think there was any intention on the part of those noble Lords to differ from the conclusions of their colleagues It must be taken therefore that the House of Lords adopted the formulation of the law given by Lord Davey as above mentioned

But if any doubt remained on the point it is in their Lordships' opinion set at rest by a consideration of the subsequent decision of the House of Lords in

the case of *Jolly* v. *Kine* (1). In that case Mr. Justice Kekewich had found as a fact that the obstruction amounted to a nuisance, but in the course of his judgment said that the room affected was 'still a well-lighted room." He gave judgment for the plaintiff On appeal to the Court of Appeal there was a division of opinion among the judges. Romer, L J, held that under the decision in *Colls's Case* (2) the finding that it was still a well-lighted room was fatal to the plaintiffs' claim. Vaughan Williams and Cozens Hardy, L JJ, held to the contrary. On appeal to the House of Lords their Lordships were equally divided and accordingly the appeal was dismissed But this division of opinion was not due to any doubt as to the law to be applied. The Lord Chancellor gives his opinion on the law as laid down in *Colls's Case* (2) in the following words —

'The right of the owner or occupier of a dominant tenement to light is based upon the principle stated by Lord Hardwicke in 1752 in *Fishmongers' Company* v *East India Company* (3) that he is not to be molested by what would be equivalent to a nuisance He does not obtain by his easement a right to all the light he has enjoyed He obtains a right to so much of it as will suffice for the ordinary purposes of inhabitancy or business according to the ordinary notions of mankind having regard to the *locality and surroundings That is the basis on which the decision of this* House proceeded

Lord James of Hereford concurred in the judgment delivered by the Lord Chancellor.

These were the judgments of the two noble Lords who were in favour of dismissing the appeal On the other hand, Lord Robertson was of opinion that the appeal should be allowed and in his opinion says —

'I adhere as I did in *Colls s Case* (2) to the definition given by Lord Davey in entire accordance with the judgments of the other noble and learned Lords According to that definition the quantity of light to which

(1) [1907] A C 1 (2) [1904] A C 179
(3) (1752) 1 Dick 163

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right is acquired in 20 years is 'what is required for the ordinary purposes of inhabitancy or business of the tenement according to the ordinary notions of mankind.'

Lord Atkinson, who was the other member of the Court, was also in favour of allowing the appeal, and referring to the decision in *Colls's Case* (1) he says:—

'It would appear to me that that case established the principle that there must be an invasion of the legal right of the owner of the dominant tenement sufficient to amount to a nuisance in order to give him a right of action, and that as long as he receives through the windows of his dwelling house, or in the case of a particular room in his dwelling house through the windows of that room an amount of light which, to use the words of James L.J., in *Kelk* v. *Pearson* (2) is 'sufficient' according to the ordinary notions of mankind for the comfortable use and enjoyment' of his dwelling house or of the room in it as the case may be, no nuisance has as regards him been created, and no legal wrong has been inflicted upon him.'

And although he does not expressly repeat the well-known passage from Lord Davey's opinion in *Colls's Case* (1) he shows by the language which he uses that he thoroughly agrees with it, and says that to him it appears to be of general application.

In the judgment of the House of Lords in *Jolly* v. *Kine* (3) there is therefore an authoritative exposition of the decision in *Colls's Case* (1), and it is established that the law as formulated by Lord Davey is the law laid down by that decision. It is somewhat remarkable therefore that counsel for the appellants should have sought to treat the decision in *Jolly* v. *Kine* (3) as throwing some doubt upon the interpretation of the decision in *Colls's Case* (1), operating, if such an expression could be used, to weaken it in the direction of directing that regard should be had to the extent of previous enjoyment of light. The only explanation of such a view is that the appeal was in the end dismissed, inasmuch as the House was equally divided. But this

(1) [1904] A. C. 179. (2) (1871) L. R. 6 Ch. App. 809.
(3) [1907] A. C. 1.

was in no way due to any difference of opinion as to the law, but to the fact that the Lord Chancellor felt himself entitled to disregard the finding that the room was "still a well-lighted room" in the sense which those words would naturally convey and to hold them as meaning that it would have been considered to be well-lighted according to the standard of a crowded city." His Lordship was led to this conclusion by passages in the evidence and the context of Mr. Justice Kekewich's judgment It was on this ground alone that he was in favour of dismissing the appeal, and therefore the actual result in that case has no bearing on its effect as an authoritative explanation of the law laid down in *Colls's Case* (1).

Their Lordships are therefore of opinion that the learned Judge at the trial took the proper test as to whether or not there had been an infringement of the rights of the appellants and that he applied it correctly to the facts of the case They are therefore of opinion that his judgment was right and that the Court of Appeal was right in affirming it and they will humbly advise His Majesty that the present appeal should be dismissed with costs

Appeal dismissed

Solicitors for the appellants *Westbury Preston & Stavridi*

Solicitors for the respondents, the Members of Mackintosh Burn & Co *Watkins & Hunter*

(1) [1904] A C 179

J A. W

PRIVY COUNCIL.

P C*
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BIJRAJ NOPANI
v
PURA SUNDARY DASEE

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Vendor and Purchaser—Conveyance by executor as beneficial owner—Construction of deed of sale—Inconsistency between recitals and operative part of deed—Omission to state expressly that he was conveying the property sold in his capacity of executor

Held (reversing the appellate decision of the High Court, and restoring that of the first Court) that on the construction of a deed of sale and on the evidence in and under the circumstances of the case the title vested in an executor passed to the appellants under the deed by which he together with other vendors purported to convey all his estate right title claim, and demand whatsoever in the property sold although he did not expressly state therein that he was conveying the property in his capacity as executor The plain legal interpretation of the deed should not be allowed to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some or all of the parties to the conveyance at the date of its execution The deed stated plainly that whatever right or title the vendors possessed was to go to support the conveyance and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in a natural sense

APPEAL No 99 of 1912 from a judgment and decree (25th January 1910) of the High Court at Calcutta in the appellate jurisdiction, reversed a judgment and decree (15th February 1909) of the same Court in the exercise of its ordinary original civil jurisdiction

The defendants were the appellants to His Majesty in Council.

The main question for determination in the present appeal was whether the title vested in an executor

* *Present* LORD DUNEDIN, LORD MOULTON, SIR JOHN EDGE AND MR AMEER ALI

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passed to the appellants under a conveyance executed by him, by which he conveyed "all his estate, right, title, claim and demand whatsoever," without expressly stating therein that he was conveying the property in his capacity as executor

The facts are fully stated in the report of the case on appeal before the High Court (SIR LAWRENCE JENKINS C J. and WOODROFFE J.) which will be found in I L R 37 Calc 362

On this appeal,

Sir R Finlay K C and *B Dubé*, for the appellants, contended that there was in the will no restriction on the alienation of the property The permission of the High Court was not necessary, the executor was mistaken in applying for it. *see* section 90 of the Probate and Administration Act (V of 1881). The fact that one of the vendors was an executor made no difference to the transaction, his failure to describe himself as executor did not affect the sale the case of *Preonath Karar* v *Surja Coomar Goswami* (1) was referred to In the construction of the deed of sale there was no ambiguity in the disposing part of the deed as to what the vendors were selling, it was "all the estate, right, title, interest, claim and demand whatsoever of the vendors unto and upon" the property. That included, it was submitted, the right in the property of Hemendranath as executor of the will of Premchand Bysack. The property claimed was alleged to be *stridhan* property which the respondent inherited from her mother Katyani Dasi *see* Mayne's Hindu Law, 7th Edn page 900, paragraph 632, but she had failed to prove that her mother's title to the legacy in the will had been completed before her

(1) (1891) I L R 19 Calc 26

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death by the assent of the executor to the legacy The respondent was not equitably entitled to the relief claimed by her In any case she was not entitled to recover her share of the house in dispute without paying her portion of the mortgage debt, and of the annuity discharged by the appellants The decision of the Original Court (STEPHEN J) was, it was contended, correct

De Gruyther K C and *A M Dunne*, for the respondent, contended that she had established against the appellants her title to a moiety of the house and premises in dispute, and that the conveyance of 12th December 1900 did not pass or affect her right to the said moiety, The deed did not purport to convey any of the rights Hemendranath Bysack had as executor to the appellants The executorship had in fact come to an end at the date of the deed, and the deed itself stated so The deed of sale was executed 14 years after the death of the testator, and according to the statement in the petition for probate there were no debts payable by the testator On the facts Hemendranath did not retain the property in his hands as executor None of the three vendors who purported to convey the property, had any title in it the conveyance absolutely denies the respondent's title, and could not therefore convey her rights and interests The vendors claimed title through Kityani Dasi who was a specific legatee and the executor assented to the legacy, and therefore he had no title to this property which he could convey because, on assenting, his title as executor was displaced and came to an end The Probate and Administration Act (V of 1881) section 112 was referred to [LORD MOULTON That is a question of fact, and should have been raised in the Court of first instance] The respondents were minors at the time

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Sir R. Finlay K. C., in reply. The point raised at the end of the argument for the respondent was not only not raised previously in the suit, but was absolutely inconsistent with the pleadings, where there was no mention of it, nor was it suggested in the grounds of appeal.

The judgment of their Lordships was delivered by

May 21

LORD MOULTON. This is an appeal in a suit brought by the respondent against the appellants for a declaration of her title to an equal undivided half part or share in a certain house and premises known as 8, Sobharam Bysack's Street, Calcutta, and for recovery of the premises from the appellants, in whose possession they were at the commencement of the suit, with an inquiry as to *mesne* profits. The facts of the case so far as they are material, are not now in dispute, and are as follows:—

The house and premises originally belonged to Prem Chand Bysack who died on the 13th June 1886, leaving a will dated 25th October 1884. By his will the said testator devised and bequeathed the said house and premises "to his daughter Katyani Dasee, and her heirs absolutely," subject to two charges of 20 rupees per month, payable to two of his daughters-in-law and their children as and for periods specified in the will. He appointed as executors Shambhoo Nath Bysack (the husband of his daughter Katyani Dasee), and two of her sons, Hemendra Nath Bysack and Ratanlal Bysack. On application for probate of this will, the executors found that a caveat had been entered by some of the relations of the deceased testator, who alleged that the will was a forgery. This led to a suit, where, after a prolonged inquiry, the Court, on the 16th May 1887, pronounced the will

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to be genuine and granted probate of it, and directed that the costs of the executors should be paid out of the testator's estate

It would appear that the executors had no funds in hand out of which they could meet the costs of this litigation, and they therefore mortgaged the property for a sum of Rs 3,950 to Dwarka Nath Dutt, who had been their attorney in the probate suit, in order to secure the payment of his costs, which amounted to Rs 3,400, the balance, Rs 550, being treated as a loan to them Katyani Dasee was made a party to the mortgage bond apparently to put on record her wish that no portion of the estate should be sold to defray these costs. The term of the mortgage was 10 years

Shumbhoo Nath Bysack died in 1899, and Ratanlal Bysack died in 1891, leaving his brother Hemendra Nath Bysack sole surviving executor In 1891 Katyani Dasee also died leaving five sons and two unmarried daughters, of which the respondent was one

In 1900 the heirs of Dwarka Nath Dutt who had died in the meanwhile, instituted a suit against Hemendra Nath Bysack as sole surviving executor for sale of the property under their mortgage, and at the same time the two annuitants brought suits against him for arrears of their annuities. To meet these demands it was determined to sell the property, and accordingly by a deed, dated the 12th of December 1900, the property was sold to the appellant Bijraj Nopani, one of the appellants, and Dowlatram, since deceased The other appellants are sued as the executors of his last will and testament, one of them being Biraj Nopani himself It is on the interpretation of this deed of conveyance that the question now in issue depends, and in order to make clear the contentions of the two parties it is necessary to explain its

form and to state how the dispute has arisen before discussing the construction of the deed

The deed is made between Hemendra Nath Bysack and his two surviving brothers of the first part, Baroda Sundary Dasee, one of the annuitants of the second part, and Bijraj and Dowlatram of the third part. It recites that the property originally belonged to Prem Chand Bysack, that he devised it to his daughter Katyani Dasee and her heirs absolutely, subject to a charge for annuities of Rs 20 per month, to Baroda Sundary Dasee and Sonamoni Dasee respectively, and that he appointed Shambhoo Nath Bysack, Hemendra Nath Bysack, and Ratanlal Bysack executors of such will It then recites the obtaining of probate of the will after suit It then recites the death of Katyani Dasee on the 8th day of April 1891, leaving five sons and three daughters, and the death of two of the sons unmarried, and also the death of Shambhoo Nath Bysack on 9th January 1899

There next comes a recital that Hemendra Nath Bysack on the 4th day of September 1900 obtained an order whereby it was referred to the Registrar of the High Court to enquire whether there was any necessity for the sale of the said house and what provision should be made to secure the payment of the legacies mentioned in the said will out of the rents and profits of the house It next recites that—

'the said Hemendra Nath Bysack the sole surviving executor of the said will has since paid all the debts liabilities and legacies mentioned in the said will

Then follows a recital that Sonamoni Dasee has filed a suit against the said Hemendra Nath Bysack for, amongst other things, a declaration of her rights under the said will, and that the vendors have taken upon themselves the responsibility of entering satisfaction in the said suit, as also of satisfying the claims

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of any of their sisters, and that therefore the petition will not be proceeded with There next comes a recital that the vendors have agreed with the purchasers that Rs 10,000 shall remain with the purchasers as security for the annuity to Sonamoni Dasee, and that the other annuitant has been paid off by a sum of Rs 705 in full satisfaction of her claim against the property

Here the recitals terminate and the indenture goes on to witness that the vendors have sold the property to the purchasers for Rs 35,000, of which Rs 10,000 are to be retained by them as security as aforesaid. The vendors grant sell, and convey the property to the purchasers in ordinary form together with "all the estate right, title, interest, claim, and demand whatsoever of the vendors unto and upon the said messuage, land, hereditaments, and premises and every part thereof, and also all deeds, papers, and writings solely relating to the said premises or any part thereof now in the custody of the vendors or which they can procure without suit"

Then follows a covenant in the following words —

"The vendors do for themselves and himself their and his heirs and representatives do and each of them doth hereby covenant with the purchasers, their heirs representatives and assigns in manner following that is to say that the vendors at the time of sealing and delivery of these presents are lawfully rightfully and absolutely possessed of and in the said messuage land and hereditaments hereinbefore granted and conveyed as an estate equivalent to fee simple in possession free from encumbrances, and that the vendors now have in themselves full power and absolute right, title and authority by these presents to grant and convey the said messuage, land, hereditaments, and premises unto and to the use and behoof of the purchasers their heirs representatives and assigns from time to time

Finally, there is a covenant to indemnify the purchasers against any loss at the suit of the annuitant, Sonamoni Dasee, or the three sisters (of whom the respondent is one), which may be incurred by them

by or by reason of the defect, if any, in the title of the vendors to the property

The appellants paid the purchase money and took possession of the property under the conveyance, and remained in possession until the 22nd June 1897 when the respondent brought the present suit, claiming that she was entitled to one-half share in the said house, because as she and her sister Kanak Manjuri Dasee were unmarried daughters they were entitled to share equally her property, inasmuch as it was *stridhan* She claimed that she was not bound by the said sale

The respondent's claim to a moiety of her mother's *stridhan* is admitted to be good in law so that the only question in the suit is whether the conveyance was valid It is plain that at the date of this conveyance the property was still in the hands of the sole surviving executor, Hemendra Nath Bysack and therefore he was competent as executor to sell it to the appellants, who were *bonâ fide* purchasers for value But the respondent contends that although Hemendra Nath Bysack was in a position validly to convey it to the appellants as such executor, and did purport to convey it he did not effectively do so, because the deed shows that he intended only to convey as a beneficial owner of the property, being under the impression that he and his two brothers, the co-vendors were beneficially entitled to it as heirs to their mother, and being ignorant or forgetful of the right of the sisters to inherit in preference to them It is on this ground alone that the High Court decided in favour of the respondent, reversing the decision of the Judge of the Court below, who had held that Hemondra Nath Bysack had by the deed conveyed all the right and title he possessed in every capacity, including that of sole surviving executor of the will of Prem Chand Bysack

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Their Lordships are of opinion that the judgment of the Judge of first instance was right and ought to have been affirmed by the Court of Appeal. In the first place the deed itself gives abundant evidence that the position of Hemendra Nath Bysack as sole surviving executor was viewed as material by the parties to the conveyance, inasmuch as there are careful recitals as to the original appointment of executors and as to the death of his co-executors. His position as sole surviving executor could have no bearing on the conveyance if it were not that it affected, or might affect, his title to convey. But even in the absence of such direct evidence that the conveyance was by him in his capacity as executor as well as beneficial owner (if and to the extent that he was such owner) the deed makes it clear that all the vendors convey all the title and right that they possessed in the property, and that would undoubtedly include the right and title which one of them possessed as executor. That this would be the ordinary rule is admitted by the Judges of the Court of Appeal, who base their judgment on what they consider to be indications in the deed and in the conduct of the parties that the intention was that only the beneficial interest possessed by the vendors should be conveyed. Their Lordships are of opinion that this would be to contradict the deed itself; and, moreover, they are of opinion that the matters referred to would not support the conclusion drawn therefrom by the Judges of the High Court even if it was permissible to permit such considerations to affect the interpretation of the deed.

If the deed be considered from the point of view of the appellants who were the purchasers and who were not otherwise concerned with the property or its history, the transaction, as well as the deed which carries it out, become perfectly clear and intelligible.

The property was by the will charged with two annuities, and in order that the executor might procure the funds necessary to pay the costs of past litigation the property was under mortgage. This mortgage was being called in and the sale was to enable the mortgage money to be raised. The purchasers naturally desired a clear title free from entanglements. They therefore required that the mortgage should be paid off and the annuitants settled with or security given against their claims. For both these purposes it was necessary that Hemendra Nath Bysack as executor should be a party to the deed, because the original mortgage was effected by him for the purpose of securing the costs for which he was of course liable, and on his discharging the indebtedness as to costs he would become entitled to claim for the same as against the estate including the house in question. Moreover, it is abundantly clear from the executor's accounts and from all the facts appearing in the record that the house still formed part of the undivided estate and that therefore he would be liable to pay the annuitants the amount of their annuities from time to time, as he had been doing for years past. The purchasers would not be likely to trouble themselves as to the question of whether or not the property would ultimately go to the sons or daughters, but would take care that all the persons in whom title could in any wise exist should join in the conveyance, and that they should be guaranteed against claims from those who did not do so. This is what the deed shows to have been done, and it would be entirely contrary to settled principles of law as well as most unjust to *bonâ fide* purchasers if the Courts were to allow its plain legal interpretation to be affected by speculations as to what particular rights existing in the various vendors were present to the minds of some

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or all of the parties to the conveyance at the date of its execution The deed states plainly that whatever right or title the vendors possess is to go to support the conveyance, and it is a settled rule that the meaning of a deed is to be decided by the language used interpreted in its natural sense From this wholesome rule their Lordships see no reason for departing in the present case

Their Lordships will therefore humbly advise His Majesty that this appeal should be allowed and that the judgment of the Court of Appeal should be set aside, with costs, and the judgment of the Judge of first instance restored The respondents will pay the costs of this appeal

Appeal allowed

Solicitors for the appellants *Barrow, Rogers & Nevill*

Solicitors for the respondent *Burton, Yeates & Hart*

J V W

APPELLATE CIVIL.

Before Holmwood and Chapman JJ

INTU MEAH MISTRY 1914

v *May 15*

DARBUKSH BHUIYAN *

Summons—Service of summons—Indian Marine Service—Civil Procedure Code (Act V of 1908) O V rr 15 17 and 27—Ex parte decree—Officer or mechanic in the employ of the Indian Marine

Under the Civil Procedure Code an officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as any other person as regards service of summons They come within the operation of rules 15 and 17 of Order V of the Code of Civil Procedure

APPEAL by Intu Meah Mistry, the petitioner

This appeal arises out of the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree passed on the 28th of July 1909

It appears that this litigation began in 1907 and that a decree was passed on the 14th of March 1908 in favour of 5 persons among whom the appellant was defendant No 2 But upon appeal the Subordinate Judge reversed the Munsif's decision and found against the defendants The defendant No 1 who is proved to be joint with the defendant No 2, preferred an appeal to the High Court and that appeal was summarily dismissed During the pendency of the appeal in the High Court, defendant No 2, the present appellant applied to the Subordinate Judge to have his appeal re-heard by him The Subordinate

* Appeal from Original order No 49 of 1912 against the order of J M Sarkar Subordinate Judge of Chittagong, dated Dec 16 1911

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Judge held that he had no jurisdiction to entertain the application On appeal to this Court a Divisional Bench held that the Subordinate Judge had jurisdiction to decide the matter and he, accordingly on the 16th of December 1911 decided against the application made by defendant No 2

In his application the defendant No 2 stated that he was employed as driver in H M S *Rob Roy* and that he was all along away at Rangoon and that he had no knowledge of the institution of any appeal

Aggrieved by the order of the Subordinate Judge defendant No 2 appealed to this Court

Babu Bepin Behari Ghose (with him *Babu Probodh Kumar Dass* and *Babu Khitish Chandra Chakravarti*), for the appellant, submitted that the appellant having admittedly been at Rangoon, no notice of the appeal in question was served upon him The serving officer did not exercise the due and reasonable care required of him Referred to O V, rr 11 and 17 of the Code of Civil Procedure *Sakharam Bhaskar v Padamkar Mahadeo* (1)

[HOLMWOOD J What is the special procedure for service of summons upon a person belonging to the Indian Marine Service?]

There is no provision in the Code regarding the service of summons upon members of the Indian Marine Service The serving officer did not make any enquiries from the members of the appellant's family as to where he was then residing

His address could easily have been ascertained and notice duly served upon him

Babu Surendra Nath Guha, for the respondent, submitted that the present application for rehearing was not a *bonâ fide* one The defendant No 1, who

(1) (1906) I L R 30 Bom 623

appeared and contested the appeal, was joint with defendant No 2 He set up a false story that he was separate from his brother At the time of the service of notice appellant's wife, brother and nephew were residing at the ancestral house Referred to O V, r 15 of the Code of Civil Procedure According to r 15 the service was a good service There was no special provision for service of notice upon officers of the Indian Marine, and, therefore, rule 15 applied

Regarding the meaning of the word residence, see *Kumud Nath Roy Chowdhury* v *Jotindra Nath Chowdhury* (1) The defendant No 2 was in correspondence with defendent No 1 and his wife, and it would be impossible to believe that he had no notice of the appeal

Babu Bepin Behari Ghose, in reply

HOLMWOOD AND CHAPMAN JJ This is an appeal from the order of the Subordinate Judge of Chittagong rejecting the appellant's application to set aside an *ex parte* decree of the 28th July 1909

It appears that this litigation began in 1907 and that a decree was passed on the 14th March 1908 by the Munsif in favour of 5 persons among whom the appellant was the defendant No 2 But upon appeal the learned Subordinate Judge in the Court below reversed the Munsif's decision and found against the five defendants The defendant No 1 who is proved to be joint with the defendant No 2 preferred an appeal to the High Court and that appeal was summarily dismissed The defendant No 2 the present appellant, applied to the learned Subordinate Judge during the pendency of the appeal in the High Court to have his appeal re-heard by the Subordinate Judge

(1) (1911) I L R 38 Calc 394

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The Subordinate Judge held that he had no jurisdiction to entertain the application On appeal to this Court a Divisional Bench of this Court held that he had jurisdiction to decide the matter and he was the best person to decide it He has accordingly on the 16th of December 1911 decided against the defendant No 2's application The grounds which he has given appear on the face of them to be good, for it would appear from what he states not only that the provisions of the law contained in Order V, rules 15 and 17, were complied with but that the learned Judge satisfied himself that the defendant No 2 had an opportunity of appearing inasmuch as he was in communication with his wife, brother and nephew during his absence at Rangoon both before and after the service

One new factor has arisen in the case, namely that in his application in this case he states that he is employed as a *mistry* or engine hand on H M S 'Rob Roy,' and it may therefore be that he belongs to the Indian Marine Service It is a curious fact that by rule 27 of Order V, officers belonging to his Majesty's Military or Naval forces or his Majesty's Indian Marine Service are excluded from the discretion which is given to the Court of serving notice on public officers or servants of a Railway Company or local authority through the head of their office if that course is most convenient There is a further rule (rule 28) that where the defendant is a soldier, the Court shall send summons for service to his Commanding Officer In this state of the law the only conclusion we can come to is that the officer or mechanic in the employ of the Indian Marine is subject to exactly the same rules as every other person under the Code, and we cannot therefore go beyond the provisions of rules 15 and 17 in this case

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It is urged that there was no proper enquiry, and if the peon had made the least enquiry from the other members he must have learnt that defendant No 2 had gone back to Rangoon to join his employment This might have some substance if defendant No 2 had succeeded in establishing what he sought to establish viz, that he had separated from his brother, defendant No 1, and from the other defendants after the Munsif's decision and that he had adverse interest to his brother, defendant No 1 But in this he appears to have put forward a false story, and the Subordinate Judge in the lower Court has clearly found that his story is false That being so there is no other alternative but to accept the theory that defendant No 1 did accept service on behalf of his brother although he refused to sign the notice That notice was duly posted up, as is found, upon the office-room door of the place where the family ordinarily resided, and at the time living in that house were the wife, the brother and nephew of the defendant No 2, and all these persons had correspondence with the defendant No 2 during the time that the negotiations for the prosecution of the appeal were going on It is therefore impossible for us to hold that the defendant No 2 had not in fact notice of this appeal and his continuous attempts to have this case re-opened which has been going on for many years and when he is exactly in the same boat with his brother defendant No 1, do not appear to be *bonâ fide* For these reasons, the appeal is dismissed with costs,

S K B *Appeal dismissed*

PRIVY COUNCIL.

P.C.*
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April 24, 27; May 18

RAGHUNATH DAS
v.
SUNDAR DAS KHETRI.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL]

Insolvency—Attachment under mortgage decree and order for sale of mortgaged property—Vesting order under s 7 of Insolvency Act (11 & 12 Vict, c 21), effect of—Sale after vesting order—Sale by Official Assignee to plaintiff—Title of purchaser from Official Assignee as against judgment creditor purchasing at sale in execution of his own decree—Notice

An attachment in execution of a money decree on a mortgage of land, followed by an order for sal of the interest of the judgment debtor does not create any charge on the land

Sarlies v *Bundhoo Bae* (1) referred to

An attachment prevents and avoids any private alienation, but does not invalidate an alienation by operation of law such as is effected by a vesting order under the Indian Insolvency Act (11 & 12 Vict, c 21), and an order for sale though it finds the parties does not confer title

Previous to the 8th September 1904 a colliery leased to the judgment-debtors was attached under a mortgage decree by the respondents (judgment creditors) and an order for sale on 5th September was made, but at the request of the judgment debtors the sale was postponed until the 10th *On 8th September the judgment debtors filed their petition in the Insolvency* Court in Calcutta and the usual vesting order was made on the same day. On 12th September the execution proceedings were stayed After issue of notice, on the application of the respondents, to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors, the Subordinate Judge on 10th January 1905, finding that the notice had been duly served, made the order for substitution and fixed the sale for 6th March 1905, on which day the property was sold, and purchased

* *Present* Lord Moulton, Lord Parker, Sir John Edge and Mr. Ameer Ali

(1) (1866) 1 N.-W. P. 172.

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by the respondents who in June were put into possession Meanwhile on 23rd May 1905 the Official Assignee with leave from the Insolvency Court in March 1908 sold the property to a purchaser, who on 24th June 1908 sold it to the plaintiffs by whom on 16th July 1908 the present suit was brought for possession of the colliery

Held (reversing the decision of the High Court) that the notice calling on the Official Assignee to show cause why he should not be substituted for the judgment debtors was not a proper notice under section 248 of the Civil Procedure Code, 1882 A notice under that section should have called on him to show cause why the decree should not be executed against him. But assuming the notice to have been duly served (which was denied) the sale was altogether irregular and inoperative The property having vested in the Official Assignee it was wrong to allow the sale to proceed at all The judgment creditors had no charge on the land and the Court could not properly give them such a charge at the expense of the other creditors of the insolvents In the second place no proper steps had been taken to bring the Official Assignee before the Court and obtain an order binding on him, and accordingly he was not bound by anything which had been done In the third place the judgment debtors had, at the time of the sale, no right, title or interest which could be sold to or vested in a purchaser, and consequently the respondents acquired no title to the property

Mallarjun v *Narhari* (1) distinguished

No proper notice was served under section 248 of the Civil Procedure Code, and the respondents had full notice, and were responsible for the irregularities of the procedure adopted

APPEAL 98 of 1913 from a judgment and decree (4th June 1912) of the High Court at Calcutta, which reversed a judgment and decree (8th September 1909) of the Court of the Subordinate Judge of Burdwan

The plaintiffs were the appellants to His Majesty in Council.

The main question for determination in this appeal was as to whether the title to certain lease-hold interests in a colliery, together with its equipment, engines, boilers, offices, etc, is in the appellants who were purchasers from the Official Assignee of Bengal, or in the respondents (defendants) who were

(1) (1900) I. L R 25 Bom 337, L R 27 I A. 216

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purchasers in execution of a decree. The Subordinate Judge gave a decree for the plaintiffs.

The judgment appealed from (CHITTY and TEUNON JJ.), where the facts of the case are sufficiently stated, was as follows:—

"On 1st December 1899 the defendants granted a pottah of coal lands to Atul Nath Chatterji and Rajendra Nath Chatterji at an annual jama of Rs. 3,626-11-10 and a salami of Rs. 4,001. The lessees were two of four brothers, the others being Aghore Nath Chatterji and Chandra Nath Chatterji. The four brothers who were members of a joint family, became heavily indebted to several creditors. On 6th December 1903, the present defendants filed a suit against their lessees for rent under the pottah and, on 23rd June 1904 obtained a decree against them for Rs. 3,090-10-6 and costs Rs. 350-7 annas. The other two brothers were also parties to that suit as *pro forma* defendants. On 13th July 1904 the defendants applied for execution of their decree by attachment of the immovable properties belonging to the judgment-debtors. The lease-hold property was accordingly attached and 5th September 1904 was fixed for the sale. On that day, the judgment-debtors Nos. 1 and 2 applied for time to enable them to raise money by sale of the attached property, and the sale was accordingly adjourned until 10th September. On the 8th September all four brothers filed their petition in the Court for the Relief of Insolvent Debtors at Calcutta and on the same day the Court made the usual vesting order under section 7 of the Indian Insolvent Act. On 30th September 1904, the defendants applied to the Subordinate Judge of Burdwan to substitute the Official Assignee in the place of the judgment-debtors in the execution proceedings under their decree. On 23rd November, notice was ordered to issue to the Official Assignee to show cause why he should not be substituted in the place of the judgment-debtors and it was made returnable on 22nd December 1904. On 10th January 1905 the Subordinate Judge, finding that Mr. Miller had been duly served with the notice, ordered that he be substituted in the place of the judgment-debtors and 6th March 1905 was fixed for the sale of the attached property. On that day the property was sold and purchased by the defendants the decree-holders. On 18th April 1905, the sale was confirmed and on the 14th June 1905, an order was made for delivery of possession to the defendants as purchasers and they accordingly took possession under it. Meanwhile, on the 23rd May 1905, the Official Assignee applied to the Insolvency Court and obtained an order that he should be at liberty to sell either by public auction or private contract to the best purchaser the properties of the insolvents including the lease-hold premises in question. He did not, as a matter of fact, sell at

that time, but, on the 24th March, 1908, he sold the premises now in question to Hormusji Pestonji Banker *alias* Billimoria, a Parsi gentleman of Asansole. On the 24th June 1908 three months later, Banker sold the property to the present plaintiffs. On 16th July 1908, this suit was instituted to recover possession of the property.

"The learned Subordinate Judge has decreed the plaintiffs' suit and the defendants have appealed.

"The first question is one of fact—whether the notice for substitution was duly served on the Official Assignee in the execution case. The Judge says that it is shown to have been served on a clerk of the Official Assignee and, in the absence of evidence to show that this amounted to service on the Official Assignee or that the clerk had authority to receive it he finds that it was not properly served. This finding appears to us to be entirely against the evidence on the record. The clerk of the Official Assignee, Lakhinarayan Dhar, states that he has been an Assistant in the Official Assignee's office for 29 years. He admits that the notice was served in that office and that he signed acknowledging the receipt. He states that he received the notice on behalf of the Official Assignee, and made over the copy to Mr Langer, the Head Assistant. The Small Cause Court bailiff (who has been a bailiff for 30 years and who served the notice) says that he has known Lakhinarayan Babu as the head clerk or Bara Babu for 20 years and that he served notices for the Official Assignee upon him 20 or 30 times. He states that he always served notices for Mr. A. B. Miller on Lakhinarayan Dhar in this manner. There can be no question on this evidence that the notice was served in the Official Assignee's office in the usual way and in the absence of any evidence to the contrary we must presume that Lakhinarayan Dhar was a person authorised to receive such notices within the meaning of section 75 of the Code of the Civil Procedure of 1882. It would have been simple for the opposite party to have called evidence from the Official Assignee's office to disprove this, had it been incorrect. We therefore hold that the notice for the substitution was duly served on the Official Assignee.

"The next question is what was the effect of the sale in execution as against the Official Assignee. It was argued for the defendants (i) that the Official Assignee was bound by the execution proceedings and by the sale which took place as we have stated, (ii) that the lease hold interest did not vest in the Official Assignee because he did not take possession, and (iii) that the decree being one for rent the decree holders were entitled to sell the lease hold interest of the insolvents and to give a good title.

"(i) With regard to the first question, it must be conceded that the order for substituting the Official Assignee in place of the judgment debtors in the execution proceedings was incorrect: see the case of *Miller* v.

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Budhsingh Dudhuria (1) But the Official Assignee having been added and having taken no exception to the procedure, the sale must be regarded as having taken place in his presence and as binding upon him The fact that a person who was not the representative of the judgment debtors was brought upon the record as such representative, would not affect the validity of the sale see *Mallarjun v Narhari* (2) The Official Assignee having taken no steps to have that sale set aside in the manner provided by law, *the sale must be taken to be good as against him*

"(ii) We cannot accept the second contention raised by the learned pleader for the defendants that the property had not vested in the Official Assignee It is true that in cases of lease hold property, the Official Assignee has the right to elect whether or not he will accept the property under the vesting order If he does so there is no question that his acceptance relates back to the date of the vesting order see *Abdul Razak v Kernan* (3) That was the converse case and the question there was whether the Official Assignee could be made liable for the rent of the lease hold property It was held that inasmuch as he had taken possession, he must be regarded as having elected to take over the property Here, he paid no rent nor did he take actual possession but the property did vest in him by the vesting order and that he regarded it as having vested in him is made plain by the application which he made to the Insolvency Court on the 23rd May 1905 for leave to sell the property He could not sell it unless it were vested in him That being so we must hold that the sale was effective as against the Official Assignee and also against the plaintiffs who claim through him The plaintiffs are in fact in a dilemma If the property had not then vested in the Official Assignee, it was sold away before the Official Assignee acquired any title to it, if it had vested in him—and we think that it had—it was sold in his presence and the sale was binding on him

The High Court held that it was unnecessary to decide the 3rd point, and the appeal was allowed and the suit dismissed with costs

On this appeal,

De Gruyther K C and *A M. Dunne*, for the appellants, contended that they had established a good title

(1) (1890) I L. R. 18 Calc 43
(2) (1900) I L. R 25 Bom 337, L R. 27 I. A 216
(3) (1893) I L. R 22 Bom 617

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to the property in suit. The proceedings in execution subsequent to the insolvency of the judgment-debtors, and the sale of 6th March 1905 were without jurisdiction, *ultra vires*, and invalid, and passed no title to the respondents. The Insolvency Act (11 & 12 Vict., c. 21) section 7 under which the vesting order was made, was referred to. In India an attachment of property and an order to sell it did not affect the title of the Official Assignee. Was it different where he had been made a party? It was submitted not. A judgment-creditor had no priority over the Official Assignee in respect of property attached by him prior to the vesting order: *Peacock* v. *Madan Gopal*(1). The proper proceedings to make the Official Assignee a party were not taken. He was served with a notice to show cause why he should not be substituted for the judgment-debtors in the suit. The procedure for substituting one person for another on the record was contained in chapter XXI, sections 370, 372 of the Civil Procedure Code 1882, that section (372) applied where the substituted party represented the other, but there was no provision for making the Official Assignee a defendant in place of the judgment-debtors whom he did not represent: see *Miller* v. *Budh Singh Dhudhuria* (2). The Official Assignee represented rather the interests of the creditors for the benefit of whom the insolvent's estate was vested in him. Those sections were not applicable in execution of decree: *Goodall* v. *Mussoorie Bank* (3). The substitution of the Official Assignee would have no effect on the sale; what was ordered to be sold was the right, title and interest of the judgment-debtors, and that was not altered by the substitution, the purchaser took nothing as after the making of the vesting order the

(1) (1912) I. L. R. 29 Calc. 428. (2) (1890) I. L. R. 18 Calc. 48.
(3) (1887) I. L. R. 10 All. 97.

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judgment debtors had no interest that could be sold The position of the Official Assignee was shown by the case of *In re Hunt Monnet & Co Ex parte Gamble* v *Bholagir Mangir*(1) and section 49 of the Insolvency Act was referred to He could apply for stay of execution and the word may in that section meant shall A notice might have been served on him under section 248 of the Code of Civil Procedure to show cause why the decree should not be executed but he received no notice except for the substitution of his name in place of the judgment debtors which was wrong *Jitmand Ramanand* v *Ramchand Nandram*(2) and *Kristnaswamy Mudaliar* v *Official Assignee of Madras* (3) which both followed the case of *Peacock* v *Madan Gopal*(4) and also Civil Procedure Code 1882 sections 284 287 291 and 316 were referred to The proclamation of sale only referred to the right title and interest of the judgment-debtors there was no power in the Court to make a fresh order for sale of the Official Assignee s interest and even if there was power to do it such an order was not made

B Dulé for the respondents contended that the appellants had tried to make out an entirely new case The notice of the execution proceedings the evidence showed was duly served on the Official Assignee under sections 75 91 and 92 of the Civil Procedure Code, and the sale took place in his presence he represented the judgment-debtors under section 244 of the Civil Procedure Code It was settled law that where a person has been made a party to execution proceedings his only remedy in such a case as this was under section 244 that was a suit to set aside the sale under section 311 but that had to be done within a year

(1) (1864) 1 Bom H C 251
(2) (1905) I L R 29 Bom 405
(3) (1903) I L R 26 Mad 673
(4) (1902) I L R 29 Calc 428

after the sale. As to the notice to the Official Assignee even if it were wrongly served, such an irregularity was a matter which could be dealt with in execution of decree under section 244 of the Code Reference was made to *Malkarjun* v *Narhari*(1), *Prosunno Kumar Sanyal* v. *Kali Das Sanyal*(2) and *Punchanun Bundopadhya* v *Rabia Bibi*(3) It must be presumed that the notice was duly served As to notice under section 248 of the Civil Procedure Code, reference was made to *Bimola Sundaree Dassee* v *Kalee Kishen Mojoomdar* (4) It was now too late to set aside the sale An application to do so was barred by limitation under Article 12 of Schedule II of the Limitation Act 1877

De Gruyther K C replied

The judgment of their Lordships was delivered by

May 18

LORD PARKER The action in which this appeal arises is an action for the recovery of a leasehold colliery The plaintiffs (the present appellants) claimed title to the property under the Official Assignee in the insolvency of the lessees The order vesting the property in such Official Assignee was made under the Insolvent Debtors (India) Act, 1848, on the 8th September 1904 At the date of this order, the colliery had been attached in execution case No. 303 of 1904, in which the lessees were the judgment-debtors and the defendants (the present respondents) were the judgment-creditors, and an order had been obtained for the sale of the interest therein of the judgment-debtors Counsel for the respondents admitted that attachment in execution of

(1) (1900) I L R 25 Bom 337 346 L R 27 I A 216, 224
(2) (1892) I L R. 19 Calc 683 L R 19 I A 166
(3) (1890) I L R 17 Calc 711
(4) (1874) 22 W R 6

NOTE.—[In the case of a civil officer being appointed to perform the judicial duties and a military officer the executive duties in addition, in each case, to the duties of his own appointment, the allowance will be equally divided between the two officers.]

Military Officer.

174. The allowances for his Civil duties of a Military officer appointed to officiate in a Civil office other than a Cantonment Magistracy without being relieved of his Military duty, are regulated in accordance with Article 168 and Rule 2 under it, and are drawn in the Civil Department. If he has no substantive appointment in the Military Department, the pay of his rank is held to be his substantive pay for the purposes of Article 168.

NOTE.—[This Article does not apply to cases of medical appointments falling under Article 170.]

Chapter IX.—Joining Time.

175. Joining time is the time allowed to an officer to proceed from one station to another when his appointment is changed, or when, being unemployed, he is appointed to any office. An officer is held to be on duty during Joining Time if he is entitled to allowances

176. Only one day is allowed for joining an appointment which does not necessarily involve a change of residence from one station to another.

NOTE.—[Sundays are included in the calculation of the joining time of one day admissible under this Article An officer who gives over charge on Saturday forenoon must, therefore, take charge on Saturday afternoon, and an officer who gives over charge on Saturday afternoon must take charge on Monday forenoon.]

177. In cases involving a change of station, Joining Time is calculated as follows, subject to a maximum of thirty days.—

(i) Six days for preparation; and, in addition thereto:—

For the portion of the journey which the officer travels or might travel—	a day for each—	
By railway	250 miles	
By ocean steamer	200 „	or any longer time actually occupied in the journey.
By river steamers	80 „	
By motor car plying for public hire	80 „	
By mail cart or other public stage conveyance drawn by horses	80 „	
In any other way	15 „	

An extra day is allowed for any fraction of distance over that prescribed

(ii) When part of the journey is by steamer, the days intervening between the officer being set free from his office, or, if he has no office, receiving his orders, and the departure of the steamer or his start duly regulated to catch the steamer, shall be added.

NOTE 1.—[Sundays are not included in the above calculations, though they are included in the maximum limit of thirty days.]

NOTE 2.—[A journey by road of five miles or under to or from a railway station from or to the point which may be prescribed under Article 998 does not count for joining time.]

NOTE 3.—[An officer whose salary does not exceed Rs. 100 a month, should not ordinarily be required to travel by mail cart or other public stage conveyance drawn by horses.]

178. By whatever route the officer travels, his Joining Time shall, unless the Local Government specially permit otherwise, be calculated by the route which travellers habitually use.

NOTE.—[The Local Government may delegate its powers under this Article to Heads of Departments.]

179. If an officer is authorised under Article 53 to make over charge of an office elsewhere than at its head-quarters, any joining time to which he may be entitled shall be reckoned from the place at which he actually makes over charge.

Extensions.

180. (*a*) The Local Government may in any case extend the joining time admissible by rule provided the general spirit of the rules is observed.

(*b*) Within the maximum of thirty days, Heads of Departments and Commissioners of Divisions, in the case of officers of Provincial Services and non-gazetted subordinates under their control, may extend the joining time admissible by rule—

(i) if the officer has been unable to avail himself of the usual mode of travelling, or if, notwithstanding due diligence on his part, the journey has occupied more time than is allowed by the rules—to the extent of the time actually taken :

(ii) if such extension is considered necessary for the public convenience or for the saving of public expense, as, for example, to prevent unnecessary and merely formal transfers—to the extent necessary :

(iii) if the rules have in any particular case operated harshly, as, for example, if an officer has through no fault on his part missed a steamer or fallen sick on the journey—to the extent necessary, on such conditions as to allowances or otherwise as the sanctioning authority may think fit.

NOTE.—[A Local Government may delegate the powers of Heads of Departments under clause (*b*) of this Article to other subordinate authorities in respect of non-gazetted officers serving under the latter.]

181. The Audit Officer shall move the Local Government to report to the Government of India any concession made under the preceding Article, which appears to him contrary to the spirit of the rules. The Local Government may not, finally, overrule the Audit Officer without a reference to the Governor General in Council.

When Leave intervenes.

182. When an officer, after giving over charge of his office at one station on transfer, or reversion to another office, takes Privilege or Examination leave before joining the office to which he has been transferred, or to which he has reverted, or when an officer, while on Privilege or Examination leave, is transferred to a station other than that from which he took leave, he is entitled to Joining Time in addition to his Privilege or Examina-

tion leave. The Joining Time of an officer transferred during Privilege or Examination leave will be counted from his old station, or from the place where he receives the order of transfer, whichever calculation would entitle him to the less Joining Time.

183. If an officer, during transit from one appointment to another, obtains Furlough on medical certificate (with or without Privilege leave or Subsidiary leave prefixed), he may be allowed only the Joining Time calculated for the journey from his old station to the furthest place to which he has proceeded on his route to his new station

Appointment Changed.

184. [illegible]
he is in [illegible]
that on [illegible]

Allowances.

185. Except in the case mentioned in Article 188, an officer draws, during Joining Time, the pay or salary which he drew in his old appointment or that which he will draw on joining his new appointment, whichever is less: Provided that an officer transferred from one officiating appointment to another shall not draw any [illegible] Time if he had not a superior lien on either [illegible] to that of the officer relieved by or relievi[illegible] to tentage in his old appointment and tentage is also attached to his new appointment, he [illegible] tes. If the [illegible] account of s[illegible] district, pro[illegible] him the sam[illegible] during joining time. Provided that, if the rates differ in the two appointments or parts of the local area, he may draw the lower rate only. If an officer drawing a duty allowance in one appointment is transferred to another appointment similarly carrying a duty allowance, he may draw the same during the period of transit provided that, if the rates differ, the allowance to which he is entitled is the lower of the two.

NOTE —An officer transferred from service under His Majesty's Government in the United Kingdom to service to which these Regulations apply draws, for the period of the voyage to India and from the date of debarkation to the date preceding that of assumption of charge, pay at the rate last drawn by him in his appointment under His Majesty's Government.

186. When, under Article 182, an officer combines Privilege or Examination leave and Joining Time, his allowances during Joining Time,—that is to say for the period, not exceeding the Joining Time admissible by rule, in excess of his Privilege or Examination leave, during which he is absent from duty,—must be calculated at the rate at which his Joining Time allowance would have been calculated if he had joined the office to which he is transferred directly.

187. If a member of the Indian Civil Service, on first arrival in India, is unable, from illness, to proceed to the seat of the Government to which he is attached or to any other station to which he is ordered to proceed direct, the Local Government in whose jurisdiction he is, may, on medical certificate, grant him a subsistence allowance of Rs. 250 a month for not more than two months. Time thus spent is not Active Service.

188. An officer who is not in the Indian Civil Service or in the Army, and who has no substantive appointment, is not entitled to any allowance during Joining Time; but if such an officer officiating in an office is transferred to another office under the same Local Government, the officer who orders the transfer may allow him to draw, during his transit, the allowance to which he would be entitled under the first sentence of Article 185.

Exceeding Joining Time.

189. An officer who does not join his new appointment within his Joining Time is entitled to no allowances after the end of his Joining Time, and

No. 3.

Page 51. Article 190.

Substitute the following for this Article :—

190. A ministerial officer transferred to service in another office is entitled to joining time under the rules in this Chapter and his service for leave and pension is not interrupted. But unless his transfer has been ordered for the public convenience he is not entitled to any allowances during joining time and the joining time does not count as service for leave or pension.

NOTE 1. [A transfer at the officer's request for his own advantage or in consequence of any fault on his part is not a transfer for the public convenience within the meaning of this Article.]

NOTE 2 [The procedure laid down in article 1099 should be followed when an officer is transferred otherwise than for the public convenience.]

(6th Edition—2nd Reprint, No. 3, dated 3-4-18.)

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191. A member of the Indian Civil Service is entitled when under suspension to the subsistence allowance of his rank, and a Military officer in Civil employ to the pay and allowances of his rank.

Other Officers.

192. Saving as provided in Article 193 (*b*), an officer under suspension is entitled to no salary while he is absent from duty, and the salary of an officer who is dismissed ceases absolutely from the date of his dismissal, no allowances may be granted for any period occupied in the prosecution of appeals against the order of dismissal.

193. (*a*) A subsistence allowance, at a rate not exceeding one quarter of his salary, may be granted by the authority suspending him to an officer removed from office pending enquiry into his alleged misconduct Provided that the subsistence allowance of a European should not commonly be less than Rs. 25 a month: if his salary be less than Rs. 100 a month, the rate may

be increased accordingly. An officer of the Marine Department, whose duties are not confined to the shore, will draw, in addition to the subsistence allowance, rations, or, when rations are not issued, compensation in lieu thereof.

(*b*) If the suspension of an officer as a penalty for misconduct is, upon reconsideration or appeal, held to have been unjustifiable or not wholly justifiable, or if an officer dismissed from office or suspended pending enquiry into his alleged misconduct is, upon reconsideration or appeal, reinstated, then the revising or appellate authority may grant to the officer for the period of his absence from duty—

(i) If the officer is honourably acquitted, an allowance equal to the full salary to which he would have been entitled if he had continued to hold the appointment from which he was dismissed, and also, by an order to be separately recorded, any conveyance or local or other allowance of which he may have been in receipt prior to his suspension or dismissal.

(ii) Otherwise, an allowance equal to such proportion of the full salary and other allowances as aforesaid, as the revising or appellate authority may deem expedient.

(*c*) No extra cost may ordinarily be imposed on the State by the grant of an allowance under either clause (*a*) or clause (*b*) without the permission of the Local Government. In cases however where it does not exceed Rs. 500 and where the period during which the officer has remained unemployed through suspension or dismissal does not exceed six months, the excess expenditure may be admitted on the sanction of the authority mentioned in clause (*a*) or in clause (*b*) as the case may be.

NOTE.—[The subsistence allowance referred to in clause (*a*) is authorised as a matter of grace only, and cannot be claimed as of right.]

193A. The preceding Article applies also to officers in temporary employ, but in deciding whether an allowance should be granted to such officers, the period for which the temporary appointment has been sanctioned should be taken into consideration.

Committals to Prison.

194. A servant of Government committed to prison either for debt or on a criminal charge, should be considered as under suspension from the date of his arrest, and not allowed to draw any pay until the termination of the proceedings against him, when an adjustment of his allowances should be made according to the circumstances of the case, the full amount being given only in the event of the officer being acquitted of blame or (if the imprisonment was for debt), of its being proved that the officer's liability arose from circumstances beyond his control.

Leave while under Suspension.

195. Leave of absence for a definite period is not admissible to an officer who has been suspended from duty. If permission to proceed to England is granted in such a case, it should only be for such period as the Secretary of State may determine.

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PART III.—LEAVE RULES.

Chapter XI.—General Conditions of Leave.

SECTION I.—GENERAL RULES.

196. The rules in this Chapter apply to all officers in Civil employ except in as far as they are inconsistent with, or overridden by, the special conditions of leave which obtain in the case of the following classes of officers :—

(*a*) Lieutenant-Governors and Members of Council (see Chapter XXII).
(*b*) Judges of the High Courts (see Chapter XXIII).
(*c*) Barristers and Pleaders holding the appointments specified in Article 547 (see Chapter XXIV).
(*d*) Statutory Civil Servants (see Chapter XXVI).
(*e*) Ecclesiastical Officers (see Chapter XXVII)
(*f*) Officers subject to the Military Leave Rules (see Chapter XXVIII).
(*g*) Army Veterinary Officers of the Civil Veterinary Department (see Chapter XXIX).
(*h*) Law Officers (see Chapter XXXI).
(*i*) State Railway Establishments (see Chapter XXXII).
(*j*) Bengal Covenanted Pilot Service (see Chapter XXXIII).
(*k*) Port Blair Police (see Chapter XXXIV).
(*l*) Assam and Dacca Military Police (see Chapter XXXV).
(*m*) Calcutta and Suburban Police Forces (see Chapter XXXVI).
(*n*) Burma Military Police (see Chapter XXXVII).
(*o*) Officers serving under Special Contracts (their contract).

Note under Article [illegible])

NOTE.—[If the health of an officer who is serving under an agreement which does not give a title to leave until the expiry of a fixed period fails during that period, his engagement should be terminated, unless—

(i) he has exhibited such special ability that it is desirable on public grounds to retain him even at the cost of the difference between a leave allowance and any passage money, etc., due under his agreement ; and
(ii) it is certified that he will in all probability be able to return to duty at or before the end of six months.

In cases in which the engagement is not terminated, leave may be granted for a period not exceeding six months and on allowances not exceeding half pay.]

Discretion of Government.

197. (*a*) Leave of absence cannot be claimed as of right. Nothing in these Regulations must be understood to limit the free discretion of the Government to refuse, or revoke, leave of absence of any description, at any time according to the exigencies of the public service.

(b) The Local Government may refuse to grant the full amount of leave applied for in any case, and should, by the exercise of this power, so regulate the date of an officer's return from leave as to cause as little change as possible in administrative arrangements.

(c) This Article gives Local Governments ample powers for regulating leave of every description, and in dealing with applications for leave the following instructions should be carefully borne in mind :—

[illegible]

* * * * * * * *

2.—*Home Department No 513 (Public), dated 16th April 1883.*—"Two Military officers having applied for ordinary furlough within a short period after their transfer to employment in the Civil Department,—namely, before they had completed one year's service in that

[illegible]

was accordingly approved."

Maximum Leave Admissible.

198. After five years' continuous absence, whether with or without leave, an officer is considered to be out of Government employ. But this rule may, on public grounds and with the sanction of the Secretary of State in Council, be relaxed in the case of any Civil officer other than a member of the Indian Civil Service.

[illegible]

NOTE 1.—[This Article does not apply to officers transferred to Foreign Service in India.]

NOTE 2.—[The Government of India have the power to relax the rule in this Article without a reference to the Secretary of State in the case of officers who are lent to Siam and who are not members of the Indian Civil Service.]

Recall from Leave.

199. An officer recalled to duty before the expiry of leave of any kind is entitled, if the return to duty is optional, to no concession save the

exception in Article 233 (iv). If the return to duty is compulsory he is entitled—

(a) to take the balance of his leave, together with any leave which was admissible at the time of recall, or for which he has subsequently become eligible, as soon as he can be spared from duty; and

(b) if the leave from which he is recalled is out of India—

(i) to the concessions in Articles 8 (iii) and 1127 subject to the conditions and limitations specified therein; and

(ii) to leave allowances during the voyage to India; and for the period from the date of landing in India to the date of joining his appointment, to the subsidiary leave allowance which he would have drawn had he not been recalled, but simply returned on the termination of his leave.

(c) If the leave from which he is recalled is in India,—

(i) to the concessions in Article 1127 subject to the conditions and limitations specified therein;

(ii) to be treated (if the recall is from leave other than privilege leave) as on duty from the date on which he starts for the station to which he is ordered, but he is entitled until he rejoins his appointment to draw leave allowances only.

NOTE 1.—[All orders recalling an officer before the expiry of his leave should distinctly state whether the return to duty is optional or compulsory. Orders recalling an officer from leave out of India should be communicated to him officially through the Secretary of State.]

NOTE 2.—[The concession allowed by clause (a) of this Article ordinarily lapses on the grant

200. An officer who is on leave may not take service, or accept any employment which involves the receipt of a fee or honorarium, without obtaining the previous sanction of—

(i) the Secretary of State, if the officer is residing in Europe, North Africa, America or the West Indies; and

(ii) the Government of India, or the Local Government under which he is employed, as the case may be, if he is residing in India or in any place out of India not mentioned in clause (i); provided that when the officer is non-gazetted and is resident in India, the special permission of the officer empowered to appoint him is sufficient authority for the acceptance of such employment.

NOTE.—[This Article does not apply to the acceptance of fees for literary work or for service as an examiner or to similar employment. Nor does it apply to acceptance of foreign service during leave, which is governed by Article 761 of these Regulations.]

SECTION II.—SERVICE QUALIFYING FOR LEAVE.

Temporary Service.

201. Temporary and officiating service, if it counts for pension, counts also for leave.

NOTE.—[The rules providing for the grant of leave to an officer who has a temporary or officiating appointment only are contained in Articles 242, 336, Rule 1, and 339, Rule 2.]

Probationers and Apprentices.

202. (*a*) An officer appointed as probationer for a certain period before formal appointment is entitled to the same leave as if he held a substantive appointment.

1. Officers appointed under contract in England on probation in view to permanent service in India are entitled to leave as follows :—

(i) Officers appointed for three years or more (see Appendix No 33), the same leave as if they held permanent appointments.

(ii) Officers appointed for less than three years (see Appendix No 33), privilege leave and if necessary, leave on medical certificate, not more than six months of such leave carrying allowances.

NOTE 1.—[Officers appointed in England to posts created temporarily but with the prospect more or less definite, of their being eventually made permanent, are entitled to leave under clause (i) of this rule, if they are otherwise qualified]

NOTE 2.—[Leave on medical certificate under clause (i) or (ii) shall not be granted for a period extending beyond the term of an officer's contract unless or until it has been decided to retain him in permanent employment]

NOTE 3.—[The Government of India have the power to revise Appendix 33 without reference to the Secretary of State.]

(*b*) Police probationers and temporary and officiating Assistant Superintendents of Police in all Provinces count their service as follows :—

(1) If recruited in England—from the date on which they report their arrival in India.

(2) If recruited in India under the orders in the Secretary of State's despatch No. 14, dated the 15th March 1894—from the date of assuming charge of their appointments.

(3) If recruited in India before the date of the orders of 1894 mentioned in (2) above—from the date either of attaining the age of 20 years or of assuming charge of their appointments, whichever is later, provided that the service has been continuous.

(*c*) The service of—

(1) [illegible]

(2) [illegible] United Provinces,

(3) Probationary, officiating and temporary Extra Assistant Commissioners in the Punjab and Assam, and

(4) Officiating and temporary Extra Assistant Commissioners in the Central Provinces,

counts for leave from the date on which all the three following conditions are fulfilled, namely,

(a) two years' continuous probationary or officiating service as such has been rendered,
(b) departmental examinations have been fully passed, and
(c) the age of twenty years has been attained.

[illegible] for leave the whole of their continuous service from the date of their first appointment in the Settlement Department]

[illegible]

203. (a) Service as an Apprentice does not qualify except in the following cases :—

Engineer or Examiner Apprentices, Qualified students of the Thomason College under practical training, } in the Public Works or Railway Department.

Assistant Superintendent Apprentices in the Indian Telegraph Department.

The service of candidates in the Superior Revenue Establishment of State Railways counts towards leave after they are confirmed in their appointments.

(b) Apprentice Overseers in the Public Works or Railway Department and Apprentice Permanent-way Inspectors on State Railways may be allowed leave on medical certificate on half pay subject, in the case of Military Apprentices to the proviso that the leave allowance shall not be less than Military pay and allowances An apprentice of either class counts his service as such for leave if on the termination of his apprenticeship he is appointed to the department.

Officers under Training.

203A. A Local Government may at its discretion decide, in the case of an officer who is selected to undergo a course of training whether the time spent in training shall count as service qualifying for leave ; and also whether or not such time shall be regarded as an interruption entailing forfeiture of leave already earned.

NOTE 1 —[The Local Government may delegate its power under this Article to Heads of Departments in respect of officers serving under them]

NOTE 2 —[A Local Government may issue general orders under this Article in regard to any specified class of officers under training]

Service under other Rules.

204. An officer transferred to an office to which these rules apply is not entitled to Long Leave under them in respect of service rendered in an office to which they do not apply. But service in the Army which under Article 356 counts towards Civil pension qualifies also for leave under Civil rules. Any leave taken by an officer during such service will in the calculation of future leave be treated as if it had been taken under these Regulations.

Service before Discharge, Resignation, or Dismissal.

205. (*a*) An officer who is discharged on reduction of establishment from, or resigns, the public service and is re-employed after an interval, cannot, without the permission of the authority sanctioning the re-employment, count his former service towards leave.

(*b*) An officer who is dismissed or removed from the public service and who is reinstated on appeal, cannot count his former service towards leave unless the authority who, on revision or appeal, reverses the order of dismissal or removal, declares that his former qualifying service shall count.

Private Secretary.

206. Service as Private Secretary to the Governor-General, a Governor or a Lieutenant-Governor qualifies for leave, provided that the officer (before his appointment as Private Secretary) belonged to the Civi Service (whether the Indian Civil Service or not), or to the Indian Army, or to any of the Indian Establishments of the British Army.

207. After a continuous service of three years, a Private Secretary whose case is not provided for by the preceding Article, may be granted Leave on Medical Certificate to the extent of one year with a leave allowance equal to half his salary, and subject to a maximum of £1,000 a year.

Press Servants.

208. A Section-writer, or a Press servant, paid under the piece-work system, if granted leave, is not entitled to any allowance whatever during his absence.

Rule of Proportions.

209. The leave allowances of an officer not subject to the Foreign Service Rules (Part VII) who has served in any appointment the salary of which has been derived either wholly or in part otherwise than from Indian Revenues, is charged according to the Rule of Proportions.

SECTION III.—RETENTION OF APPOINTMENT.

Lien on Appointment.

210. An officer on Privilege leave has a lien on his substantive appointment; he has also a lien on his officiating appointment, so long as it is not resumed by an officer having a superior lien on it.

211. (a) An officer under the European Service Leave Rules, on ordinary Furlough, or on Special leave, has a lien on his substantive appointment or on a substantive appointment of a like character and not less pay. He has no lien on an acting appointment.

(b) On other Furlough a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, has no lien; but a Civil Engineer or other officer subject to the European Service Leave Rules has a lien. (*See also Article 313.*)

212. An officer on Long Leave under the Indian Service Leave Rules retains a lien on his substantive appointment, but has no lien on an acting appointment.

213. An officer on Subsidiary leave has or has not a lien on an appointment according as he has or has not such a lien on the first or last day, as the case may be, of the leave to which it is subsidiary.

NOTE.—[A Military officer subject to the Military Leave Rules does not lose his lien during Subsidiary leave preparatory to Furlough.]

214. An officer on leave may not surrender his lien on his substantive [illegible]

215. An officer cannot obtain ordinary Furlough or Special leave unless he has a substantive appointment.

NOTE 1.—[A Military officer who has officiated continuously in the Civil [illegible] at least 3 years [illegible]

NOTE 2.— [illegible]
Burma or Ass[illegible]
the Military L[illegible] subject.]

Compulsory Retirement.

216. If a Local Government decides, before an officer whom it has the power to remove from the service leaves India, that he shall not be permitted to return to duty in India, it should give notice to him before he leaves India, so that any remonstrance which he may wish to make may be considered on the spot by an authority fully cognizant of the facts of the case. Such notice should not be postponed until after the officer's departure, and then communicated to him through the Secretary of State.

217. If when an officer is going on leave out of India it is necessary to consider the propriety of removing him for incapacity, whether mental or physical, which is of such a nature that it is not possible to say, before his departure from India, whether it will be permanent or temporary, or if for any reason it is considered inexpedient that an officer who is on leave should return to India, the Local Government should report the circumstances fully (in the case of the Government of Madras, Bombay or Bengal direct; otherwise through the Government of India) to the Secretary of State. A

communication of this nature should not be made direct to the officer concerned. The report should be made in time to enable the Secretary of State to take any necessary measures before the officer would in ordinary course be permitted to return to duty, and in any case should reach the India Office at latest three months before the end of the officer's leave.

218. Articles 216 and 217 must not be understood to authorize the grant of Furlough to an officer who ought to be dismissed or removed from the service for misconduct or general incapacity.

Abolition of Appointment.

219 The abolition of the appointment of an officer absent on leave out of India should be immediately communicated to the Secretary of State.

SECTION IV.—COMMENCEMENT AND END OF LEAVE.

220 Ordinarily leave in India including Subsidiary leave, and leave out of India when Subsidiary leave is not taken, begins on the day on which transfer of charge is effected, or, if charge is transferred after noon, on the following day; similarly such leave ordinarily ends on the day preceding that on [illegible] on that day. B [illegible] the day immedia [illegible] day on which the leave or the joining time between two appointments ends, an officer may leave his station at the close of the day before, or return to it at the end of, such holidays, provided his departure or return does not involve—

(i) the immediate transfer of an officer from or to another station or the loss of his appointment by an officer appointed temporarily to the service.

(ii) the taking over of money, unless, subject to the condition that the departing officer remains responsible for the money in his charge, the Local Government specially allows transfer of charge to take place before or after the holidays.

If holidays are as above prefixed to leave, the leave and consequent rearrangement of allowances, if any, take effect from the first day after the holidays on which the office is opened for business, and if holidays are affixed to leave or joining time, the leave or joining time is treated as having terminated on, and the rearrangement of allowances, if any, takes effect from the day on which the officer would have resumed charge had holidays not followed the leave or joining time.

In cases in which the application of the above rules as to prefixing and affixing holidays to leave is doubtful or inequitable, the Local Government shall decide which officer shall be held to have been in charge and to which the salary of the office for the Sunday or holiday shall be paid.

221. When Subsidiary leave is taken, Furlough and Special leave out of India begin on, and include, the day of the departure from the port where the officer first meets it of the vessel in which he sails. If an officer remains in India after the end of Subsidiary leave, his Furlough or Special leave dates from the beginning of his Subsidiary leave, unless he is specially exempted from forfeiture of his Subsidiary leave by his Local Government under the provision of Article 323 (*b*). Furlough and Special leave out of India end on, and include, the day before the arrival at the port where the officer last quits it of the vessel in which he returns, and Subsidiary leave begins the day after.

NOTE 1.—[The Furlough or Special leave of an officer sailing from Calcutta in a vessel which touches at Madras begins on the departure of the vessel from Calcutta, and not from Madras]

NOTE 2.—[The day on which the vessel in which the officer sails quits her moorings or anchorage, whether she leaves the limits of the port or not on that day, is the day of the departure of the vessel. The day of arrival of the vessel in which the officer returns, is the day on which the vessel reaches her moorings or anchorage in port.]

221A. Special rules have been laid down in Appendix 6A for reckoning leave in the case of officers stationed in certain remote districts outside India.

222. An officer taking Furlough or Special leave out of India, whether by itself or in combination with Privilege leave, must report his embarkation, through the Audit Officer, to the Local Government (or other authority) which granted his leave, and his arrival in England to the Secretary of State.

SECTION V.—RETURN TO DUTY.

NOTE.—[With the exception of Article 231, this Section applies to Military officers in Civil employ subject to the Military Leave Rules.]

Permission to Return.

223. (*a*) An officer may not, without the permission of the authority which granted him leave, return to duty more than fourteen days before the end of Long Leave.

(*b*) Officers returning to India at times other than those fixed for them by their own Government, are liable to be kept on subsistence allowance until a suitable vacancy occurs to which to post them.

224. An officer on Long Leave in Europe, North Africa, America, or the West Indies must, if the leave was granted or has been extended on account of ill-health, whether it be technically leave on medical certificate or not, satisfy the Medical Board at the India Office as to his fitness to return to duty. Ordinarily he must attend at the India Office for examination by the Board, but, in special cases, particularly if he be residing at a distance of more than sixty miles from London, a certificate in a form to be obtained from the India Office from two medical practitioners may be accepted. On the required evidence of fitness being furnished, the officer will receive from the India Office permission to return to India. An officer whose leave was

not granted, and has not been extended, on medical grounds, does not require permission from the India Office to return to India. He must, however, take steps, either personally or through his agents, to obtain from the India Office a last-pay certificate, and should also inform the authority in India who granted him the leave, of the date on which he expects to return to duty, at least a month before he is due to arrive in India.

[illegible]

225. An officer who has taken leave on account of ill-health, whether the leave be technically leave on medical certificate or not, may, if he is residing in India or in any place not mentioned in Article 224, be required by the authority which granted the leave to produce, before he is permitted to return to duty, a medical certificate of fitness signed by such medical officer as the authority may direct.

226. An officer is not entitled, at the end of Long Leave or Subsidiary leave affixed thereto, to resume, as a matter of course, without further orders, the particular appointment which he vacated before his leave. He should report his return to duty as prescribed in Article 228 and await orders.

Change of Appointment.

227. If the [illegible] d during Long Leave in India, he must [illegible] leave. But if he have not had sufficie[illegible] Government may allow him joining time. During such joining time his allowances will be the same as for Subsidiary leave on return from Furlough.

Report of Return.

228. A gazetted officer must report his return to duty to the Local Government under which he is employed. A member of the Indian Civil Service on the Bengal Establishment employed directly under the Government of India, returning from Long Leave, must also report his return to the Government of India in the Home Department.

Overstaying Leave.

229. An officer who remains absent after the end of his leave is entitled to no allowance for the period of such absence, and ceases to have a lien on any appointment,—

(i) if his leave was Furlough without Medical Certificate under the European Service Leave Rules; or Furlough under the Indian Service Leave Rules,—immediately; and

(ii) if it was Furlough on Medical Certificate, or Special Leave, under the European Service Leave Rules; Leave on Medical Certificate or on Private Affairs under the Indian Service Leave Rules; Vaca-

tion; or Privilege Leave,—after a week. In the case of officers to whom exception (ii) under Article 251 applies, the week commences from the end of the fifteen days mentioned therein.

NOTE 1.—[This Article does not affect the liability of an officer overstaying leave to forfeit past service under the rule in Article 420 (b).]

NOTE 2.—[Short extensions of leave may be granted retrospectively in India to officers who under certain specified circumstances overstay their leave. See Article 237(c).]

230. If the Local Government is satisfied that the default of an officer is due to circumstances beyond his control, it may exempt him from loss of appointment under the preceding Article, but not from loss of allowances during the period of his absence without leave. The Local Government may authorize the payment to an officer subject to the Indian Service Leave Rules of as much as it thinks fit of any allowances during Subsidiary leave under clause (ii) of Article 321 (a), to which he would have been entitled if he had not remained absent after the end of his Furlough, or Leave on Private Affairs, or Leave on Medical Certificate.

NOTE.—[The Local Government may delegate the power exercised by it under the first sentence of this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave.]

231. So long as an officer retains a lien under Section III, or if he is exempted under the preceding Article from loss of appointment, absence after the end of his leave, though not counting as Continuous Service, does not operate as an interruption of Continuous Service or Continuous Active Service.

SECTION VI.—COMBINATION, EXTENSION AND COMMUTATION OF LEAVE.

232. No kind of leave, except Extraordinary leave under Articles 332 and 339, leave under Articles 199 (a), 233, and 288, and in certain cases Examination leave, can be granted in continuation of any other kind of leave; leave under Article 288 may also be followed by any other kind of leave. Any leave granted under these Regulations may be retrospectively [illegible] for any other kind or period of leave for which the officer was quali- [illegible] authority who has the power [illegible] ce with- [illegible] continua- [illegible] to Furlough, Leave on Medical Certificate, [illegible] affairs, Leave on Private Affairs, and Extraordinary leave without allowances, subject to the following conditions.—

Page 65. Article 232.

Add the following at the end of the first sentence of this Article:—

"and that under Article 288A by leave on medical certificate."

(5th Edition—2nd Reprint, No. 1, dated 3-4-18)

(i) when Privilege leave is combined with Furlough, the amount of the combined leave shall not exceed two years,

(ii) when Privilege leave is combined with Special leave under the European Service Leave Rules or Leave on Private Affairs

under the Indian Service Leave Rules, the combined leave shall not exceed six months ,

(iii) when however, Furlough, Special leave, or Leave on Private Affairs, granted in combination with Privilege leave, is extended on medical certificate, the full period of Furlough, Special leave, or Leave on Private Affairs ordinarily admissible under rule may be allowed irrespective of the limits prescribed in clauses (i) and (ii) ;

(iv) when Privilege leave is combined with leave of any kind, the combined leave must, except in cases falling under Article 199, be for not less than six months ,

(v) the periods mentioned in (i), (ii) and (iv) count from the beginning of the Privilege leave to the end (under the ordinary rules) of the leave with which it is combined.

NOTE 1 —[Clause (iii) of this Article does not apply to military officers in civil employ who are subject to the Military Leave Rules In their case the rules in the Army Regulations limiting the total period of absence from duty, will apply.]

NOTE 2 —[If the maximum limit prescribed in clause (ii) or clause (i) of this Article [illegible] certificate) shall be dealt [illegible] eave before the end of [illegible] the requirements of the [illegible] urn is not more than 14 days before the end of the six months]

234 The grant of extension of Furlough, under Article 232 (otherwise than on medical certificate), is subject to proviso (v) under Article 308 (b).

[illegible]

235. If an officer subject to the Indian Service Leave Rules, who is absent on Leave on Private Affairs or on Furlough, takes in continuation Leave on Medical Certificate under Article 336, the whole of his absence is treated as leave under that Article.

236. Extraordinary leave without allowances cannot be converted retrospectively into Leave on Medical Certificate; but Leave on Medical Certificate may be given in continuation of Extraordinary leave without allowances.

Extension of Leave out of India.

237. (a) An officer absent on long leave in Europe, North Africa, America, or the West Indies, who wishes to have his leave extended or commuted must apply to the Secretary of State about three months before the expiration [illegible]

to the extension or commutation desired. If the officer is on medical leave and desires an extension for more than 14 days, or if he is on other leave and desires an extension on medical grounds, he must satisfy the Medical Board at the India Office of the necessity for the extension. If application for

extension be delayed until the last two months of leave, advice of any extension granted for a period of more than seven days will be sent to India by telegraph and the cost of the telegram will ordinarily be charged to the officer.

1. In the case of a Commissioned Medical Officer, the Local Government should make a reference to the Director General, Indian Medical Service, before granting the permission.

(b) The Secretary of State reserves to himself the power of granting extension or commutation of leave to an officer in any case in which it appears to him that sufficient ground has been shown for the previous approval of the local Government not having been obtained before the application was made. In the event of the Secretary of State deciding to telegraph to India in regard to any such application, the cost of the telegrams to and from India will be charged to the applicant.

NOTE —[The Secretary of State in granting extension of leave sometimes declines to guarantee retention of appointment, if there is no time to communicate with the Local Government in India.]

(c) The authority in India by which leave was originally granted is empowered, in any case in which it is satisfied that the non-return of an officer within the period of his leave was due to circumstances beyond his control, and of such a nature that an application to the Secretary of State for an extension was impossible before embarkation, or that the non-return was for administrative convenience, to sanction retrospectively extension of furlough or leave, if furlough or leave be due, up to a maximum period of 14 days. It is also empowered in the case of an officer returning from furlough on medical certificate or leave on medical certificate to sanction an extension, if the circumstances seem to require it, up to a maximum of 14 days inclusive of any short extension that may have been granted by the Secretary of State.

[illegible]

(d) Furlough out of India on medical certificate may be commuted into leave without medical certificate if such leave was due at the time when the original Furlough was granted, and if the officer seeking commutation is certified, as prescribed in Article 224, to have recovered his health. When extension of the commuted Furlough is applied for, the application must be supported by evidence that the officer's Local Government consents to the extension of his leave.

Applications for extensions of commuted Furlough on medical certificate should be dealt with by Local Governments in such a way that officers who have preferential claims to Furlough under Article 310 are not thereby debarred for a considerable time from availing themselves of the Furlough at their credit.

NOTE.—[This Article applies to the placing of officers who are on leave out of India on special duty in extension of the leave]

238. An officer on long leave in any place out of India not mentioned in Article 237 (a) who wishes to have his leave extended or commuted, must apply three months before the expiry of the leave to the authority in India

which granted it Whenever leave is extended or commuted under this Article, the fact should forthwith be notified by the Audit Officer to the Government of India in the Finance Department, in order that it may be communicated to the Secretary of State with a view to the payments by Colonial Treasurers or Staff Officers being checked

Privilege Leave.

239. When Privilege leave is, on medical certificate, retrospectively changed for Furlough out of India, so much of the leave passed before the departure of the vessel in which the officer sails may be treated as Subsidiary leave under clause (i) of Article 321 (*a*) as might have been granted as Subsidiary leave if the officer had originally obtained Furlough and not Privilege leave, notwithstanding that a portion of such retrospective Furlough has been passed in India.

NOTE —[This Article will not apply when the subsequent order grants leave in continuation of the Privilege leave under Article 233.]

Military Officers.

240. In the case of a Military officer subject to the Military Leave Rules leave may be retrospectively commuted by the authority which granted it to any other kind of leave which the said authority would have been competent to allow when the original leave was sanctioned.

NOTE.—[Articles 237 to 239 apply to Military officers subject to the Military Leave Rules.]

Chapter XII.—Short Leave.

SECTION I.—EXTENT OF APPLICATION.

241. The rules in this Chapter regulate the Short Leave of all officers in Civil employ (whatever may be the rules to which they are subject in regard to other leave) except :—

(*a*) The Governor-General, Governors, Lieutenant-Governors, and Members of Council (see Chapter XXII).
(*b*) Judges of High Courts (see Chapter XXIII).
(*c*) Barristers holding the appointments referred to in Chapter XXIV except as stated in that Chapter.
(*d*) Ecclesiastical officers appointed before 29th July 1906. But Articles 264, 279 and 280 do apply (see Chapter XXVII).
(*e*) Law officers, except as stated in Chapter XXXI.
(*f*) State Railway Establishments, except as stated in Chapter XXXII.
(*g*) Bengal Covenanted Pilots, except as stated in Chapter XXXIII.
(*h*) Port Blair Police (see Chapter XXXIV)
(*i*) Calcutta and Suburban Police Forces (see Chapter XXXVI).

1. Medical Storekeepers to Government are subject to these Regulations as regards Privilege leave, but as regards other leave they remain subject to the Leave Rules, Military or Civil, under which they were serving at the time of their transfer to the Medical Store Department

Temporary and Non-Continuous Service.

242. (a) An officer who has
may be allowed Privilege leave,
if no substitute is required, or if
tional expense.

(b) If such an officer is, without interruption of his service, appointed to a permanent office, his temporary or officiating service may be treated as duty qualifying for Privilege leave.

NOTE.—[This rule does not apply to the State Railway officers whose service is classed under clauses (c) and (d) of Article 659.]

243. Privilege leave is not allowed to an officer employed in an establishment the duties of which are not continuous, but are restricted to certain fixed periods in each year. (*See also Article 369.*)

Petty Military Officers.

244. Privilege leave may be granted under this Chapter to a Military Hospital Assistant temporarily lent to the Civil Department. A Hospital Assistant is not entitled to Privilege leave in respect of duty done in the Military Department.

Seamen.

245. An officer or seaman attached to a Pilot vessel at the Sandheads may, in addition to the Privilege leave admissible under this Chapter, be allowed one month's leave on shore, beginning on the date of his arrival at Calcutta, after four months' continuous duty at the Sandheads.

SECTION II.—PRIVILEGE LEAVE—ORDINARY RULES.

Amount earned

246. The amount of Privilege leave earned by an officer is one-eleventh part of the time during which he has been on duty without interruption: Provided that no Privilege leave can be earned by an officer by duty performed while three months' such leave is due to him, and that, whenever duty is interrupted, all claim to Privilege leave earned theretofore is forfeited. Absence on Privilege leave, though not counting as duty, is not an interruption of duty within the meaning of this Article.

247. The calculation must be made as follows:—One calendar month for every eleven complete calendar months of duty, and one day for every eleven days of the balance.

Qualifying Service.

248. When an officer is first appointed to the public service, duty qualifying for Privilege leave does not begin until he takes charge of his office.

249. Time spent on Subsidiary leave does not qualify for Privilege leave, but if an officer, returning from leave, not before the expiration thereof, be, only for the convenience of the Local Government and not for any fault of his

ment ready for duty.

250. (*a*) In calculating the Privilege leave of a Military officer no distinction should be made between an officer who has a substantive Civil appointment and one who is merely officiating in the Civil Department.

(*b*) The leave is earned by uninterrupted duty in either the Civil or the Military Department. But a Military officer who has taken in any calendar year the whole or a portion of the Privilege leave admissible to him for that year, under Military Rules, does not begin to count service for Privilege leave in the Civil Department until the first day of the following year.

Limit.

251. The amount of Privilege leave admissible at one time is limited to three calendar months.

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Amount due.

252. The Privilege leave due to an officer is the privilege leave which he has earned since the last interruption of duty, less the period during which he has been absent on Privilege leave.

Interruptions of Duty.

253. If an officer remains absent after the end of Privilege leave, his duty is interrupted within the meaning of Articles 246 and 260. But if the Local Government considers that his default was due to circumstances beyond his control, it may remit the penalty.

NOTE.—[The Local Government may delegate its power under this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave.]

254. If an officer remains absent after the end of Examination leave, or of Joining Time, the period of absence cannot count as duty qualifying for Privilege leave, and, unless the absence is accounted for to the satisfaction of the Local Government, it is an interruption of duty.

NOTE.—[The Local Government may delegate its power under this Article to any subordinate authority in respect of officers to whom such authority is empowered to grant leave]

255. (a) Leave under Articles 279 and 280 may, if the examination for which it is granted be successfully passed, and if the officer has not already had twelve months' leave under that Article, count as duty qualifying for Privilege leave.

(b) Leave under Article 281 may also count as duty qualifying for Privilege leave if the examination for which it is granted is successfully passed.

(c) Examination leave does not interrupt duty.

256. Hospital leave under Articles 287, 288, 288 A and 291 and leave on medical certificate under Articles 661 and 663 are not interruptions of duty

257. Suspension from office as a penalty for misconduct is an interruption of duty.

258. Suspension from office pending enquiry into an officer's conduct interrupts duty or not as may be decided in each case by the authority having power to pass final orders in the case. Time passed under suspension does not qualify for Privilege leave, unless, in any case, such authority expressly orders that it shall so qualify.

259. "Leave in India" under Rule 1 of the Leave Rules for the Indian Army is an interruption of duty.

Condition of Grant.

260. To an officer who has been on duty, without interruption, for eleven calendar months, and who has not, for six calendar months, been absent on Privilege leave, the whole or any part of the Privilege leave due to him may be granted. But when Privilege leave is combined with other leave under Article 233, the amount due may be granted irrespective of these conditions

1 The condition prescribed in this Article by which an interval of six months is required to elapse between two periods of absence on privilege leave, does not apply to officers of the State Railway Revenue Establishment referred to in Articles 661 and 663, nor to Gazetted Officers of the Opium Department.

2 The Government of India may relax the condition in this Article requiring an interval of six months to elapse between two periods of privilege leave, in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.

Leave Allowances.

261. Except as provided in Articles 266, 271, and 275, an officer on Privilege leave is entitled to a leave allowance equal to the salary which he would receive if he were on duty in the appointment on which he has a lien, and he is entitled to this allowance even though another officer be appointed to act for him.

262. *Cancelled*

263. An officer who has no lien on an appointment is entitled, during Privilege leave,—

(i) in the case of a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules—to Subsistence allowance ;

(ii) in the case of any other Civil officer—to no allowance

Exception —Officers of the Indian Medical Service who have rendered not less than 3 years' officiating service but have not yet been confirmed in a civil appointment may draw, during privilege leave, when they have no lien on any appointment, the allowances that would be admissible under the military leave rules

264. Save when privilege leave or vacation is combined under the rules with other leave; the right to receive allowances admissible during privilege leave or vacation is contingent (except in case of death) upon the return of an officer to duty on the expiry of such leave or vacation.

NOTE 1.—[This Article does not affect the right to privilege leave allowances of an officer

265. If an officer, on transfer from one appointment to another, obtains Privilege leave without joining his new office, his leave allowance shall not be less than it would have been if he had joined his new office before taking leave, provided that the rate of pay attached to the new appointment is not different from and higher than the rate of pay attached to the old appointment. Where, however, the transfer involves an increase in the officer's duties or responsibilities, and is to an office on a different and higher rate of pay from that drawn by the officer in the old office, the officer shall not draw the higher rate of salary until he actually joins his new office.

Example —The rate of pay drawn by a Collector and by an Accountant General is different from and higher than the rate of pay drawn by a Joint Magistrate or by an officer in *class I of the Indian Finance Department respectively.*

266. An officer who holds an appointment sanctioned for not more than six months is not entitled, during Privilege leave, to the special rate of pay of, or any special allowance attached to, the appointment.

Local Allowances how affected.

267. A Local Allowance may be drawn by an officer on Privilege leave only if there is no *locum tenens* to whom it is payable.

1. An officer on Privilege leave may draw Presidency allowance or Presidency house-rent, provided that no extra expense is thereby caused to the State and provided his previous rate of expenditure for a house is continued during his absence

NOTE.—[This rule applies also to officers in receipt of house-rent allowances at Shillong,

Irrigation Departments are manned from a single cadre, may be regarded as one Province]

3. Provincial Forest Officers and Executive Engineers serving in the Andamans who are recruited from Burma draw their local allowances while on Privilege leave.

House-rent, Horse Allowances, Tentage, etc.

268. In the Bombay Presidency, an officer on Privilege leave may draw the house-rent attached to his appointment, if he places his house at the disposal of the officer, if any, who officiates for him. The officiating officer cannot, in such case, draw the house-rent attached to the appointment. But if the officer, for a reason which the Local Government considers sufficient, refuses the accommodation placed at his disposal. the allowance is to be drawn by him and not by the absentee.

1. Constables of the Bombay City Police and policemen in the Bombay Presidency proper while on leave under Article 288 may draw the house-rent allowance admissible to them, provided it is not paid to their substitutes.

269. A Military Medical Subordinate employed in the Civil Department may, when on Privilege leave, draw the special allowances of his appointment such as house-rent, horse allowance, etc., provided that they are not drawn by any other officer during his absence

270. *Cancelled.*

SECTION III.—PRIVILEGE LEAVE IN CASES OF REGULAR VACATIONS.

271. Privilege leave is not admissible to officers serving in departments in which regular vacations are allowed, during which the officers are permitted to be absent from duty, as Judicial Officers (other than District and Sessions Judges), Educational Officers, Officers in a High Court. But in case of urgent necessity, Privilege leave may be granted to any such officer under the ordinary rules, subject to the conditions—

(i) that the officer shall during his absence receive only half the salary and allowances ordinarily admissible during Privilege leave, and

(ii) that the leave cannot in any case be combined with vacation.

NOTE.—[The rule in this Article does not apply to the Judicial Commissioners and Additional Judicial Commissioners of Oudh, Sind, and the Central Provinces in cases where the conditions of the note to Article 278 are satisfied]

272. The preceding Article does not apply to the case of an officer who is by general or special orders issued by competent authority prevented in any year from availing himself of the vacation or vacations by reason of his having to remain at his post on duty. In such a case, Privilege leave may be granted under the ordinary rules: Provided always that the leave shall not in any case be combined with vacation.

NOTE —[In the case of every officer to whom Articles 271 and 272 apply, the presumption is that he will avail himself of the vacation No certificate of title to Privilege leave, except the leave " in case of urgent necessity " under Article 271, can be given for the period

of service rendered between two vacations until the second vacation ...
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with Privilege leave on half salary, to the extent due, granted under Article 271.]

273. ...

(i) that he was not absent from his station for more than fifteen days or

(ii) that he was absent from his station for a specified number of days exceeding fifteen,

in any of the vacations included in the period of service by which the Privilege leave claimed has been earned.

NOTE.—[Absence on duty, whether within or out of jurisdiction, is not absence from station for the purposes of this Article.]

274. An officer who is, by general or special orders issued by competent authority, prevented from availing himself of a part only of a ...

275. An officer transferred from a department to which the ordinary Privilege leave rules apply to one in which Articles 271 to 274 apply, loses all claim to take the Privilege leave at his credit, provided that—

(i) Any ...

(ii) If he returns to a department in which Privilege leave is regulated by the ordinary rules, he shall be reckoned on such return to have at his credit the amount of leave which was at his credit at the time of the first transfer, less any amount enjoyed under proviso (i).

276 The reckoning under the preceding Article shall not, in any case, extend backwards over an interruption of duty.

277. Officers to whom Privilege leave under the ordinary rules and conditions is not admissible (Article 271), may combine vacation with Long Leave (either at the beginning or end thereof) on the same conditions as those on which other officers are allowed to combine Privilege leave under Article 233.

278. The foregoing rules do not apply to District and Sessions Judges: to them privilege leave is granted under the ordinary rules, and they may combine—

(*a*) Privilege leave with long leave under the conditions of Article 233

(*b*) Vacation on full pay with leave of any kind provided that—

(*i*) No additional expense is incurred by the State for the period of the vacation.

(*ii*) Vacation is not both affixed and suffixed to leave.

(*iii*) The total period of absence on full pay, when vacation is taken in conjunction with combined leave, does not exceed three months.

NOTE 1.—[The rule in this Article has been extended to the Judicial Commissioners, and Additional Judicial Commissioners of Oudh, Sindh and the Central Provinces, for such time as the Court of the Judicial Commissioners in each case consists of not less than three Judges and provided the Court's annual vacation does not exceed one month.]

NOTE 2.—[The provisions of this Article also apply to Sessions and Subordinate Judges in the United Provinces.]

SECTION IV.—EXAMINATION LEAVE

279. In cases not specially provided for in this Section, permission to [illegible] the day or days of examination.

280. (*a*) A candidate for the High Proficiency and Degree of Honour examinations in all vernacular languages may, at the discretion of the Local Government, be granted study leave up to three months before the examination.

(*b*) A candidate for a reward by the Higher Standard or High Proficiency in Sanskrit, Arabic or Persian may be allowed leave for a period not exceeding three months if he undertakes to spend it in study under professional tuition at any place approved by the Local Government.

(*c*) An officer who is a candidate for the Degree of Honour in Sanskrit, Arabic or Persian may be allowed either leave for a period not exceeding three months under clause (*b*), or if he leaves India for study, leave for six months to Persia for Persian, or for six months to Arabia, Mesopotamia, Egypt and Syria for Arabic, or for six months to any place approved by the Local Government for Sanskrit. Officers of the Political Department of the Government of India may be granted this leave even when they are candidates only for the Higher Standard or High Proficiency test in Arabic or Persian.

NOTE.—[Leave under clause (*a*), (*b*) or (*c*) is not admissible more than once; nor can such leave be combined.]

(*d*) Leave under this Article may be combined with Privilege leave, provided that Privilege leave prefixed to leave under clause (*c*) must be spent in, or in travelling to, one of the countries mentioned in the clause.

(*e*) An officer on leave under this Article has a lien on his appointment, substantive or officiating, and is entitled to leave allowances, as if he were on Privilege leave, for an aggregate maximum period of twelve months.

NOTE —[An officer serving in a department in which regular vacations are allowed is entitled, during examination leave, to a leave allowance equal to the salary which he would receive if he were on duty in the appointment on which he has a lien]

281. An officer of the Burma Commission, who has passed an elementary examination in Chinese, and is a candidate for the reward of Rs. 2,000, may, on condition that the leave must be spent in China, be granted leave, on Privilege leave allowances, to China for fifteen months, for the purpose of studying the Chinese language. This leave may be affixed or prefixed to (1) Privilege leave, (2) Furlough or (3) Privilege leave and Furlough combined under Article 233, provided that in the case of (2) and (3) the whole period of absence shall not exceed two years, exclusive of Subsidiary leave. But Privilege leave cannot be allowed in continuation if the officer fails to pass the examination

Such leave can be granted only once to any officer.

NOTE —[Leave granted under Articles 280 and 281, covers the whole period of absence from regular duty, including the day or days of examination and the time spent in proceeding to and from the place of examination. The leave cannot be taken in instalments]

282. Except as provided in Articles 280 and 281, no kind of leave, except Furlough on medical certificate, may be granted in continuation of Examination leave.

283 The rules in this Section apply to Military officers subject to the Military Leave Rules serving in any Civil Department other than the Public Works, Railway, the Survey of India and Forest Departments, to which Departments they are not applicable.

Departmental Examinations.

284. (*a*) An officer while absent from his office or from his station to attend an obligatory Departmental Examination, or (in the Punjab) an examination in Pushtu or Baluchi, is considered to be on duty.

(*b*) Leave may not be given under this Article to an officer to prepare for examination, or for recreation after examination. A reasonable time, including the day or days of examination, should be allowed for the journey to and from the place of examination, and nothing more.

285. An officer permitted to present himself at any examination which must be passed before a person is eligible for a higher subordinate appointment in any branch of the service, such as a Deputy Magistracy, may, under the orders of his immediate departmental superior, be allowed leave of absence for the number of days actually necessary to enable him to attend at the examination. During this short absence, no deduction will be made from the officer's allowances, unless the head of the office finds such deduction necessary to enable him to make arrangements for carrying on the work. Such leave should not be allowed more than twice for each standard of examination.

286. Leave may not be granted under this Section to a Military officer subject to the Military Leave Rules to enable him to pass an examination under Article 681, Army Regulations, India, Volume I, Part I.

SECTION V.—HOSPITAL LEAVE.

Jail Warders, Postal Officers ; Peons and Guards.

287. A Warder of a Lunatic Asylum (except in Central Provinces and other provinces where the Local Government has extended the concession of Article 288 to this class of officers), Postman, Mail Carrier or Mail Coachman, or a Peon or a Guard in permanent employ whose case is not provided for in Article 288, while ill in hospital or dispensary, or receiving medical aid as an out-door patient of the hospital or dispensary of the station at which he serves, may, without reference to the allowance paid to his substitute, be allowed half pay for a period not exceeding six months altogether in any one term of three years, whether such leave be taken in one period or by instalments. The Director-General of Posts and Telegraphs and Postmasters General may grant full pay for three months to a Postman, Mail Carrier or Mail Coachman in exceptional circumstances, as, for example, if he is wounded by robbers or a wild animal, and may also, at his discretion, dispense with the condition requiring attendance at a hospital or dispensary. The Director-General may also grant leave on full pay in India for a period not exceeding six months to subordinates of the Railway Mail Service who may be injured in the execution of their duty, subject to the conditions under which such leave is granted to State Railway employés by the Managers of State Railways under Article 665.

NOTE.—[The term "Peon" in this Article includes a process-server of that class.]

Police and Salt Department Officers.

288. A police officer enrolled under any Act of the Legislature (not being a member of the Port Blair Police Force), whose pay does not exceed Rs 20, or if he be a member of the Bombay City Police Force, Rs 25, or an officer of the Northern India Salt Revenue Department, or of the Madras Salt and Abkari Department, or of the Customs Department in the out-ports and land customs stations in the Madras Presidency, or of the Bengal Excise and Salt Department, or of the Bihar and Orissa Excise and Salt Department, or the Bombay Salt and Abkari Departments (including officers of the Opium Preventive Service) whose pay does not exceed Rs. 20, or a Head Warder, a Warder or an orderly belonging to the Jail Department in Bengal or Bihar and Orissa or a Head Warder or Warder of the Jail Department in any other province whose pay does not exceed Rs. 20 a month, or a Head Warder or Warder of a Lunatic Asylum whose pay does not exceed Rs 20 in the Central Provinces or in any other province where the Local Government extends the concession of this Article to this class of officers, or a Matron of the Jail Department whose pay does not exceed Rs. 20 a month, may, while sick in hospital or while

receiving medical aid as an out-door patient at the station or head-quarters of the district in which he serves, be allowed, at the discretion of the sanctioning authority, leave of absence from duty for six months altogether in any period of three years. Such leave may be taken in one period or by instalments and may be followed by or taken in continuation of, any other leave admissible under these Regulations. For the first three months of such leave the officer may receive full pay, and for the remaining three months half pay, without the restriction that no extra cost shall be imposed upon the State: Provided always that this concession shall be confined strictly to cases in which illness shall be certified not to have been caused by irregular or intemperate habits.

NOTE 1.—[A Police officer on leave under this Article may for the first three months of such leave, during which full pay is admissible, retain any local allowance attached to his appointment: Provided there is no *locum tenens* to whom it is payable.]

NOTE 2.—[Constables of the Bombay City Police while on leave under this Article may draw the house-rent allowance admissible to them, provided it is not paid to their substitutes.]

NOTE 3.—[This Article so far as it applies to Head Warders or Warders of the Jail Department includes both female and male Warders.]

School Mistresses.

288A. Maternity leave of absence from duty may be granted on full pay by a Local Government or any subordinate authority empowered in this behalf whether by general or special order by a Local Government to ~~school mistresses~~ for a period which shall not ordinarily exceed two months, but which may be extended to 3 months at the discretion of the sanctioning authority.

Marine and Military Establishments.

289. An Officer, Warrant or Petty officer, of the Indian Government, sea-going, inland, or harbour vessels and hulks, is, in case of sickness or injury, ordinarily treated on board his vessel, and is entitled to full pay for a period not exceeding six weeks. If sent to a hospital, such an officer is, unless the disease or injury is certified by a responsible Medical Officer to have been caused by an offence such as malingering, wilful maiming, wilful aggravating of disease or injury, drunkenness, etc., committed by him, entitled to full pay for a period of six weeks, inclusive of any time passed on board his ship sick-quarters. Time thus spent in ship sick-quarters or in hospital on shore, up to a period of six weeks, is not an interruption of duty within the meaning of Articles 246 and 260. An officer of the Marine Department who holds a shore appointment is not entitled to this concession.

NOTE.—[The provisions of this Article apply to the crew of the Indo-European Telegraph Department Steamer.]

290. A seaman disabled while in the discharge of duty may be allowed pay at harbour rates for a period not exceeding three months, provided that the injuries from which he is disabled are certified to by a Government Medical Officer; and are not owing to the seaman's own carelessness or inexperience, and that the vacancy caused by his absence is not filled up

291. An Engineer of the Marine Department, an employé in a Government Press, a subordinate employé (including a temporary or extra employé)

in an Ordnance or Government Dockyard establishment, a syce whether permanent or temporary in charge of a Government stallion, or a public servant in a Commissariat establishment may, during absence from work on account of injuries received in the course of his duty, be allowed full pay for one month, and thereafter half pay for three months.

292. A Dockyard artificer on the permanent establishment may, in case of ordinary sickness, be allowed full pay for a week, if his work can be carried on without a substitute and without incovenience, but no pay can be allowed to him—

(i) if it be necessary to appoint a substitute; or

(ii) if his absence be prolonged beyond a week, whether it be necessary to appoint a substitute or not.

Hospit... y.

...hs altogether in any ...e period or by instal- ...rvants, during their ...owance paid to their ... that the person concerned ... for a disease not the result of impru- ..., Toties, Bearers, Cooks, Cook's mate, Cook's assist- ... the Presidency Town of Madras; and Ward attendants (including dispensary servants, and dressers), Cooks, Sweepers, Bhistis, Dhobis, in the Bombay Presidency.

Presidency Public Works Workshops, Madras.

294. Labourers in the Presidency Public Works Workshops, Madras, the Government Public Works Workshops at Dowlaishwaram and Bezwada, the Public Works Stores at Madras and in the Pumping Station at Divi, employed on daily wages, when temporarily absent from work in consequence of injuries sustained on duty, may, on production of a medical certificate, signed by a properly qualified officer of Government, recommending their ... perintendent ... Article 666

SECTION VI.—DEPARTMENTAL LEAVE.

295. Departmental leave may be granted during the Recess by the Head of the party or Office to which he belongs to—

(i) a Native Surveyor or other subordinate in the Survey of India, or in the traverse Survey Party of the Central Provinces, whose service is superior,—on half pay or less (payable on return to duty), or without pay;

PART III.

(ii) such of the Tindals, Mates, Khalasis, Jamadars, Chaprasis, Burkandazes attached to any Party or Office of the Survey of India or to the traverse Survey Party in the Central Provinces, as the Head of the Party or Office may deem it desirable to re-entertain for the ensuing season,—on allowances not exceeding half pay (payable on return to duty).

Provided always that the officer returns to duty when required by his superior officers.

1 Superintendents in charge of Survey circles and the Superintendent of the Trigono-

an extension of the departmental leave is asked for on a medical certificate, the entire absence should be converted into leave under Article 336.

2. This Article does not apply to the establishments attached to the Head Quarters Offices, Calcutta and Dehra Dun

3 The establishments of the Bengal and Bihar and Orissa Survey Departments employed *purely on field work may be granted leave under this Article on the same conditions as similar* officers of the Survey of India

296. Privilege leave may not be granted to an officer who is entitled to departmental leave under the preceding Article, but a Lower Subordinate in the Survey of India, or in the Traverse Survey Party of the Central Provinces, a menial in the Survey of India, or a Lower Subordinate or menial in the Bengal and Bihar and Orissa Survey Departments employed purely on field work, who is prevented from availing himself of departmental leave, may be allowed to take Privilege leave under the ordinary rules, service towards such leave counting from the date of return from departmental leave. Privilege leave will not be granted except upon a certificate, from the Head of the Party or Office to which the officer is attached, that he was prevented from availing himself of departmental leave in consequence of the exigencies of the service.

Chapter XIII.—Long Leave—European Services.

SECTION I.—EXTENT OF APPLICATION.

297 The rules in this Chapter apply to—

(*a*) Members of the Indian Civil Service.

(*b*) Military officers subject to the Civil Leave Rules.

(*c*) The officers enumerated in Appendix 3 of the 2nd edition of these Regulations, and also all officers belonging to the classes enumerated in Article 330 (*c*) of that edition and appointed thereto by the Secretary of State or with his particular sanction.

(*d*) Members of the Imperial Branch of the General (Executive and Judicial) Administration; the Education Department; the Forest Department; and the Survey Department.

PART III.

(e) Officers substantively holding any of the appointments enumerated below :—

JUDIC[illegible]

(2) Re[illegible] nd Registrar in Equity, amentary and Admiralty Registrar, Original Side, r Barristers or Solicitors.

POLICE DEPARTMENT.—Assistant Superintendents and officers of higher rank.

JAIL DEPARTMENT.—Inspectors General and Superintendents of Central and Presidency Jails.

EDUCATION DEPARTMENT.—Principals of the following institutions.—Lawrence Military Asylum, Sanawar; Mayo College, Ajmer; Residency College, Indore; Government College, Ajmere; Rajkumar College, Rajkot.

BERAR COMMISSION.—Assistant Commissioners and officers of higher rank appointed by the Secretary of State, or with his particular sanction.

PORT BLAIR COMMISSION.—Assistant Superintendents and officers of higher rank.

ACCOUNTS DEPARTMENT (CIVIL)—

(a) Officers of the Indian Finance Department, including members both of the late Enrolled List and of the late Superior Accounts Branch of the Public Works Department :—

(i) if appointed in England by the Secretary of State;

(ii) if appointed otherwise, but drawing pay not less than Rs. 800 a month.

(b) Officers of the late Postal Accounts Department drawing pay not less than Rs. 80[illegible] a month.

MILITARY ACCOUNTS DEPARTMENT.—Officers appointed in England by the Secretary of State.

POSTAL DEPARTMENT.—Officers of higher rank than Superintendent.

OPIUM DEPARTMENT.—Sub-Deputy Opium Agents and officers of higher rank.

SALT DEPARTMENT.—Assistant Commissioners and Assistant Collectors and officers of higher rank.

MINOR SCIENTIFIC DEPARTMENTS.—Civil officers of the Civil Veterinary Department and all other officers originally appointed to the public service by the Secretary of State or with his special sanction.

ARCHÆOLOGICAL DEPARTMENT.—Director-General, Epigraphist, and Superintendents of circles

IMPERIAL CUSTOMS DEPARTMENT—

(1) Officers appointed in England by the Secretary of State.
(2) Other officers on pay of not less than Rs 900 a month.

PUBLIC WORKS AND RAILWAY DEPARTMENTS. *General.*—Officers of the Engineer Establishment, the Superior Accounts Branch, and the Superior Revenue Establishment of State Railways, appointed thereto by the Secretary of State or with his particular sanction.

ENGINEER ESTABLISHMENT.—Engineer officers of whatever rank in the Department, who belong to the Imperial Branch of the establishment, except those who were appointed in India as Natives of India

[illegible]

Superior Revenue Establishment of State Railways.—Officers whose pay is not [illegible] Rs. 800 a month.

Government of India, Public Works Department, Secretariat.—Under [illegible] being a member of a graded establishment.

INDIAN TELEGRAPH DEPARTMENT.—The Imperial Branch of the Department.

INDO-EUROPEAN TELEGRAPH DEPARTMENT.—Officers of the graded establishment of Directors; Electrician; Superintendents and Assistant Superintendents. Medical officers, if appointed by the Secretary of State. The Commander, First and Second Officers, and Chief Engineer of the Cable Ship.

MARINE DEPARTMENT.—Constructors, Bombay and Kidderpore Dockyards.

MEDICAL DEPARTMENT.—Matron, Assistant Matron and the Nursing Sisters of the General Hospital, Rangoon, when recruited in England.

PRINTING DEPARTMENT.—Superintendents of Government Printing, India, Madras, Bombay, Bengal, United Provinces and Burma on pay not less than Rs. 800 a month.

OTHER OFFICERS.—The First Engineer and Shipwright Surveyor to the Government of Bengal; the Agent for Government Consignments, Calcutta; and the Superintendent of the Government Museum and Principal Librarian of the Connemara Public Library, Madras.

(f) Officers specially admitted by the Government of India to the benefit of the rules in this Chapter.

298. An officer to whom the rules in this Chapter are applicable does not forfeit his privileges upon transfer to some office not included in Article 297, unless such transfer is ordered as a penalty, or because of the officer's inefficiency.

SECTION II.—FURLOUGH.

General Limitation.

299. The amount of Furlough admissible to a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules and the [illegible] nissi- [illegible] ears.

300. The following leave under other rules is counted as Furlough under the preceding Article :—

(a) In the case of a Military Officer subject to the Civil Leave Rules :—

(1) Furlough under Rules 1 and 6 of the Military Furlough and Leave Rules of 1875; and

(2) Leave in or out of India with pay under the Leave Rules of 1886 for the Indian Army.

[illegible]

(b) In the case of any other officer to whom these rules apply,—Furlough and leave with allowances on medical certificate, and Leave on Private Affairs under the Indian Service Leave Rules.

Leave after completion of term of Service.

301. (a) The limitations affecting members of the Indian Civil Service whose term of service is complete, are prescribed in Article 555, and those affecting Military Officers, in Article 620.

(b) Any other officer subject to the rules of this Chapter who is retained in the service after the age of fifty-five years may, after attaining that age, be granted Privilege leave or any Special leave to which he may be otherwise entitled or Subsidiary Leave preparatory to retirement, or Extraordinary leave without allowances under Article 332. The total leave granted, under the heads of Special or Extraordinary, must not exceed six months in all. No other kind of leave may be granted, and any leave, other than Privilege leave or Special leave or Subsidiary Leave preparatory to retirement, granted to such an officer before the date on which he attains the age of fifty-five years, ceases to have effect on that date.

Furlough earned.

302. The amount of Furlough "earned" by an officer is one-fourth of his Active Service. (*See also Article 305.*)

[1] NOTE.—[In the case of a Military officer subject to the Civil Leave Rules this Article has effect only from the date on which he becomes subject to those rules (see rules 1 and 2 under Article 35), furlough in respect of previous service being credited under Article 303.]

303. A Military officer subject to Civil Rules may, if he desire it, add to Furlough earned by service under Civil rules an amount of Furlough in respect of his previous service calculated as shown below. If, however, the result of such calculation is that the officer had, at the time of coming under Civil rules, taken leave in excess of the proportion applicable to his previous service, such excess shall not be taken in reduction of the Furlough earned by him under Civil rules. A Military officer subject to Civil rules may be granted at any time any leave which he has earned under Civil rules and may defer or forego the leave he has earned under Military Regulations.

(i) An officer who, at the time of coming under Civil Leave Rules, was subject to the Military Furlough Regulations of 1868 or 1875, may be credited with the Furlough that may have accrued to him, less any Furlough already taken which, under those rules, would reduce the amount of Furlough due. The amount of Furlough accrued shall, in that case, be calculated proportionably on the whole service qualifying for Furlough without reference (a) to the restriction imposed by those rules on the counting towards Furlough of any Military Service in India rendered by the Officer previous to his becoming subject to such rules, and (b) to the minimum periods of service which those rules require to be rendered before Furlough can be granted

(ii) The service for Furlough of an officer whose case does not fall under clause (iii) of this Article, and who, when he came under the Civil Leave Rules, was subject to the Indian Army Leave Rules (1886), shall be calculated in accordance with Article 302 retrospectively from the date of his arrival in India, *i.e.*, he shall be

Despatch No. 188 of September 21, 1893, by reason of his acquiring on or after that date the qualification specified in Article 297 (*d*) or (*e*) :—

(i) The amount of Furlough due to him shall be taken at one-eighth of his active service while under the Indian Service Leave Rules, less the amount of Furlough or of Leave on Private Affairs enjoyed by him under Articles 337 and 338.

(ii) Leave on Medical Certificate shall in this calculation reckon neither as service qualifying for Furlough nor as Furlough taken, but the amount of Furlough due shall not exceed the amount which would be due if the officer had been under the European Service Leave Rules from the beginning of his service and the leave taken by him on medical certificate had been Furlough on medical certificate under the rules in this Chapter.

(*b*) In the case of an officer who is brought under the rules in this Chapter for the first time, by the operation of the orders in the despatch of the 21st September 1893, but who would have come under them at an earlier date if they had been in force at the time, the calculation of Furlough and other leave due shall be made as follows :—

(i) If under those orders he would have been under the rules in this Chapter from the commencement of his service, the calculation shall be made as if such rules had applied to him from the commencement of his service, and all leave taken by him had been taken under those rules

(ii) If under those orders he would at some stage in his service have passed from the Indian Service Leave Rules to the rules in this Chapter, then the calculation shall be made under the rules in clause (*a*) under this Article, as if he had come under the rules in this Chapter at such earlier stage. He shall be held to have been under the rules in this Chapter from the said earlier date, and all Furlough, Leave on Private Affairs, or Leave on Medical Certificate taken after such date shall be treated as Furlough taken under the rules in this Chapter.

Provided that in the case of the officers mentioned in Article 297 (*c*) who came under the rules in this Chapter before the 11th October 1893, the calculation shall continue to be made under the following rules :—

In calculating the Furlough " earned " only half the Active Service rendered by the officer in offices other than those included in Article 330 of the Second Edition of these Regulations is taken into account. The whole of the Active service rendered by the officer whilst officiating in any of those offices is taken into account

In calculating the Furlough " due " the Furlough " earned " is diminished by the Furlough, Leave on Private Affairs and Leave on Medical Certificate with allowances, which the officer has enjoyed under the Indian Service Leave Rules

306. The rules in Articles 304 (*b*) and 305 are subject to the proviso that if more than two years' Furlough be due to an officer when he first becomes subject to the rules in this Chapter, the excess shall be cancelled.

307. An officer who comes under the rules in this Chapter, while he is on leave under the Indian Service Leave Rules, may at his option—

(a) change his leave allowances to the amount admissible under the European Service Leave Rules and come under them immediately; or

(b) postpone his coming under them until his return from leave.

Furlough admissible.

308. To an officer who has rendered three years' Continuous Service, Furlough for not more than two years may be granted as follows :—

(a) On medical certificate :—unconditionally ; *see Articles 828 to 832 ;*

(b) without medical certificate :—subject to these provisos :—

(i) that the Furlough be due to him ;

(ii) that he has rendered eight years' Active Service in Civil employ ;

(iii) that an interval of not less than eighteen months has elapsed between last return from Privilege leave of over six weeks' duration, and the furlough, or privilege leave, if any, with which the furlough is combined. In the case of Privilege leave combined with other leave which does not interrupt Continuous Service (Article 22), the period of 18 months begins to run from the date subsequent to that of the end of the combined leave ;

(iv) if a Military Officer subject to the Civil Leave Rules, who has not rendered eight years' Active Service in Civil employ, and

(1) if the Furlough which he applies for is his first Furlough—that he has two years' Furlough due to him under the calculation in Article 303 ; or

(2) if the Furlough applied for be other than his first Furlough—that he has rendered three years' Continuous Service since his return from Furlough ;

(v) tha

NOTE—[The Government of India may relax the following conditions governing the grant of furlough under this Article, in cases in which their enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State :—

(1) three years' continuous service in civil employ ;
(2) eight years' active service in civil employ ;
(3) an interval of eighteen months since last return from privilege leave of over six weeks' duration ;
(4) three years' continuous service since his return from furlough in the case of a military officer subject to civil leave rules, who has not rendered eight years' active service in civil employ and who applies for furlough after he has availed of it once in such employ]

309. Except on medical certificate or on very urgent private affairs, Furlough or Special leave may not be granted to any member of the Indian

Civil Service, or to any Military officer whether subject to the Civil or Military Leave Rules, or to any other officer who is, if employed in Oudh, the Central Provinces, Burma, Assam, Ajmer, Coorg or Berar, a member of the Commission, or who is, if employed elsewhere, the holder of an office corresponding to that of a member of a Commission, if one-fifth of all the officers of a Commission or of all officers holding appointments similar to those of members of a Commission, as the case may be, are already absent on Furlough or Special leave, or study leave in the case of officers of the Indian Medical Service.

310. (*a*) If, under the operation of proviso (v), Article 308, the applications for Furlough (including those under Article 232) cannot all be complied with, Furlough will be granted in the following order :—

First—To the applicant to whom the most Furlough is due ;

Secondly—Of two or more applicants to whom the same amount is due ; to him who has rendered longest Continuous Active Service ;

Thirdly—Of two or more such applicants who have rendered the same Continuous Active Service—to the Senior.

(*b*) Th[illegible]
vacant. [illegible]
ficance [illegible]
vacant unless they happen to arrive by the same post.

311. To an officer who has not rendered three years' Continuous Service, Furlough may be granted on medical certificate as follows —

(*a*) if the Furlough due exceeds a year—to the extent due, not exceeding two years ,

(*b*) if the furlough due does not exceed a year—for not more than one year.

Extension of Furlough.

312. (*a*) Furlough granted under Article 308 may, on medical certificate, be extended to not more than three years

(*b*) Furlough granted under Article 311 for less than two years under clause (*a*), or less than one year under clause (*b*), may, on medical certificate, be extended to the extent of the Furlough due to the officer, not exceeding two years, or to one year, respectively.

Ordinary Furlough.

313. Ordinary Furlough can, under no circumstances, extend beyond two years at one time ; it includes—

(i) the first two years of each separate period of Furlough under Article 308, including any extension under Article 312 (*a*) ;

(ii) so much of Furlough under Article 311, including any extension under Article 312 (*b*), as may be due.

Leave Allowances.

314. An officer on ordinary Furlough is entitled to a leave allowance equal to half his average salary, subject to the following limits :—

(*a*) In the case of a member of the Indian Civil Service—

(i) if paid[1] at the Home Treasury of the Government of India, maximum £1,000 a year and minimum £500 a year, or the salary last drawn by him on duty, whichever is less ;

(ii) if paid in India, maximum Rs. 833$\frac{1}{3}$ a month and minimum Rs 416$\frac{2}{3}$ a month, or the salary last drawn by him on duty, whichever is less.

(*b*) In the case of a Military Officer, subject to the Civil Leave Rules, the same maxima and minima as in the case of a member of the Indian Civil Service : Provided that, during furlough added under Article 303 to the furlough earned under Civil Rules, the minimum shall (in the case of an officer who became subject to the Civil Leave Rules on or after the 1st April 1888) be that prescribed by the Military Rules to which an officer was subject immediately before coming under the Civil Leave Rules and that in the case of an officer of the Royal Engineers, whose case is governed by clause (ii) under Article 303, the minimum shall be the rate prescribed by the Leave Rules for the Indian Army, according to the length of his service for Indian pension. In the case, however, of an officer of the Royal Engineers serving under British Army Leave Rules, the minimum for so much of the furlough credited under Article 303 (ii) as has been earned by service in Civil employment shall be at the rate of—

[illegible]

for this concession.

(*c*) In the case of any other officer subject to these rules—

(i) if paid at the Home Treasury of the Government of India, maximum £800 a year ; no minimum except as provided in Article 320 ,

(ii) if paid in India, maximum Rs. 666$\frac{2}{3}$ a month ; no minimum, except as provided in Article 320 :

Provided always that the allowances of an officer during leave shall in no case exceed his actual salary when he takes leave.

[1] An officer on furlough does not forfeit his past leave allowances by resigning the Service without returning to India.

315. An officer on Furlough other than ordinary is entitled—

(i) if a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, to subsistence allowance [see Article 108 (*a*)] ;

(ii) if an officer not in the Indian Civil Service or the Army, to £480 a year paid at the Home Treasury, or Rs. 400 a month paid in India or to one-quarter of his average salary, whichever is less. In the case provided for in Article 320, quarter average salary is subject to the minima prescribed in that Article.

NOTE.—[Absentee allowances in respect of leave spent out of India, if paid in India, are

SECTION III.—SPECIAL LEAVE

316. Subject to the rule laid down in Article 232, special leave on urgent private affairs may be granted at any time for not more than six months

Provided that an officer who has had Special leave must render six years' Active Service before he can again have such leave.

1. Furlough under Rule XI of the Military Furlough Rules of 1868 is "Special leave" within the meaning of this proviso.

317. An officer promoted from an office, subject to the Indian Service Leave Rules, is not debarred from obtaining Special leave with allowances under the preceding Article by reason of his having had Leave on Private Affairs under the Indian Service Leave Rules which is furlough in another form.

Leave Allowances.

318. (*a*) For the first six months for which an officer is on Special leave, whether the six months be included in the same leave or not, he is entitled to the leave allowance admissible under Article 314. Thereafter, he is entitled to no leave allowance

(*b*) An officer on Special leave does not forfeit his past leave allowances by resigning the Service without returning to India.

319. A Military Officer in Civil employ, subject to the Furlough Rules of 1868, is entitled, during the first six months of Special leave under Article 316, to an allowance of half average salary, subject to a maximum of £1,000 and a minimum of £250 a year. The title to this allowance is not affected by any leave previously taken under Rule XI of the Rules of 1868

SECTION IV.—MINIMUM LEAVE ALLOWANCE.

320. The leave allowances of an officer of the classes referred to in Article 314 (*c*) if on leave out of India (except in Ceylon or the Straits Settlements) are subject to the following minima :—

(*a*) if the leave is furlough on Medical Certificate under Article 308 (*a*) or Article 311, or

(b) if the leave, although not Furlough on Medical Certificate under Article 308 (a) or Article 311, has been granted on account of ill-health.

On ordinary Furlough or Special leave—

When paid in England . . .	£200 a year, or ⅝ths of the salary last drawn on duty, whichever is less.
When paid in India	Rs. 166⅔ a month, or ⅝ths of the salary last drawn on duty, whichever is less.

On Furlough other than ordinary—

When paid in England	£100 a year, or 37½ per cent. of the salary last drawn on duty, whichever is less
When paid in India	Rs 83⅓ a month, or 37½ per cent. of the salary last drawn on duty, whichever is less.

NOTE.—[illegible]

SECTION V.—SUBSIDIARY LEAVE.

321. (a) Subsidiary Leave is the time allowed—

(i) to an officer leaving India, on retiring from the service, or on Furlough or Special leave, to break up his domestic establishment and travel to the port of embarkation, and

(ii) to an officer returning to India from Furlough or Special leave to travel from the port of debarkation and reorganise his domestic establishment.

No subsidiary leave is admissible to an officer who does not leave India by sea.

(b) Subsidiary leave granted to an officer preparatory to retirement ceases when he actually resigns the service.

1. An officer, serving in Persia or Turkish Arabia, reckons Subsidiary leave to or from the port or frontier town by which he leaves or returns to the country. The date of departure or return must be certified by the British Consul or, if there be no British Consul, by the officer himself.

2. An officer either of the Persian or the Persian Gulf Section of the Indo-European Telegraph Department, who practically has to go on or return from leave by an Indian port, whether it be Karachi or Bombay, may reckon Subsidiary leave to or from such port.

322. (a) The grant to an officer leaving India—

(i) of permission to retire from the service, or

(ii) of Furlough or Special leave out of India,

carries with it the grant of Subsidiary leave. But Subsidiary leave is admissible only at the end and not at the beginning of leave out of India when such leave is combined with Privilege leave under Article 233.

(*b*) An officer returning to India, without the permission of the authority which granted him leave, more than fourteen days before the end of his Furlough or Special leave, is not entitled to Subsidiary leave, save under the special orders of the Local Government.

Leave in and out of India.

323. (*a*) An officer (including a Military officer subject to the Military Leave Rules) may take Furlough or Special leave partly in and partly out of India. But Subsidiary leave is not admissible unless the Furlough or Special leave begins or, as the case may be, ends, as Furlough or Special leave out of India.

(*b*) If an officer going on Furlough or Special leave out of India is prevented by sickness or other reasons not within his own control,—such, for example, as the postponement of the departure of the vessel in which his passage is engaged,—from embarking within his Subsidiary leave, the Local Government may order that his Furlough or Special leave shall begin in India at the end of the Subsidiary leave otherwise admissible, without forfeiture of his Subsidiary leave.

Period admissible.

324. The minimum Subsidiary leave is ten days; otherwise Subsidiary leave is calculated according to the rules and restrictions laid down in Chapter IX for "Joining Time"

Prolongation of Subsidiary Leave.

325. [illegible]

A B having applied to us (or me) for medical certificate under Article 829 of the Civil Service Regulations, we (or I) consider it expedient, before granting or refusing such a certificate to *A B*, to detain him under professional observation for days.

326. Unless an officer is expressly permitted by the Local Government [illegible] on leave, [illegible] rticle 829, [illegible] servation, [illegible] sible under rule being prolonged if necessary in case of detention by a period not exceeding that for which he was detained.

327. In the case of an officer who fails to obtain the certificate, the time from the date on which he leaves his station to that on which the certificate is refused is treated as Subsidiary leave. From the date following that on which the certificate is refused the officer is treated as on Joining Time, carrying subsidiary leave allowances.

328. If an officer (including a Military officer subject to the Military Leave Rules) who, under the rules of his
in a troop-ship when proceeding on leave
granted Subsidiary leave, detained wai
fault of his own, his subsidiary leave may be extended to the date of the sailing of the vessel in which he is provided with a passage, without reference to the maximum period of thirty days for which Subsidiary leave can be granted.

329. Subsidiary leave is ordinarily reckoned from the date of debarkation, but if there is any special delay in the issue of orders appointing an officer to a particular post, the Subsidiary leave may be extended by the Local Government, provided that the whole period so allowed does not exceed 30 days.

Leave Allowances.

330. An officer on Subsidiary leave is entitled to allowances as follows :—

(*a*) If the leave be subsidiary to Special leave, and the officer has had leave subsidiary to a former Special leave—no allowance

(*b*) If the leave be subsidiary to ordinary Furlough or Special leave [otherwise than as provided in clause (*a*)]—the allowance admissible under Article 314, but calculated, in the case of a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, without the limitations of maximum or minimum prescribed by clauses (*a*) and (*b*) of Article 314. The limitations prescribed by clause (*c*) of Article 314 apply to the allowances of any other officer subject to this Article on Subsidiary leave.

(*c*) If the leave be subsidiary to Furlough other than ordinary—the allowance admissible under Article 315.

(*d*) If the officer has been absent on extraordinary leave the duration of which exceeds a fortnight, or has, under Article 229, ceased to have a lien on a substantive appointment—

(i) in the case of a member of the Indian Civil Service or a Military Officer subject to the Civil Leave Rules—subsistence allowance; and

(ii) in the case of any other officer subject to this Article—no allowance.

(*e*) If the leave be *preparatory to retirement*—*the allowances which* would be admissible if the officer were proceeding on leave of such description as may be admissible to him; and if no leave is admissible—subsistence allowance only.

331. An officer may draw allowances as if he were on Privilege leave for any part of his Subsidiary leave under clause (i) of Article 321 (*a*) for which, if he were not retiring from the service or going on Furlough or Special leave, Privilege leave may be admissible to him. It is to be observed that an officer who has no lien on an appointment cannot benefit by this rule. (*See Article 203.*)

NOTE.—[This Article will have no application in cases in which Privilege leave is combined with other leave under Article 233, as Subsidiary leave is not then admissible.] [*See Article* 322 (*a*).]

SECTION VI.—EXTRAORDINARY LEAVE.

332. Subject always to the provisions of any Statute applicable to the case, the Local Government (or, if the officer be on Furlough or Special leave in Europe, the Secretary of State) may, in special circumstances and when no other kind of leave is by rule admissible, grant leave of absence from duty otherwise than under these Regulations: Provided that—

(i) such leave may not be granted in combination with the grant of other leave except as provided in Article 233. But it may be granted in continuation of other leave if circumstances arise which in the opinion of the Local Government are such as to justify the concession. No officer is *entitled* to Extraordinary leave;

(ii) an officer absent from duty on leave so granted shall receive no absentee allowance; and

(iii) if he is a member of the Indian Civil Service or a Military officer subject to the Civil Leave Rules, he shall retain no lien upon any office except when Extraordinary leave, not exceeding a fortnight, is granted in continuation of other leave. [See clause (*d*) of Article 330.]

1. In cases in which the duration of the Extraordinary leave to be granted does not exceed two months, the Local Government may dispense with the condition in this Article that the leave can be granted only when no other kind of leave is by rule admissible.

[illegible]

(see Articles 52 to 55),

(see Articles 220 to 231),

or so as to extend the term of Privilege or other leave beyond the time admissible by rule]

[illegible]

the person concerned.

[illegible]

absence from duty.

(2) If the further absence from duty cannot be covered in this way, the period, or such part of it as remains uncovered, will be treated as leave without allowances, unless the person concerned prefers to substitute leave of another description for that which he has previously taken.

Example.—*A*, who has had two months' Privilege leave, is detained for a further period of [illegible]

333. A Military officer subject to the Civil Leave Rules, who has exhausted the full period of Furlough admissible to him under these Regulations, and who is granted Extraordinary leave on medical certificate, will continue to be treated as wholly in Civil employ for all purposes, with the exception that, if the Medical Board at the India Office report that there is no prospect of the officer returning to duty within a reasonable period, he will be placed on Military half pay. If an officer thus placed on half pay is afterwards permitted to revert to the effective list and returns to duty in India, he will not be entitled to be reinstated in Civil employment, but will be posted to Civil or Military duty as may be decided in India.

Chapter XIV.—Long Leave—Indian Services.

SECTION I.—EXTENT OF APPLICATION

334. The rules in this Chapter apply to all officers who are not entitled to leave under the other Chapters of these Regulations. They apply *fully* only to those officers whose pay is *not less* than Rs. 100 a month, and who have substantive appointments on permanent establishment under the Government.

335. (*a*) Leave may, however, be granted under this Chapter to an officer (whether he be a superior or an inferior servant) whose pay is less than Rs. 100, so far as it can be done without imposing any cost upon the State. The absentee allowance of the substantive incumbent must not exceed what remains from his pay after provision is made for the efficient discharge of his duties during his absence, except when, in the resultant acting arrangements, an officer who has no substantive appointment is given more than half the pay of the appointment in which he acts, in which case the excess over half pay granted to him may, at the discretion of the Local Government, be disregarded altogether in calculating the sum available for the leave allowance of the absentee and the acting allowances paid in consequence of his absence.

1. The Local Government may delegate its power under this clause to Heads of Offices and Departments.

(*b*) No leave in excess of the leave admissible under these rules may be granted to such an officer, with allowances, or counting as service for pension.

1. An officer holding an appointment on a Progressive pay, rising to a maximum of Rs 100, who is in the receipt of the maximum pay, is not to be treated as an officer whose pay is less than Rs. 100.

2. If it becomes necessary to bring an officer from a distance to act for an officer on leave whose pay is less than Rs. 100, the travelling allowances and transit pay admissible to the substitute may be borne by the State; but such a transfer should never be made if it can be avoided.

3 The minimum allowance during long leave of a Naib Tahsildar in the United Provinces, or Baluchistan, is Rs 30 a month.

SECTION II.—LONG LEAVE.

Leave on Medical Certificate.

336. Leave on Medical Certificate may be granted for three years in all, but not for more than two years at one time; and no officer can have Leave on Medical Certificate out of India more than twice.

1. An officer who has a temporary or officiating appointment only may be allowed leave under this Article for not more than three months at one time, if no substitute is required, or if his duties can be provided for without additional expense.

Leave on Private Affairs.

337. Leave on Private Affairs for six months may be granted to an officer who has not had Furlough, after six years' service, and repeated after intervals of six years.

1. Leave on Private Affairs does not accumulate, and cannot be taken in instalments.
2. Leave on Medical Certificate counts as service for Leave on Private Affairs.

Furlough.

338. Furlough may be granted as follows :—

(a) After ten years' service—one year or any less period; and thereafter at intervals of not less than eight years, one year or such other period as together with all periods already spent on Furlough may not exceed two years; or,

(b) After eighteen years' service—two years or any less period; and thereafter, at intervals of not less than eight years, any such period as together with all periods already spent on Furlough may not exceed two years: Provided that—

(i) The service for Furlough of an officer who has had Leave on Private Affairs counts only from the date of his last return from such leave;

(ii) The aggregate amount of Furlough, or of Furlough and Leave on Private Affairs taken together, shall not exceed two years;

(iii) An interval of not less than eighteen months has elapsed between last return from privilege leave of over six weeks' duration, whether taken by itself or combined with Leave on Medical Certificate, and the furlough, or privilege leave, if any, with which the furlough is combined.

1. Leave on Medical Certificate counts as service for Furlough.

NOTE —[The restriction in clause b(iii) of this Article may be relaxed by the Government of India in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State]

Leave without Allowances.

339. Extraordinary leave without allowances may, in case of necessity, and when no other leave is by rule admissible, be granted for such time as may be necessary. Time spent on leave under this Article does not

count as service for other leave. Subject to the provisions of Article 198, there is no limit to the length or frequency of leave under this Article. It may not be granted in combination with the grant of other leave except as provided in Article 233. But it may be granted in continuation of other leave if circumstances arise which prevent the return by the officer to duty, and which, in the opinion of the Local Government or the authority empowered to grant the leave, are such as to justify the concession. No officer is *entitled* to Extraordinary leave.

1. In cases in which the duration of the Extraordinary leave to be granted does not [illegible]

a month.]

Leave Allowances.

340. (*a*) An officer on Leave on Medical Certificate under Article 336 is entitled to half his average salary for the first fifteen months of each period of such leave, but not for more than thirty months in all. For the rest of his leave under Article 336 he is entitled to a quarter of his average salary.

(*b*) An officer on Furlough or on Leave on Private Affairs is entitled to half his average salary.

(*c*) But whenever an officer whose appointment is not gazetted takes leave for *not more* than one month, or whenever such an officer's salary is less than Rs. 300, his pay (not salary) when he gives up office is to be taken in lieu of average salary.

341. (*a*) Half average salary is subject to the following maxima :—

(i) if paid in India, Rs. 666⅔ a month in the case of officers of the Provincial Civil Service holding "listed" appointments and Rs. 500 a month in the case of other officers;

(ii) if paid at the Home Treasury £600 a year.

(*b*) Quarter average salary is subject to a maximum of Rs. 400 a month if paid in India, and £480 a year if paid at the Home Treasury.

(*c*) For non-gazetted officers whose salary is not less than Rs. 300, the minimum of half average salary is Rs. 150, and of quarter average salary Rs. 75 a month.

NOTE 1.—[Absentee allowances in respect of leave [illegible]

NOTE 2.—[For the purposes of this Article, Ceylon and the Straits Settlements are not held to be "out of India."]

342. The half average salary and quarter average salary of an officer subject to the rules in this Chapter if on leave out of India (except in Ceylon or the Straits Settlements) are subject to the following minima :—

(*a*) if the leave is Leave on Medical Certificate under Article 336, or

(*b*) if the leave, although not Leave on Medical Certificate under Article 336, has been granted on account of ill-health.

	Minima
Half average salary—	
If paid in England	£200 a year, or ⅗ths of the salary last drawn on duty, whichever is less
If paid in India	Rs. 166⅔ a month, or ⅗ths of the salary last drawn on duty, whichever is less
Quarter average salary—	
If paid in England	£100 a year, or 37½ per cent. of the salary last drawn on duty, whichever is less.
If paid in India	Rs. 83⅓ a month, or 37½ per cent of the salary last drawn on duty, whichever is less.

NOTE.—[The benefit of this Article is admissible only in cases in which a Medical Certificate in the form prescribed in Chapter XLIV recommends leave out of India, or in which leave (except Extraordinary Leave without allowances) spent out of India, whether so recommended or not, is extended on Medical Certificate or commuted into Leave on Medical Certificate]

343. All the rules in Article 340 are subject to the proviso that the allowances of an officer during leave shall in no case exceed his actual salary when he takes leave.

344. An officer does not forfeit the allowances to which he is entitled under Articles 340 to 343 by resigning the Service at the end of the leave.

Leave after fifty-five years of age.

345. An officer in Superior service who is subject to the rules of this Chapter is eligible, after he attains the age of fifty-five years, for Privilege leave, for any Leave on Private Affairs (Article 337) to which he may be otherwise entitled, for Subsidiary Leave preparatory to retirement, and also for leave without allowances under Article 339, provided that the total leave granted, whether on private affairs or without allowances, does not exceed six months in all, and for no other kind of leave. Any leave, other than Privilege leave or Leave on Private Affairs or Subsidiary Leave preparatory to retirement, granted to such an officer before the date on which he attains the age of fifty-five years, ceases to have effect on this date

NOTE —[Except in the case of an officer who, after the age of 54 years, has been refused leave owing to the exigencies of the public service, the grant of leave under this Article is subject to the condition that the officer returns to duty at the end of the leave. In applying for leave the officer must record a declaration that he has no intention of retiring for three months after his return to duty.]

SECTION III.—SUBSIDIARY LEAVE.

346. An officer going on, or returning from, Leave out of India on Medical Certificate, Leave on Private Affairs, or Furlough, is entitled to Subsidiary [illegible]

NOTE.—[When Privilege leave is combined with other leave under Article 233, Subsidiary leave is not admissible to an officer going on leave.]

347. Subsidiary leave on half pay for not more than fourteen days may be granted to an officer leaving India by sea on retirement, provided that the grant causes no additional expense to the State.

348. (a) An officer on Subsidiary leave prefixed to other leave is entitled to half average salary. But he may draw allowances as if he were on Privilege leave, for any part of this leave for which, if he were not going on Leave out of India, Privilege leave would be admissible.

NOTE.—[See Note under Article 331.]

(b) An officer on Subsidiary leave following other leave is entitled to half or quarter average salary, according to the rate of allowance to which he is entitled at the end of the leave to which it is subsidiary.

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PART IV.—ORDINARY PENSIONS.

Chapter XV.—General Rules.

SECTION I.—EXTENT OF APPLICATION.

348A. Every pension shall be held to have been granted subject to the conditions contained in Chapter XXI.

349. The conditions of service of officers of the following classes include special rules for pension which are laid down in the chapters noted against each, *viz.* —

(*a*) Judges of the High Courts (see Chapter XXIII).
(*b*) Barristers holding the appointments specified in Article 547 (see Chapter XXIV).
(*c*) Members of the Indian Civil Service (see Chapter XXV).
(*d*) Statutory Civil Servants (see Chapter XXVI).
(*e*) Ecclesiastical Officers (see Chapter XXVII).
(*f*) Civil Engineers and Telegraph Officers (see Chapter XXX).
(*g*) State Railway Establishments (see Chapter XXXII).
(*h*) Bengal Covenanted Pilots (see Chapter XXXIII)
(*i*) Police Officers drawing less than Rs. 20 a month (see Chapter XX).
(*j*) Port Blair Police (see Chapter XXXIV).
(*k*) Army Veterinary Officers of the Civil Veterinary Department (see Chapter XXIX).
(*l*) Burma Military Police (see Chapter XXXVII).

350. [illegible] in this [illegible] service [illegible]

1 Service in Dâk Bungalow and District Garden Establishments does not qualify

2 The service of a Patwari, whether appointed before or after the abolition of the Patwari or Village Officers' Cesses and Funds, does not qualify in any case in which it did not qualify prior to that abolition.

351. Future good conduct is an implied condition of every grant of a pension The Local Government, the Government of India, and the Secretary of State in Council reserve to themselves the right of withholding or withdrawing a pension or any part of it, if the pensioner be convicted of serious crime or be guilty of grave misconduct.

The decision of the Secretary of State in Council on any question of withholding or withdrawing the whole or any part of a pension under this Regulation shall be final and conclusive.

NOTE.—[This rule is applicable to all the officers enumerated in Article 349 except Judges of the High Courts, Bishops, Army Veterinary Officers of the Civil Veterinary Department and members of the Civil Service appointed before 16th January 1904.]

SECTION II.—CASES IN WHICH CLAIMS ARE INADMISSIBLE.

352. In the following cases no claim to pension is admitted :—

(*a*) When an officer is appointed for a limited time only, or for a specified duty, on the completion of which he is to be discharged.

(*b*) When a person is employed temporarily on monthly wages without specified limit of time or duty ; but a month's notice of discharge should be given to such a person, and his wages must be paid for any period by which such notice falls short of a month.

(*c*) When a person's whole time is not retained for the public service, but he is merely paid for work done for the State.

1. This clause applies, among others, to the following officers :—Advocate General, Solicitor to Government, Government Pleaders and Law Officers not debarred from private practice, Sheriffs in Presidency towns, Coroners, Roman Catholic Priests

(*d*) When a public servant holds some other pensionable office, he earns no pension in respect of an office of the kind mentioned in clause (*c*) or in respect of duties paid for by a Local Allowance.

(*e*) When an officer serves under a covenant which contains no stipulation regarding pension, unless the Government of India specially authorises an officer to count such service towards pension.

[illegible]

[illegible]

executed'

"Covenants with mechanics and others engaged for service in India will accordingly in future be prepared containing provisions to the effect recommended by your Government."]

Misconduct or Inefficiency.

353. No pension may be granted to an officer removed for misconduct, insolvency or inefficiency ; but to officers so removed compassionate allowances may be granted by the Government of India in cases where the pay of the officer does not exceed Rs. 800 a month, or by a Provincial Government in the case of officers serving under it whose pay does not exceed Rs. 500 a month, when they are deserving of special consideration ; provided that, without the sanction of the Secretary of State.

(1) no allowance shall be granted to an officer appointed in England, and

(2) the allowance granted to any officer shall not exceed two-thirds of the pension which would have been admissible to him if he had retired on medical certificate.

Unfitness for Further Advancement.

353A. When an officer, belonging to one of the following services, who is proved to be unfit for further advancement, is removed from service by the Secretary of State on the recommendation of the Local Government and the Government of India, he may, with the sanction of the Secretary of State, be granted a pension not usually exceeding, and not necessarily so great as, that which would have been admissible to the officer if he had been invalided on medical certificate In making their recommendations in such cases, the Government of India and the Local Government will be guided by the circumstances of each case and are not debarred from proposing, if the circumstances justify it, a pension lower or (in exceptional cases) higher in amount than that which would be admissible to the officer if he was invalided on medical certificate :—

(a) The Indian Civil Service.
(b) The Indian Political Department.
(c) The Indian Finance Department (General List, including the Public Works List).
(d) The Imperial Police Service
(e) The Imperial Customs Service.
(f) The Post Office of India and the Indian Telegraph Department.
(g) The Geological Survey of India.
(h) The Engineer establishment of the Indian Public Works and State Railway Departments.

NOTE 1.—[In the case of the military officers belonging to the Indian Political Department the pension recommended will be based on the amount of retiring pension which an officer

Claims of Widow.

354. (a) It being the duty of every Government officer himself to provide for his family, the Government recognises no claim by a widow on account of the services of her husband, and is almost invariably under the painful necessity of rejecting recommendations made in contravention of this rule.

(b) The submission of such recommendations, save under very extraordinary circumstances, is disapproved, as calculated only to give rise to hopes which cannot be fulfilled

deceased servants. Whether or not a tel... reliance have any effect in discouraging subscriptions to

Limitations.

355. (*a*) An officer cannot earn two pensions in the same office at the same time, or by the same continuous service.

(*b*) Two officers may not simultaneously count service in respect of the same office.

Military Service.

356. Service which is pensionable under Military Rules does not count: and an officer who is counting service for Military pension cannot simultaneously count service for Civil pension. The following exceptions have been made to the provisions of this Article:—

(1) Military Hospital Assistants and Enlisted Native Doctors are excluded by this Article

Hospital Assistant or Native Doctor, as the case may be, irrespective of the particular age at which the examination may be passed. [*See Article 358 (a) and 259 (3)*.]

(2) In the Public Works or Railway Department, Departmental Commissioned Officers h

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following offices:—

Army Head Quarters Offices,
Northern and Southern Army Offices,
Divisional Offices,
Brigade Offices, and
The late Command, District and 1st class Station Staff Offices prior to 1st June 1907.]

PART IV.

[illegible]

ment.

[illegible]

357. The Local Government may, in exceptional cases, allow service which is pensionable under Military rules to count for pension on the Inferior scale

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Chapter XVI.—Conditions of Qualifying Service.

SECTION I.—DEFINITION OF QUALIFYING SERVICE.

Beginning of Service.

358. (*a*) Except for Compensation gratuity, an officer's service does not in the case of Superior service qualify till he has completed twenty years of age.

(*b*) In other cases unless it be otherwise provided by special rule or contract, the service of every officer begins when he takes charge of the office to which he is first appointed.

NOTE —[In every covenant with an officer appointed in England by the Secretary of State, not being a member of the Indian Civil Service or a Civil Engineer or Telegraph Officer educated at the Royal Engineering College, Coopers Hill, or a Forest Officer, a clause is inserted to the effect that service for leave and pension begins only from the date on which the officer joins his first appointment in India]

359. The following exceptions are admitted to the twenty years' rule :—

(1) All officers appointed in England by the Secretary of State; "Indian College Engineers" [see Article 627 (*e*)]; and Police probationers appointed in India under the orders contained in the Despatch of the Secretary of State, No. 14 (Judicial), dated 15th March 1891

(2) Signallers in the Indian and Indo-European Telegraph Department may count towards pension service rendered by them after they attain the age of eighteen years.

ing as service the period during which the establishment is not employed does not apply to an officer who was not on actual duty when the establishment was discharged, after completion of its work, or to an officer who was not on actual duty on the first day on which the establishment was again re-employed.

370. An officer transferred from a temporary to a permanent appointment can count his service in the temporary office, if, though at first created experimentally or temporarily, it eventually becomes permanent.

371. An officer without a substantive appointment officiating in an office which is vacant, or the permanent incumbent of which does not draw any part of the pay or count service, may, if he is confirmed without interruption in his service, count his officiating service.

Apprentices and Probationers.

372. Service as an apprentice does not qualify, except in the following cases —

[illegible] [illegible] Works and Rail- [illegible]

373. The service of a probationer who holds a substantive office and draws substantive pay qualifies. So does that of an officer who is on probation for a substantive office, if he is employed in a vacancy reserved for him, pending probation, and in which no other officer simultaneously counts service.

374. Police probationers and temporary and officiating Assistant Superintendents of Police in all Provinces count their service as follows :—

(1) If recruited in England—from the date on which they report their arrival in India.

(2) If recruited in India under the orders in Secretary of State's despatch No. 14, dated the 15th March 1894—from the date of assuming charge of their appointments.

(3) If recruited in India before the date of the orders of 1894 mentioned in (2) above—from the date either of attaining the age of 20 years or of assuming charge of their appointments, whichever is later, provided that the service has been continuous.

375. The service of·

(1) Probationary, officiating and temporary Deputy Magistrate-Collectors and Sub-Deputy Collectors and sub. *pro tem.* Sub-Deputy Collectors in Bengal, Bihar and Orissa and Assam,

(2) Probationary, officiating and temporary Deputy Collectors in the United Provinces,

(3) Probationary, officiating and temporary Extra Assistant Commissioners in the Punjab and Assam, and

(4) Officiating and temporary Extra Assistant Commissioners in the Central Provinces,

counts for pension from the date on which all the three following conditions are fulfilled, namely :—

(a) Two years' continuous probationary or officiating service as such has been rendered ;

(b) Departmental examinations have been fully passed ; and

(c) The age of twenty years has been attained.

NOTE 1 —[The above conditions do not apply to Deputy Collectors and Sub-Deputy Collectors who began service in the Settlement Department on a temporary footing and were promoted to be probationary officiating or sub *pro tempore* Deputy Collectors or Sub-Deputy Collectors in the provincial and subordinate civil services. Such officers are allowed to count the whole of their continuous service for pension from the date of their first appointment in the Settlement Department]

NOTE 3 —[Sub-Deputy Collectors in Bengal and Bihar and Orissa who were appointed

pro tempore Sub-Deputy Collector.]

Permanent Officer deputed.

376. An officer on a permanent establishment detached on temporary duty, on the understanding that, when the temporary duty ceases, he will return to the permanent establishment, counts his detached service.

377. The preceding Article permits the temporary suspension of the second condition of qualifying service which forms the subject of this Section ; it does not authorise any relaxation of the first condition (Section II), or the third condition (Section IV), and, in particular, must not be understood to countenance any modification of the rules in Part VII, which apply to an officer on Foreign Service.

378. Service as Private Secretary to the Governor-General, a Governor or a Lieutenant-Governor, qualifies, provided that the officer belonged, before his appointment as Private Secretary, to the Civil Service of Government, whether the Indian Civil Service or not.

Substantive Office abolished.

379. If the substantive office of an officer is abolished within the meaning of Article 426, but the officer is, at the time, on special duty, or is, on abolition of his office deputed on special duty, his service on special duty qualifies, but the duty must be *special ;* mere employment, in continuation of permanent employment, in a temporary appointment which happens at the time to be vacant, does not qualify.

1. The service of an officer of the Marine Service continues to qualify when, upon the abolition of his appointment, he is retained on subsistence allowance or in an acting appointment.

Piece-work.

380. A Press servant, who is paid for piece-work, is treated as having held a substantive office, if—

(i) he is employed, not casually, but as a member of a fixed establishment; and

(ii) during the last seventy-two months of his actual employment he has been attached to one office uninterruptedly for twenty-four months, or it has not been through his own choice or misconduct that he has not been so attached.

Surveys and Settlements.

381. (*a*) The service of an officer not merely temporarily engaged in the undermentioned Settlement and Survey Departments which are (or were) on a *quasi*-permanent footing qualifies :—

(*b*) Except in the regular Departments and to the extent above specified, Settlement and Survey service does not count unless it is followed, without interruption, by qualifying Service. Settlement Service followed, without interruption, by pensionable service paid from a Patwari Fund also qualifies.

NOTE 1.—[From the dates mentioned, the following posts have been declared to be on a *quasi*-permanent footing.—

(*a*) In a Settlement Office in the United Provinces from 1st October 1899—

Head and Second Clerk. Settlement Officer's Reader.
Sadr Munsarim. Nazir and Record-keeper.

(*b*) In the Settlement Establishment in Baluchistan from 1st September 1904—

Superintendent (pay Rs. 150), 1 Deputy Superintendent (pay Rs. 90), 1 Deputy Superintendent (pay Rs. 75), 2 Munsarims (pay Rs. 50 each), 2 Munsarims (pay Rs. 40 each), 1 Head Clerk (pay Rs. 90), 1 Second Clerk (pay Rs. 65), ... ent Extra Assistant Com- ... 40), 1 Nazir (pay Rs. 30), ... Rs. 40), 1 Nazir to Settle-

Service in these posts qualifies from the dates mentioned or from any previous date from which the incumbents on 1st October 1899 or 1st September 1904 (as the case may be) may have been serving substantively and without interruption in one or other of them.]

NOTE 2.—[Continuous service as Inspector, Surveyor, Holding Marker, Draughtsman, Computor and Clerk belonging to Special and Revision Survey parties in Burma qualifies.]

382. Deputy Collectors and similar gazetted officers, when not especially employed for temporary work, are not affected by the preceding article, as they count service independently of the particular department to which they happen for the time to be attached.

Exception.

383. A Medical Officer in charge of a Government vessel may count his service afloat, if he is transferred, without interruption of his service, to the Civil Medical Service.

384. Officers transferred from the Extra or Contingent List of the Customs Preventive Service in Burma or in Calcutta count their service on that list, provided the Collector declares that the transfer is made on the ground of good service rendered.

SECTION IV.—THIRD CONDITION.

Sources of Remuneration.

385. Service which satisfies the conditions prescribed in Sections II and III qualifies, or does not qualify, according to the source from which it is paid; with reference to this Article, service is classified as follows:—

(*a*) Paid from the General Revenues.
(*b*) Paid from Local Funds.
(*c*) Paid from Funds in respect to which the Government holds the position of Trustee.
(*d*) Paid by Fees levied by law, or under the authority of the Government, or by Commission.
(*e*) Paid by the Grant, in accordance with law or custom, of a tenure in land, or of any source of income, or right to collect money.

General Revenues.

386. Service paid from the General Revenues qualifies. The fact that arrangements are made for the recovery, on the part of the Government, of the whole, or part, of the cost of an establishment or officer, does not affect the operation of this principle: Provided that the establishment or officer is appointed, controlled, and paid by the Government.

[illegible]

for by shipping fees.

[illegible]

by local subscriptions.

(*e*) Certain Customs establishments in Bombay, the cost of which is paid for by private companies.

[illegible]

Revenues.—[*See* Article 495 (*b*).]

(*g*) An establishment of the Accountant General of the High Court at Bombay whose pay is provided for by a three per cent. commission on invested funds in charge of the Accountant-General

(*h*) The office establishment of the Health Officer of the Port of Bombay and the crew of the boat placed at the disposal of that officer, a portion of whose pay is paid by the Bombay Port Trust.

[illegible]

387. The service of members of office establishments in the Railway Police in Bombay, who are wholly paid by the Railway Companies, qualifies.

388. Service which was paid wholly or partly from the Revenues of Berar before 1st October 1902 qualifies for pension from General Revenues.

389. (*a*) In the case of officers who, having no status in the service of the British Government, apart from their particular employment in Mysore, were employed in Mysore and transferred to the British service proper before 1st October 1882, the pensions granted are charged according to the Rule of Proportions.

(*b*) Pensions for service in Mysore prior to 1st October 1882 of officers who had a status in the service of the British Government apart from their particular employment in Mysore, are paid wholly from British Revenues

Local Funds and Trust Funds.

390. Service paid from a Local Fund qualifies, or does not qualify, according to the rules laid down in Chapter XLII.

391. Service paid from Funds which Government hold only as a Trustee, such as under a Court of Wards or in an Attached Estate, does not qualify.

Fees and Commission.

392. Except when fees or commission are drawn in addition to pay from the General Revenues, service in an office paid only by fees, whether levied by law or under the authority of Government, or by a commission, does not qualify.

1 Service as Official Assignee does not qualify.

2 Service as a Thugyi (local collector of revenue paid by commission) in Lower Burma qualifies, but this concession does not extend to Upper Burma,—*vide* Rule 2 under Article 350

Tenures in Land, etc.

393. Service paid by the grant, in accordance with law or custom, of a tenure in land, or of any other source of income, or right to collect money, does not qualify.

394. As an exception to the preceding Article, Watandars (hereditary District Officers) and their deputies in the Kaira Collectorate and in the following talukas of the Panch Mahals, namely:—Godhra, Kalol and Dohad, and the Petás of Hálol and Jhalod, if transferred to qualifying service, count their previous service.

SECTION V.—DISTINCTION BETWEEN SUPERIOR AND INFERIOR SERVICE.

395. Qualifying service is divided into SUPERIOR and INFERIOR.

396. Service on pay not exceeding Rs. 10, and service in any office which has been graded as inferior by the rule or practice of the Local Government, is Inferior service. All other service is Superior service.

(Appendix 7A contains a list of appointments specially classed as Superior and Inferior.)

397. *Cancelled.*

Service partly Inferior and partly Superior.

398. An officer whose service has been for some time Inferior and for some time Superior may either count—

(a) the whole as Inferior towards pension or gratuity on the Inferior scale, or

(b) the Superior portion towards pension or gratuity on the Superior scale, and the Inferior portion towards gratuity on the Inferior scale.

Under (a) the pension or gratuity is calculated on the pay (whether in Superior or Inferior service) which the officer drew immediately before his retirement.

Under (b) the pension or gratuity on the Superior scale is calculated upon the average emoluments or emoluments respectively which the officer drew when last in Superior service, and the gratuity on the Inferior scale upon the pay which he drew when last in Inferior service; provided that the total gratuity or gratuity *plus* pension granted under this clause shall not exceed what would have been admissible, if the whole service had been Superior.

If an officer has been reduced from the Superior to the Inferior class for misconduct, he cannot have the benefit of this Article, without the special permission of the Local Government.

399. The claims of an officer, promoted from an Inferior to a Superior grade as a reward for meritorious service, will be specially considered by the Government of India or by the Local Government under whom the officer is serving. This rule is to be strictly interpreted and a claim under it can be founded only on exceptional promotion made out of the ordinary course.

Exceptional Cases.

400. If an officer holds two or more offices, each of which is Inferior by reason of its pay not exceeding Rs. 10, he cannot count service as Superior, on the ground that his aggregate pay exceeds Rs. 10 unless the offices were arranged and their pay determined with the intention that they should be held by one individual.

401. The service of a postman or village postman, whatever his pay, is Superior service.

402. (*a*) When the regular duties of an officer whose pay exceeds Rs. 10 but who bears an Inferior designation, are really such as are ordinarily performed by a Superior servant, his claim to pension should be specially referred to the Local Government.

NOTE.—[It is not intended by this Article that an Inferior servant should count service as Superior in virtue of his voluntarily assisting in Superior work. It provides for the case of a person who is *engaged under due authority to do Superior work*, though with an Inferior designation]

(*b*) On the other hand, an officer whose real duties are those of an Inferior servant, even though his pay exceeds Rs 10, is not entitled to pension on the Superior scale merely because he draws pay under a Superior designation.

Examples —Accountants in the Province of Agra who served under the designation of "Potdars" A Lithographic Pressman designated as a Copying Clerk.

Chapter XVII.—Rules for Reckoning Service.

SECTION I.—SPECIAL ADDITIONS.

Special Appointments.

403. Subject to the restriction specified against the first five offices, an incumbent of one of the offices enumerated below, appointed on account of professional or other special qualifications, whose whole pensionable service has been passed in one or other of such offices, shall, if appointed at an age exceeding 25, be entitled to reckon as service qualifying for superannuation pension (but not for any other class of pension) the number of completed years by which his age may at the time of appointment have exceeded 25 years, subject to the proviso that five years shall be the maximum period which can be so added.

1. Deputy Legal Remembrancer, Bengal.
2. Assistant Secretary to the Bengal Legislative Council.
3. Presidency Magistrates.
4. City Civil Judge, Madras.
5. Judges of the Small Cause Court at a Presidency Town (other than the Chief Judges) and at Rangoon.

(Items 1–5:) When Barristers, Advocates, Solicitors, or Vakils.

6. The Astronomer, Madras.
7. Director of the Colaba Observatory.
8. Members of the Indian Educational Service who entered that Service after the 23rd July 1896.
9. Superintendent of the Government Museum and Principal Librarian of the Connemara Public Library, Madras.

NOTE.—[The extra years conceded under this Article count towards the limit of 28 years' qualifying service prescribed in Article 475, in the case of the officers mentioned in the latter rule or to whom its provisions may be specially extended.]

Exception —Subsequent promotion to an appointment which is not one of the offices enumerated in this Article, but is of similar nature and carries not less pay, does not deprive an officer of the concession prescribed above,

provided that he has, when so promoted, completed not less than five years' qualifying service in one of the offices enumerated in this Article.

404. In the case of officers who were in the Education Department on 23rd July 1896, the following rule applies.

For the purpose of calculating the amount of pension ordinarily admissible to an officer, not being a Native of Asia, whose qualifying service began after 25 years of age, and whose service for which pension is claimed amounts to not less than ten years, and has been passed wholly in one or other of the following offices, three years shall be added to the qualifying service :—

1. Directors of Public Instruction.
2. Inspectors of Schools.
3. Principals and Professors of Colleges.
4. Head Masters of Colleges and High Schools.

NOTE.—[The extra years conceded under this Article count towards the limit of 28 years' qualifying service prescribed in Article 475, in the case of the officers mentioned in the latter rule or to whom its provisions may be specially extended.]

405. *Omitted.*

406. *Omitted.*

SECTION II.—PERIODS OF LEAVE.

Superior Service.

407. Except as provided in Article 408, time passed on leave other than Privilege leave or Subsidiary leave does not count as Superior service.

408. Time passed on leave with allowances counts as service as follows :—

If the total service of the Officer is not less than—	He counts as service a period of leave out of India not exceeding—	He counts as service a period of leave in India not exceeding—
15 years	1 year	1 year.
20 "	2 years.	"
25 "	3 "	"
30 "	4 "	2 years.
35 "	5 "	"

NOTE 1.—[The periods in columns 2 and 3 are not cumulative, that is, an officer may not count two years' leave in 15 years' service or more than four years' leave in thirty years' service. The maximum amount of leave both in and out of India which may be counted is that shown in column 2.]

NOTE 2.—[Total service in this Article means total service reckoning from the date of commencement of service qualifying for pension and includes periods of leave.]

NOTE 3.—[For the purposes of this Article, Ceylon and the Straits Settlements are not held to be "out of India."]

409. Time passed on Departmental leave by subordinates in the Survey of India and in the Bengal and Bihar and Orissa Survey Departments whose service is superior counts, provided they return to duty when required by their superior officers.

NOTE —[Departmental leave granted to Tindals and others under clause (ii) of Article 295 and to inferior servants in the Bengal and Bihar and Orissa Survey Departments employed purely on field work is treated as service qualifying for pension]

410. Time passed on leave obtained to be present at an examination which must be passed before an officer is eligible for higher subordinate appointments, such as Deputy Magistracies, counts—(*See Article 285*).

411. The Government of India may at its discretion decide in the case of an officer (including a person in training for, but not actually appointed to Government service) who is selected to undergo a course of [illegible]

it.

NOTE 1 —[The Government of India and Local Governments may delegate their power under this Article to Heads of Departments as regards officers serving under them]

NOTE 2 —[The Government of India or a Local Government may issue general orders under this Article in regard to any specified class of officers under training]

Deputation out of India.

412. When an officer is deputed out of India on duty, the whole period of his absence from India counts When an officer on leave out of India is employed, or is detained after the termination of his leave, on duty, the period of such employment or detention counts.

Recall to Duty.

413. Time spent on the voyage to India by an officer who is recalled to duty before the expiry of any recognised leave out of India counts, provided his return to duty is compulsory (see Article 199).

Inferior Service.

414. An Inferior servant counts leave with and without allowances not exceeding in the aggregate that which might be given with allowances under the rules in Chapters XII and XIV.

415. *Cancelled.*

SECTION III —SUSPENSIONS, RESIGNATIONS, BREAKS, AND DEFICIENCIES IN SERVICE.

Periods of Suspension.

416. Time passed under suspension pending enquiry into conduct counts, if the suspension is immediately followed by reinstatement, but time passed under suspension adjudged as a specific penalty does not count.

417. If an officer, who has been suspended, pending enquiry into his conduct, is reinstated, but with forfeiture of any part of his allowances for the period of suspension, this period does not count (save with the special sanction of the Head of the Department), unless the authority who reinstates the officer expressly declares *at the time* that it shall count.

Resignations and Dismissals.

418. (*a*) Resignation of the public service, or removal from it for misconduct, insolvency, inefficiency not due to age, or failure to pass a prescribed examination entails forfeiture of past service.

(*b*) Resignation of an appointment to take up another appointment, service in which counts, is not a resignation of the public service.

419. Any authority who, on revision or appeal, reverses an order dismissing an officer, may declare that the officer's past service counts.

Interruptions.

420. An interruption in the service of an officer entails forfeiture of his past service, except in the following cases :—

(*a*) Authorised leave of absence.

(*b*) Unauthorised absence in continuation of authorised leave of absence so long as the office of the absentee is not substantively filled; if his office is substantively filled, the past service of the absentee is forfeited.

(*c*) Suspension immediately followed by reinstatement, which need not be to the same office.

(*d*) Abolition of office or loss of appointment owing to reduction of establishment.

(*e*) Transfer to non-qualifying service in an establishment under Government control. The transfer must be made by competent authority; an officer who voluntarily resigns qualifying service cannot claim the benefit of this exception. Transfer to a grant-in-aid school entails forfeiture. [*But see Example* (*c*) *of Article 386.*]

(*f*) Transfer to service on the Household establishment of the Viceroy.

(*g*) Time occupied in transit from one appointment to another, provided that the officer is transferred under the orders of competent authority, or, *if he is a non-gazetted officer, with the consent of* the head of his old office.

421. The authority who sanctions the pension may commute retrospectively periods of absence without leave into leave without allowances.

Condonation of Interruptions and Deficiencies.

422. Upon such conditions as it may think fit in each case to impose the authority competent to sanction the pension of an officer may condone all interruptions in his service.

NOTE.—[The powers under this Article shall be exercised subject to any rules which the Government of India may deem fit to prescribe.]

423. (1) Upon any conditions which it may think fit to impose, the authority competent to sanction the pension of an officer may condone a deficiency of three months in his qualifying service.

(2) If besides his qualifying service an officer has rendered actual service paid from General Revenues, but not counting for pension, or if an officer claiming a pension for Superior service has also rendered Inferior service the Government of India or the Provincial Government under whom the officer is serving, may condone a deficiency in his qualifying service not exceeding half his non-qualifying or Inferior service, as the case may be, subject to a maximum of twelve months in all.

NOTE.—[The two clauses of this Article are alternative and not cumulative.]

423A. *Cancelled.*

Chapter XVIII.—Conditions of Grant of Pension.

SECTION I.—CLASSIFICATION OF PENSIONS.

424. Pensions for "Superior service" are divided into four classes, the rules for which are prescribed in the following Sections of this Chapter:—

(*a*) Compensation pensions (see Section II).
(*b*) Invalid pensions (see Section III).
(*c*) Superannuation pensions (see Section IV).
(*d*) Retiring pensions (see Section V).

425. Pensions for "Inferior service" are regulated by Articles 481 to 485.

SECTION II.—COMPENSATION PENSION.

[illegible]

An appointment, the pay which of is reduced as part of a general scheme of revision, is abolished within the meaning of this Article. But in such case it may sometimes be cheaper to grant a personal allowance than a pension.

NOTE (1).—[" You report the case of an Overseer of eight years' service, whose pay was [illegible] *10th September 1879.*)]

427. To pension an officer still capable of useful service is a waste of public money; before a pension is granted to such an officer discharged on abolition of appointment, it must be carefully considered whether he cannot be otherwise provided for. The head of a department, in forwarding an application for

Compensation pension, should invariably state for what reasons is has been found impossible to provide suitable employment for the applicant.

Selection for Discharge.

428. The selection of the officers to be discharged upon the reduction of an establishment should *primâ facie* be so made that the least charge for Compensation pension will be incurred.

429. The discharge of one officer to make room for another better qualified is not the abolition of an appointment within the meaning of Article [illegible]

[illegible]

wise it may perhaps be better to postpone the reduction of establishment or abolition of appointment.—(*See orders printed as Appendix 8.*)

NOTE.—[The relaxation of the condition laid down in this Article requires the sanction of the Provincial Government in respect of appointments which it is competent to abolish, and otherwise of the Government of India.]

Restrictions.

430. A Deputy Collector, Munsiff, or similar officer who belongs to the public service, apart from his particular local appointments cannot obtain a Compensation pension on the abolition of a particular appointment.

431. No pension is admissible to an officer for the loss of an appointment on discharge after the completion of a specified term of service.

432. No pension may be awarded for the loss of a local allowance.

433. Schoolmasters or other officers who, in addition to their other duties, are employed in any capacity in the Postal Department, are not entitled to Compensation pension on being relieved of such duties.

Special Cases.

434. If it is necessary to discharge an officer in consequence of a change in the nature of the duties of his office, the case should be referred to the Local Government, who will deal with it in accordance with the rules laid down in this Section as to notice of discharge and compensation pension or gratuity.

435. If of two appointments held by one officer only one is abolished and it is desired to give him an immediate pension in respect of the abolished post, the case should be specially referred for the orders of the Government of India or of the Provincial Government competent to abolish the appointment.

Notice of Discharge.

436. Reasonable notice should be given to an officer in permanent employ before his services are dispensed with on the abolition of his office. If in any case, notice of at least three months is not given, and the officer has not

been provided with other employment on the date on which his services are dispensed with, then, with the sanction of the authority competent to dispense with the officer's services, a gratuity not exceeding his emoluments for the period by which the notice actually given to him falls short of three months, may be paid to him, in addition to the pension to which he may be entitled under Articles 474 to 481 ; but the pension shall not be payable for the period in respect of which he receives a gratuity in lieu of notice.

1. [illegible] any gratuity.

2 Unless it contains an express statement to the contrary an order for the abolition of [illegible]

NOTE —[" Emoluments " in this rule means the emoluments or leave allowances (or partly the one, partly the other) which the officer would be receiving during the period in question, had the notice not been given him]

436A. Whenever it is found necessary to determine the service of an officer serving under a contract within the period of his agreement, a specific intimation of the determination of the agreement and of the grounds on which it has been determined shall be furnished to the officer in writing.

Offer of Re-employment.

437. An officer discharged with a Compensation pension may not, without surrendering his pension, refuse to accept any appointment which the Local Government thinks fit, within six months from the date of his discharge, to [illegible] equitably be expected to accept.

438. The rule in Articles 511 and 512, requiring the refund of a Compensation gratuity on re-employment, applies to a gratuity awarded under Article 436, if the officer is permanently re-employed within three months from the date of notice. But the officer need not refund that proportion of his gratuity under this rule which the interval of his non-employment bears to the whole period for which the gratuity is given. If the officer is re-employed only temporarily, he need refund no part of his gratuity ; but if such temporary employment is foreseen, the gratuity should be proportionately reduced

439. Article 437 applies also to the case of an officer entitled to Compensation pension, who, upon the abolition of his own appointment, is transferred by competent authority to another appointment. To such an officer a Compensation pension may be simultaneously awarded, subject always to the limitation prescribed by Article 514.

PART IV.

Acceptance of new Appointment.

440. If an officer who is entitled to Compensation pension accepts instead another appointment in the public service, and subsequently becomes again entitled to receive a pension of any class, the amount of such pension shall not be less than he could have claimed if he had not accepted the appointment

SECTION III.—INVALID PENSION

441. An Invalid pension is awarded, on his retirement from the public service, to an officer who by bodily or mental infirmity is permanently incapacitated for the public service, or for the particular branch of it to which he belongs.

Rules regarding Medical Certificates.

442. If an officer applying for an Invalid pension is sixty years old or upwards, no certificate by a Medical Officer is necessary; it suffices for the head of the office to certify to the incapacity of the applicant. Otherwise incapacity for service must be established by a medical certificate attested as follows:—

(*a*) If the officer submitting it is on leave in England—by the Medical Board at the India Office

(*b*) If he is serving at or near the capital town of a Province—by the Administrative Medical Officer of the Province, or by a Medical Committee over which the Administrative Medical Officer should, when practicable, preside.

(*c*) If he is an officer in Superior service, and is serving in the interior of the country under such circumstances that, in the opinion of the authority which sanctions the pension, he can be conveniently required to appear before a Medical Invaliding Committee—by such Committee.

(*d*) In other cases, the authority which sanctions the pension may either accept a certificate given by a single Commissioned Medical Officer or Medical Officer in charge of a civil station, or assemble a special Invaliding Committee at a convenient civil station.

(*e*) If the pension applied for exceeds Rs 100 a month, a certificate by a single Medical Officer should not be accepted as sufficient, if it is possible, without undue inconvenience, to assemble an Invaliding Committee or to cause the applicant to appear before the Director-General, Indian Medical Department, or the Standing Medical Committee at the Presidency.

(*f*) Except in the case of an officer on leave in England, no medical certificate of incapacity for service may be granted unless the applicant produces a letter to show that the head of his office or department is aware of his intention to appear before the Medical Officer. The Medical Officer shall also be supplied by the head of the office or department in which the applicant is employed, with a statement of what appears from official records to be the applicant's age. Where the applicant has a service book, the age there recorded should be reported.

443. (*a*) A succinct statement of the medical case, and of the treatment adopted, should, if possible, be appended.

(b) If the Examining Medical Officer, although unable to discover any specific disease in the officer, considers him incapacitated for further service by general debility while still under the age of fifty-five years, he should give detailed reasons for his opinion, and, if possible, a second medical opinion should always in such a case be obtained.

(c) In a case of this kind, special explanation will be expected from the head of the office or department of the grounds on which it is proposed to invalid the officer.

444. A simple certificate that inefficiency is due to old age or natural decay from advancing years, is not sufficient in the case of an officer whose recorded age is less than fifty-five years, but a Medical Officer is at liberty, when certifying that the officer is incapacitated for further service by general debility, to state his reasons for believing the age to be understated. An officer's pension should not be reduced under Article 478 (a) on the ground of such a belief having been expressed unless it is clearly shown by the medical and other evidence that the age has been intentionally understated.—[*See clauses (b) and (c) of the preceding Article.*]

Form of Medical Certificate in England.

445. The form of the medical certificate given by the Medical Board attached to the India Office, respecting an officer applying for pension in England is as follows :—

" We have carefully examined Mr.

Taking into account all the facts of the case as well as his present condition, we consider that he is incapable of discharging the duties of his situation, and that such incapability is likely to be permanent. We therefore recommend that he be permitted to retire from the service of Government on the pension or gratuity for which he may be eligible."

446. If any doubt arises regarding the validity of a certificate by the Medical Board attached to the India Office, the Audit Officer must not of his own motion reject the certificate as invalid, but must submit the matter for the decision of the Local Government.

NOTE.—[The Local Government may delegate its power under this Article to Heads of Departments.]

Form of Medical Certificate in India.

447. (a) The form of the certificate to be given respecting an officer applying for pension in India is as follows :—

Certified that I (we) have carefully examined *A B*, son of *C D*, a ———— in the ———— ———— His age is by his own statement ———— years, and by appearance about ———— years. I (we) consider *A B* to be completely and permanently incapacitated for further service of any kind [or in the Department to which he belongs] in consequence of (*here state disease or cause*). His incapacity does not appear to me (us) to have been caused by irregular or intemperate habits.

NOTE.—[If the incapacity is obviously the result of intemperance, substitute for the last sentence: "In my (our) opinion, his incapacity is the result of irregular or intemperate habits."]

(*If the incapacity does not appear to be complete and permanent, the certificate should be modified accordingly and the following addition should be made:*) I am (we are) of opinion that *A B* is fit for further service of a less laborious character than that which he has been doing [or may, after resting for ——— months, be fit for further service of a less laborious character than that which he has been doing].

(*b*) The object of the alternative certificate (of partial incapacity) is that an officer should, if possible, be employed even on lower pay, so that the expense of pensioning him may be avoided. If there be no means of employing him even on lower pay, then he may be admitted to pension; but it should be considered whether, in view of his capacity for partially earning a living, it is necessary to grant to him the full pension admissible under rule The principle of Article 427 must always be carefully borne in mind.

Signallers in the Telegraph Department.

448. (*a*) In the case of Signallers in the Indian and Indo-European Telegraph Departments, the medical certificate prescribed by Article 447 may, if it is found after medical examination that it cannot be granted, be dispensed with in special cases when inefficiency is not the result of misconduct, and instead of it two certificates—

(i) one in form A signed by two superior officers of the Telegraph Department; and

(ii) the other in form B signed by the Director-General of Telegraphs —may be substituted.

FORM A. "We certify that, after a perusal of the records of *A B's* service and of the report of his immediate superior during the last twelve months of his service, we are satisfied that he is permanently incapacitated for the duties of a Signaller in the Telegraph Department."

FORM B. "After a careful consideration of *A B's* case, I concur with Messrs. *C* and *D* in thinking that he is permanently incapacitated for the duties of a Signaller in the Telegraph Department, and accordingly recommend that he may be permitted to retire on the pension or gratuity for which he may be found eligible."

(*b*) The practice enjoined in Articles 447 (*b*) and 453 of re-employing pensioners should be carefully followed as far as practicable in these cases.

(*c*) Officers permitted to retire under this Article may be granted a pension or gratuity of only four-fifths of the amount that would be admissible for a man permanently unfit for any duty.

NOTE.—[This Article applies only to men who are "Signallers," including in that term Telegraph Masters who are members of the signalling staff, when they retire.]

PART IV.

Special Precautions in the Police.

449. District Superintendents of Police should be on their guard against endeavours to retire on Invalid pension by officers who are capable of serving longer.

450. Medical Officers should confine themselves to recommending leave to such policemen as are not likely to benefit by a further stay in hospital, and should not certify that a policeman is incapacitated for further service unless they are officially requested to report upon his incapacity for further service.

451. Medical Officers should be specially searching in their examination of the physical unfitness of every applicant for pension, and, whenever the number of applicants for pensions is large, the examination should, if possible, be conducted by two Medical Officers.

Restrictions.

452. An officer discharged on other grounds has no claim under Article 441, even although he can produce medical evidence of incapacity for service.

453. Article 427 applies, *mutatis mutandis*, in the case of an officer invalided under Article 441 as unfit for employment only in some particular branch of the public service. Every effort should be made to find for such an officer other employment suited to his particular capacity.

454. If the incapacity is directly due to irregular or intemperate habits, no pension can be granted. If it has not been directly caused by such habits, but has been accelerated or aggravated by them, it will be for the authority by which the pension is grantable to decide what reduction should be made on this account.

Applicant to be discharged.

455. An officer who has submitted under Article 442 a medical certificate of incapacity for further service, must not (except for special reasons, to be reported to the Local Government) be retained in active service pending a decision on his application for pension, nor can he obtain leave of absence except Subsidiary leave preparatory to retirement.

Without the special orders of the authority which has power to sanction the pension, service after the date of such medical certificate does not count for pension.

456. The object of Article 455 is to discourage tentative applications; but an inferior servant (including in that term a Police officer whose pay does not exceed Rs. 20) who, in the opinion of the head of his office, is fit for light work may be retained in employment till his pension is sanctioned, provided that his place is not filled up till he retires, and that his service counts only to the date of his medical certificate.

457. Article 455 refers only to the retention in *active* service of an officer who has furnished a medical certificate in support of an application for Invalid pension or gratuity while in India. The retirement of an officer who is absent on leave other than Privilege leave, when such certificate is submitted, may have effect from the termination of his leave, and the officer may continue to draw leave allowance to the end of his leave

SECTION IV.—SUPERANNUATION PENSION.

458. A Superannuation pension is granted to an officer in superior service entitled or compelled, by rule, to retire at a particular age.

459. (*a*) An officer who has attained the age of 55 may be required to retire by the Local Government under which he is employed. The Local Government may delegate this power, in respect of a non-gazetted officer, to the authority which can fill up his appointment or can sanction his pension.

(*b*) The rule should be worked with discretion in order to avoid depriving the State of the valuable experience of really efficient officers and adding unnecessarily to the non-effective charges. In the case of officers holding superior appointments, the standard of efficiency by which retention is to be decided is above the standard required in lower appointments. In every case in which the rule is enforced the reasons for enforcing it should be recorded. But no claim from an officer to compensation on account of the enforcement of the rule will be entertained.

(*c*) Each such officer's case should be taken up when he is 55 years old and before the expiry of each extension of service. In every case the extension should be given for not more than one year at a time.

(*d*) An officer who has attained the age of 60 cannot be retained in the service of Government save in very exceptional circumstance, and with the sanction of the Local Government.

460. An officer, who is compelled to retire under the preceding Article, or who retires voluntarily under Article 464, and part of whose service has been Inferior, is entitled to pension on the same conditions as if he had been invalided under Article 481, and to the option allowed by Article 398.

Survey of India.

461. Officers of the Imperial and Provincial Services of the Survey of India cease to be in employ on attaining the age of 55 years, unless specially permitted by the Secretary of State, in the interests of the public service, to remain in the Department for a further definite period.

of State for information.

462. *Cancelled.*

Procedure.

463. With a view to the issue of necessary orders as to retention or otherwise of officers to whom Article 459 applies, the Audit Officer should on or about the 1st of September in each year, submit to the authorities concerned (*vide* Article 459 and Appendix No. 1) a list of those who will attain the age of 55, or complete the term for which extension has been allowed, during the next official year.

Optional Retirement at Fifty-five.

464. An officer in Superior service who has attained the age of 55 years may, at his option, retire on a Superannuation pension.

SECTION V.—RETIRING PENSION.

465. A Retiring pension is granted to an officer who voluntarily retires *after completing qualifying Superior service for thirty years or such less time as may for any special class of officers be prescribed.*

466. (*See Article 509A.*)

Combined Appointments.

467. [illegible]
save [illegible]
partn [illegible]
until he finally retires.

Note.—[The Government of India may delegate its power under this Article to minor Local Governments and Heads of Departments. A Provincial Government also may delegate its power to Heads of Departments.]

Chapter XIX.—Amount of Pensions.

SECTION I.—GENERAL RULES.

468. The amount of pension that may be granted is determined by length of service as set forth in Articles 474 to 485. Fractions of a year are not taken into account in the calculation of any pension admissible to an officer under this part of these Regulations.

468A. Pensions fixed in rupees should be calculated to the nearest anna, that is, where the exact amount works out to six pies or more, it should be taken to the next higher anna, amounts below six pies being disregarded.

Note.—[This rule applies to all pensions granted under these Regulations.]

Currency.

469. A pension is fixed in rupees, and not in sterling money, even though it is to be paid in England.

Award of Full Pension.

470. (a) The full pension admissible under the rules is not to be given as a matter of course, or unless the service rendered has been really approved. (*See Appendix 9.*)

(b) If the service has not been thoroughly satisfactory, the authority sanctioning the pension should make such reduction in the amount as it thinks proper.

Limitations.

471. An officer entitled to pension may not take a gratuity instead of pension.

NOTE.—[See the note under Article 807.]

472. In the case of an officer who has any service under the Imperial (British) Government, pension from Indian Revenues should not be fixed until it has been ascertained whether any pension is payable from Imperial funds in respect of the service under the British Government.

473. An officer, not being a Military officer or a member of the Indian Civil Service, transferred to service under a Colonial Government, on final retirement from the Colonial service on pension or compensation allowance, receives, from Indian Revenues, for each completed year of qualifying and uninterrupted service in India, a pension of one-sixtieth of his average emoluments at the time of his transfer, such average emoluments to be calculated for the last three years, or, if the whole service in India is less than three years, for the whole period of service. The pension is subject to a maximum limit of Rs. 2,000 a year for an Indian service not exceeding ten years and Rs. 4,000 a year in any other case.

NOTE.—[The sanction of the Government of India is required to the transfer of an officer to any service of the description mentioned in this Article.]

SECTION II.—AMOUNT OF SUPERIOR PENSION.

474. The amount of a pension is regulated as follows :—

(a) After a service of less than ten years, a gratuity not exceeding (except in special cases, and under the orders of the Government of India) one month's emoluments for each completed year of service. If the emoluments of the officer have been reduced during the last three years of his service, otherwise than as a penalty, average emoluments may, at the discretion of the authority which has power to sanction the gratuity, be substituted for emoluments.

(*b*) After a service of not less than ten years a pension not exceeding the following amounts :—

Years of completed service.	Scale of pension.				Maximum limit of pension			
					Rs.		Rs.	
10	10	sixtieths of	average	emoluments	2,000	a year, or	166⅔	a month.
11	11	"	"	"	2,200	"	183⅓	"
12	12	"	"	"	2,400	"	200	"
13	13	"	"	"	2,600	"	216⅔	"
14	14	"	"	"	2,800	"	233⅓	"
15	15	"	"	"	3,000	"	250	"
16	16	"	"	"	3,200	"	266⅔	"
17	17	"	"	"	3,400	"	283⅓	"
18	18	"	"	"	3,600	"	300	"
19	19	"	"	"	3,800	"	316⅔	"
20	20	"	"	"	4,000	"	333⅓	"
21	21	"	"	"	4,200	"	350	"
22	22	"	"	"	4,400	"	366⅔	"
23	23	"	"	"	4,600	"	383⅓	"
24	24	"	"	"	4,800	"	400	"
25 and above	30	"	"	"	5,000	"	416⅔	"

NOTE 1.—[For the precise meaning of average emoluments, see Articles 486 and 487.]

475. Officers holding any of the appointments enumerated below and belonging to what was formerly termed the Uncovenanted Service, may be allowed by the Local Government an additional pension of Rs. 1,000 a year, provided that they have rendered not less than three years of effective service (that is, service of the same nature as that which, under the provisions of Article 644, counts for the special pensions admissible under Article 642) in such appointment, and provided also that in each case during such service the officer has shown such special energy and efficiency as may be considered deserving of the concession. In the case of officers entering Government service after the 31st December 1909, the grant of the additional pension is subject to the further condition that they must, in the event of voluntary retirement, have completed, twenty-eight years of qualifying service. The same rule applies to officers of the Forest Department who entered Government service on or before the 31st December, 1909 (including those who were appointed on probation on or before that date), with the exception of those who have, at the time of their retirement, rendered three years' active service in appointments not below the first grade of Conservators. Voluntary retirement for the purpose of this rule should be taken as retirement under Articles 461 and 465.

REGISTRATION DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships.

POLICE DEPARTMENT.—Inspectors-General and Deputy Inspectors-General under Local Governments and Administrations, and the Commissioners of Police, Calcutta, Madras, Rangoon and Bombay.

JAIL DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships.

EDUCATION DEPARTMENT.—Directors of Public Instruction under Local Governments and Administrations.

ACCOUNTS DEPARTMENT (CIVIL)—

(*a*) Comptroller and Auditor General and Accountants General.

(*b*) (i) In the case of officers of the late Enrolled List now employed in the Indian Finance Department who have not elected the scale of pay sanctioned in the Secretary of State's Despatch No. 51-Financial, dated the 11th May, 1906—Deputy-

Comptroller General; Deputy Auditors General; Comptroller, India Treasuries; and Comptroller, Central Provinces.

(ii) In the case of other officers of the Indian Finance Department—Appointments in class I of that Department (including those in class I of the late Enrolled List and in class I of the late Superior Accounts Branch of the Public Works Departments) *

* Mr. T. Ryan is subject to the special rule in Article 642 of these Regulations.

Accounts Department (Military)—Military Accountant General and Controllers of Military Accounts.

POSTS AND TELEGRAPHS.—Director General of Posts and Telegraphs, Chief Engineer, Telegraphs, Postmaster-General, Deputy Director-General of the Post Office, Director, Telegraph Engineering and Deputy Director-General, Telegraph Traffic.

AGRICULTURAL DEPARTMENT.—Agricultural Adviser to the Government of India.

FOREST DEPARTMENT.—Inspector-General of Forests, and Conservators.

ARCHÆOLOGICAL DEPARTMENT.—Director-General.

GEOLOGICAL SURVEY DEPARTMENT.—Director.

SURVEY DEPARTMENT.—Surveyor General and Superintendents of Circles

METEOROLOGICAL DEPARTMENT.—Director-General of Observatories.

POLITICAL DEPARTMENT.—Officers of the rank of Resident in the graded list of the Political Department.

GENERAL ADMINISTRATION.—Commissioners of Divisions.

JUDICIAL DEPARTMENT.—Divisional Judges of the first grade in Burma.

CRIMINAL INTELLIGENCE DEPARTMENT.—Deputy Director of Criminal Intelligence.

LAND REVENUE DEPARTMENT.—Settlement Commissioner and Director of Land Records in Burma.

IMPERIAL CUSTOMS DEPARTMENT.—Collectors.

PRINTING, STATIONERY AND STAMPS DEPARTMENT.—Controller.

NOTE 1.—[See special addition to the form of certificate in Form No. 26 (Page [illegible]).]

Service Regulations]

476. The following special scale of pension is admissible to officers appointed in England to the Forest and Geological Survey Departments:—

(a) After a service of less than ten years, an invalid gratuity on the scale laid down in Article 474 (a).

(b) After a service of not less than ten years, an invalid pension not exceeding the following amounts:—

Years of completed service.	Scale of pension	Maximum limit of pension.	
		Rs.	Rs.
10	20 sixtieths of average emoluments	1,000 a year or	83$\frac{1}{3}$ a month
11	21 " " "	1,400 "	116$\frac{2}{3}$ "
12	22 " " "	1,800 "	150 "
13	23 " " "	2,200 "	183$\frac{1}{3}$ "
14	24 " " "	2,600 "	216$\frac{2}{3}$ "
15	25 " " "	3,000 "	250 "
16	26 " " "		
17	27 " " "		
18	28 " " "		
19	29 " " "		

(b) After a service of not less than ten years a pension not exceeding the following amounts :—

Years of completed service	Scale of pension.				Maximum limit of pension.			
					Rs.		Rs.	
10	10	sixtieths	of average	emoluments	2,000	a year, or	166⅔	a month
11	11	"	"	"	2,200	"	183⅓	"
12	12	"	"	"	2,400	"	200	"
13	13	"	"	"	2,600	"	216⅔	"
14	14	"	"	"	2,800	"	233⅓	"
15	15	"	"	"	3,000	"	250	"
16	16	"	"	"	3,200	"	266⅔	"
17	17	"	"	"	3,400	"	283⅓	"
18	18	"	"	"	3,600	"	300	"
19	19	"	"	"	3,800	"	316⅔	"
20	20	"	"	"	4,000	"	333⅓	"
21	21	"	"	"	4,200	"	350	"
22	22	"	"	"	4,400	"	366⅔	"
23	23	"	"	"	4,600	"	383⅓	"
24	24	"	"	"	4,800	"	400	"
25 and above	30	"	"	"	5,000	"	416⅔	"

NOTE 1.—[For the precise meaning of average emoluments, see Articles 486 and 487.]

475. Officers holding any of the appointments enumerated below and belonging to what was formerly termed the Uncovenanted Service, may be allowed by the Local Government an additional pension of Rs. 1,000 a year, provided that they have rendered not less than three years of effective service (that is, service of the same nature as that which, under the provisions of Article 644, counts for the special pensions admissible under Article 642) in such appointment, and provided also that in each case during such service the officer has shown such special energy and efficiency as may be considered deserving of the concession. In the case of officers entering Government service after the 31st December 1909, the grant of the additional pension is subject to the further condition that they must, in the event of voluntary retirement, have completed, twenty-eight years of qualifying service. The same rule applies to officers of the Forest Department who entered Government service on or before the 31st December, 1909 (including those who were appointed on probation on or before that date), with the exception of those who have, at the time of their retirement, rendered three years' active service in appointments not *below the first grade of Conservators.* Voluntary retirement for the purpose of this rule should be taken as retirement under Articles 461 and 465.

REGISTRATION DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships.

POLICE DEPARTMENT.—Inspectors-General and Deputy Inspectors-General under Local Governments and Administrations, and the Commissioners of Police, Calcutta, Madras, Rangoon and Bombay

JAIL DEPARTMENT.—Inspectors-General under Local Governments, but not under Chief Commissionerships

EDUCATION DEPARTMENT.—Directors of Public Instruction under Local Governments and Administrations.

ACCOUNTS DEPARTMENT (CIVIL)—

(a) [illegible]

(b)

Dockyard and Military Artificers.

484. A Dockyard or Military Artificer whose qualifying service, on pay exceeding ten rupees, excluding interruptions of, and absence from, duty of every kind, amounts to not less than twenty-five years, may be granted a Compensation or Invalid pension not exceeding three-fourths of the pension to which he would be entitled if his service on pay exceeding ten rupees were reckoned as Superior.

Telegraph Messengers.

485. A telegraph messenger paid on the task-work system shall, for the purposes of calculating pension or gratuity, be regarded as if he drew a monthly pay equal to the average pay drawn by him during the last six months of his service. The word "pay" used in this Article means subsistence allowance *plus* task-work earnings.

SECTION IV.—ALLOWANCES RECKONED FOR PENSION.

Emoluments and Average Emoluments.

486. The term "Emoluments," when used in this Part of the Regulations, means the emoluments which the officer was receiving immediately before his retirement and includes—

(*a*) Pay;
(*b*) Personal allowance; continues to reckon as part of "Emoluments" even when it is wholly or partly absorbed in acting allowance not so reckoning;
(*c*) Fees or commission, if they are the authorised emoluments of an appointment, and are *in addition* to pay. In this case "Emoluments," means the average earnings for the last six months of service;
(*d*) Charge allowance to Telegraphists in the Indian Telegraph Department and to Signallers, Inspectors and Charge Clerks in the Indo-T
(*e*) Commissi ower Burma. "Emoluments ıean the average of his monthly receipts in commission during the three years' actual service previous to retirement—but see example (3) under Article 489;
(*f*) Bullock Train allowance in the Post Office Department;
(*g*) Allowance attached to a Professorship or Lecturership in a Government Institution;
(*h*) Acting allowances of an officer without a substantive appointment if the acting service counts under Article 371, and allowances drawn by an officer appointed provisionally, or substantively *pro tempore* to an office which is substantively vacant and on which no officer has a lien, or to an office temporarily vacant

in consequence of the absence of the permanent incumbent on leave without allowances, or on transfer to Foreign service.

1 In the case of Section writers whose service has been allowed to count for pension under special orders of the Government of India, and of Press servants whose service qualifies under Article 380 "Emoluments" means the average earnings of the last six months of service. For calculating gratuity on the Superior scale, "Emoluments" means the average earnings of the last six months in Superior service, and for calculating pension on the Inferior scale, Pay means the average earnings of the last six months in Inferior service.

487. The term "Average Emoluments" means the average calculated upon the last three years of service.

be taken into account

2 If, during the last three years of his service, an officer has been absent from duty on leave without allowances (not counting for pension), or in inferior service, or suspended under such circumstances that the period of suspension does not count as service, the periods so passed should be disregarded in the calculation of the average, an equal period before the three years being included.

3. Excepting as provided in rules 1 and 2, only emoluments actually received can be included in the calculation. For example, when an officer is allowed to count time retrospectively

NOTE 1.—[This rule applies in the case of a Press servant remunerated by a fixed rate of pay if his pay is met from the grant for piece-work]

NOTE 2 —[Overtime earnings of Press servants paid at piece-work rates may be taken into account in calculating Average Emoluments under this rule, but such earnings must be excluded in reckoning the Average Emoluments of Press employés who draw pay at fixed rates.]

NOTE 3.—[If during the last 72 months of his service a Press servant has been for some period on fixed pay and for other periods a piece-work employé, overtime earnings may be taken into account in calculating pension only for the periods during which he was remunerated at piece-work rates]

Allowances which do not count.

488. An officer cannot count the following allowances :—

(1) Local allowances, including allowances given for duties performed in addition to the work of a regular appointment ;
(2) Messing allowances, Working allowances, and Provision allowances to officers in the Marine Department ;
(3) House-rent allowance, or estimated value of free quarters ;
(4) Tour and other allowances (to officers who accompany the Viceroy or any Government) ;
(5) Compensation for dearness of provisions.

Net Emoluments taken.

489. Any part of an officer's pay or emoluments, which is specially intended to provide for expenses incidental to his duty, must be excluded.

The following are examples of the operation of this Article :--

(1) When an officer's pay is intended partly to cover the expense of his providing or keeping a horse, his pay must be taken only at what it would be if it was not intended to cover such expense. When a water-carrier's pay includes provision for a bullock, his pay must be taken at what it would be if he were not required to keep a bullock.

(2) When a consolidated pay specially includes tentage, travelling allowance, or house allowance, these must be deducted.

(3) The commission paid to a Thugyi in Lower Burma goes in part to pay expenses incidental to his office. In calculating "Emoluments" or "Average Emoluments" for pension purposes, 2½ per cent on a Thugyi's commission, if the average commission of the last three years of his service exceeds Rs. 600 a year, is deducted, as representing the expenses of his office; and pension is computed upon the remainder No deduction is made if the average commission of a Thugyi for the last three years of service does not exceed Rs. 600 a year, in such cases the pension is computed upon the total amount of such average commission.

(4) When an officer's pay is fixed at two rates, a smaller rate during stationary duty and a higher rate during periods passed on tour or travelling, the former rate alone should be the basis of the calculation.

490. When service on temporary duty counts for pension under Article 376, the pay of the permanent appointment held by the officer, and not that drawn in respect of the temporary duty, is taken into consideration in determining the amount of pension.

491. The preceding Article does not apply to an officer deputed temporarily to service in the Income Tax Department, or to an officer deputed on abolition of his appointment to special duty (*Article 379*), or to an officer who, when his appointment was abolished, was on special duty. In these cases the full allowances are counted.

Combination of Appointments.

492. If an officer has held more than one appointment, in respect of each of which, if he had held it separately and alone, pension would have been admissible to him, the pension admissible to him is the sum of the several pensions which would have been admissible to him if he had held each office separately and alone. The consolidated pension thus admissible is subject to the limitations prescribed in Articles 474 to 480 and 481.

493. An officer is not entitled, for service in an office conjointly with another office, to any pension which would not have been admissible to him if he had held the office separately and alone.

PART IV.

Chapter XX.—Special Rules for the Police.

SECTION I.—EXTENT OF APPLICATION.

Government Police.

494. The rules in this Chapter apply to—

(1) Members of Police Forces constituted under Acts XIII of 1856, XXIV of 1859, and V of 1861 of the Governor-General of India in Council, Act IV of 1866 of the Lieutenant-Governor of Bengal in Council, and Acts VII of 1867 and I of 1872 of the Governor of Bombay in Council.

(2) The Trans-Indus Police Force, which was not organised under Act V of 1861 until the 4th August 1873, and never possessed a Superannuation Fund.

(3) Members of the Salt Preventive Force employed on the Northern Frontier line, at the Runn Salt Works in the Bombay Presidency and on the Salt Preventive Lines on the Goa and Daman frontiers, though the Forces to which they belong are not constituted under any Act of the Legislature, and never possessed a Superannuation Fund

(4) Members of the Police Force serving in the Baluchistan Agency, and sowars of the Somali Coast Mounted Police Force, although the Forces are not constituted under any Act of the Legislature.

Municipal Police.

495. (*a*) If the Police of a town are wholly supported by, and under the control of, a Municipality, the Government has no concern with their pensions.

(*b*) But if the Government, being interested in the efficiency of a Police Force, paid, wholly or partly, by a Municipality, the Calcutta Port Trust, or from Cantonment Funds, or from the General Revenues subsidised by a contribution from a Municipality, the Calcutta Port Trust, or from Cantonment Funds, undertakes the organisation and control of the Force, as connected *with and auxiliary to the Civil Constabulary, service in such a Force* qualifies The contributions of Municipalities, the Calcutta Port Trust, or of Cantonment Funds towards the cost of the pensions of such Forces are, for the present, undetermined.

496. The Police Force in the Presidency towns of Calcutta, Madras, and Bombay, and in the Municipalities in Lower Bengal, come under clause (*b*) of the preceding Article.

497. *Omitted.*

Railway Police.

498. *The service of members of the Railway Police, appointed and con*trolled by Government, qualifies, though they may be either wholly or partly paid by the Railway Companies.

SECTION II.—QUALIFYING SERVICE.

499. Service in any of the Police Forces mentioned in Article 494, after the establishment of a Superannuation Fund in the Force, qualifies.

of the ordinary pension rules

1905.

In the Police Forces of which the Superannuation Funds were abolished the pay of the

of receiving back their subscriptions and coming under the ordinary pension rules, or of continuing their subscriptions and eventually receiving pensions under the special rules for the Police"]—[*Finance Department to Bombay, No 1051 D, dated 23rd June 1876.*]

500. Men of the Police Force of the Cities of Bombay and Calcutta who have served the full time for pension in the Force and who joined the Force before the 1st April 1886 and 27th December 1905, the respective dates of the abolition of the Superannuation Funds, are, on being invalided, admitted to the benefits of the Superannuation Fund on paying up their subscriptions for the full period of their service. Under this rule the service of an officer in the Bombay and Calcutta City Police before the establishment of the Superannuation Fund counts towards pension under the rules of the Funds if he pays up his subscriptions for the whole period of his service in the Police Force.

Service before Enlistment.

501. In the following cases service rendered before enlistment in the present Police Constabulary qualifies :—

(*a*) Soldiers transferred to the Police on reduction of the Native Army count their Army service.

PART IV.

1 This concession does not apply to a soldier voluntarily taking his discharge from the Army and entering the Police, except as to soldiers who, under the authority of the order in the Military Department, No. 526 E. S., dated the 25th October 1880, volunteered for service in the Port Blair Police.

(b) Service in Superior grades in any other Department qualifies.

(c) Service in the Bombay Excise (Abkari) Police, before that Force was amalgamated with the Bombay District Police, qualifies.

(d) Native Commissioned officers and men of the Army who volunteer for transfer to the levies and Military Police raised in Burma, in consequence of the annexation of Upper Burma, are allowed to count their Army service for pension under the rules applicable to the Police in that Province.

(e) A subadar or jemadar of the Bengal or Assam Military Police, recruited from the Army or from a local corps, and Native Officers and men of the Dera Ghazi Khan Border Military Police recruited from the Army count service as follows :—

(i) A man recruited from the Army will be eligible for pension under the civil rules (counting both his past Military and Police service) on completion of ten years' service in the Military Police. If he retires with less than ten years' service in the Police, he will be granted pension on the Military scale according to his rank for the whole period of his service including service in the Police.

(ii) A man recruited from a local corps may count half his service in such corps towards Civil pension.

NOTE.—[Pensions granted to men who count Army service under the foregoing rules are, if their Military service was sufficient to entitle them to pension if discharged without fault, a Military charge; otherwise they are a Civil charge.]

Breaks in Service.

502. Subject to the provisions of Chapter XXI, a policeman on pay not exceeding twenty rupees, who re-enlists within one year, after discharge or resignation, may, with the sanction of the authority who sanctions the pension or of the Inspector-General of Police, count his service before such discharge or resignation.

SECTION III.—AMOUNT OF PENSION.

Officers on pay not exceeding Rs. 20.

503. The pension admissible to an officer, whose pay at date of discharge or resignation does not exceed twenty rupees, will be determined as prescribed in Article 505, according to one of the following scales :—

Scale A.—According to the rules of the Superannuation Fund of the Force

1. As the rules of the Superannuation Fund did not always provide for Compensation pension, the following orders were issued with reference to the reductions directed in 1869 :—

(1) Compensation pension should be awarded at the same rate as the Superannuation Fund Rules provide for Invalid pensions.

(2) But if a gratuity thus awardable is less than the amount (without interest) of the officer's subscription to the Fund, the difference should be made up.

Scale B.—According to the rules prescribed in Chapters XVII to XIX for the calculation of pensions for Superior service; except that all service in the Police after the age of eighteen years qualifies

NOTE.—[Policemen in the lower ranks of the Madras City Police, on salaries not exceeding Rs 20 a month, who enlisted after the 19th July 1871, may retire on pension without medical certificate after twenty-five years' service.]

504. (*a*) The pension of an officer of the Town Police of Calcutta who was in the Force before the 27th December 1905, and of an officer of the Town Police of Bombay who was in the Force before the 1st April 1886, is regulated by Scale A.

(*b*) The pension of an officer of the Town Police of Bombay, if he was enlisted or re-enlisted on or after 1st April 1886, is regulated by Scale B

505. The pension of an officer of any other Force is regulated as follows :—

(*a*) If he was in the Police before the 19th July 1871 and has served continuously since that date, by Scale A or Scale B according to his election.

(*b*) If he was enlisted or re-enlisted on or after the 19th July 1871, by Scale B.

(*c*) The pension of an officer enlisted in the Calcutta or Suburban Police Force on or after 27th December 1905 is regulated by Scale B. The pension of an officer who was enlisted before 27th December 1905 and subscribed to the Police Superannuation Fund, and whose pay at the date of discharge does not exceed Rs. 20, is, on his being invalided regulated by Scale A, provided he pays up his subscriptions from the 27th December 1905 to the date of his retirement. Failing such payments his pension or gratuity is regulated by Scale B.

Officers on pay exceeding Rs. 20.

506. The pension admissi[illegible] or resignation exceeds twenty [illegible] to ordinary service, except t[illegible]

[illegible]

a month.

1 When a Police officer, by promotion to a pay exceeding twenty rupees, loses any benefit as to pension which he would have enjoyed had his pay remained unchanged, his pension may be regulated as if he had not received the promotion

2. Men of the Bombay City Police count as Superior their service in the Force in Inferior grades before the establishment of the Superannuation Fund

Previous Inferior Service.

507. If part of an officer's continuous service qualifies for pension under the general rules, but does not qualify under the rules in this Chapter,

he may elect to receive, in lieu of the pension admissible under this Chapter, such pension as is admissible to him under Article [illegible] and (a) to (c) for the whole of his service, both Indian and European (see Article [illegible]).

[illegible]. An officer who, under Article [illegible], has elected to abide by Grade II, will, if he fail to qualify under the preceding Article, obtain, in lieu of the scale prescribed in Article [illegible], one month's pay for every completed two years of service but not more than twelve months' pay in all.

Calculation of Pension

509. Except in the case of officers of the Town Police of Calcutta and of officers of the Town Police of Bombay who were in the Force before the 1st April 1909 (Article [illegible]), pension is to be calculated upon the net pay, i.e., the pay actually received by the officer, and not upon the gross pay, i.e., the pay from which are deducted the contributions to the Superannuation Fund (see [illegible] Note (1) to Article [illegible]). But this rule shall not, unless he be either promoted to higher pay or degraded for misconduct to lower pay, be applied to any officer who on the [illegible] July 1907 was entitled by the rules of the Superannuation Fund to have his pension calculated on his gross pay.

Chapter XXI. Re-employment of Pensioners.

SECTION I. GENERAL.

509A. An officer, Civil or Military, may retire with the view of being re-employed and drawing pension in addition to pay, whether in the general service or in the service of any Local Fund.

510. When a person who was formerly in Government employ, either Civil or Military, is re-employed, whether temporarily or permanently, in Government service or in the service of a Local Fund, it shall be incumbent on him to declare the amount of any gratuity, bonus or pension received by him on retirement. The authority re-appointing him shall specifically state in the order of re-appointment whether any deduction is to be made from pension or salary as required by the rules of this Chapter and shall communicate a copy of the order to the Audit Officer.

510A. The attention of every officer who is to be re-employed should be specially called to the provisions of this Chapter by the authority re-employing him, and, whenever he becomes aware of such an appointment, by the Audit Officer; but the failure of such authority to do this will not be admitted as a ground for condoning any breach of the regulations contained in this Chapter.

SECTION II. CIVIL PENSIONERS.

Re-employment after Compensation Gratuity

511. An officer who has obtained a Compensation gratuity, if re-employed in qualifying service, may either retain his gratuity, in which case

[illegible]

his former service will not count for future pension, or refund it and count his former service.

512. The intention to refund must be stated immediately on re-employment; but the refund may be made by monthly instalments of not less than one-third of the officer's salary, and also not less than the whole gratuity divided by the number of months which have elapsed since the end of the service for which the gratuity was given. The right to count previous service does not revive till the whole amount is refunded.

NOTE [illegible]

513. (*See 510A.*)

After Compensation Pension.

514. (*a*) An officer who has obtained a Compensation pension, if re-employed, may retain his pension in addition to his pay: provided that, if he is re-employed in a post paid from General Revenues, the pension shall remain wholly or partly in abeyance, if the sum of the pension and the pay on re-employment exceeds the pay of the appointment on abolition of which the pension was given; that is to say, an officer can draw so much pension only as will make his total present pay and pension equal to the pay he drew at the time of his retirement. In the case, however, of a pensioner re-employed, in either a permanent or temporary appointment, for *bonâ fide* temporary duty lasting for not more than a year, the Local Government or, in cases where the pension does not exceed Rs. 10 a month, the officer who controls the establishment on which the pensioner is to be employed, may allow pension to be drawn in whole or in part, even though the sum total of pay and pension exceeds the pay which the officer drew on retirement.

NOTE 1.—[This rule applies to the re-employment on all establishments paid from the General Revenues, whether paid by fixed salary or by fluctuating monthly allowances; but it does not apply to pensioners employed on work as coolies and paid daily hire.]

NOTE 2.—[In the case of re-employment under a Local Fund, no deduction is made from a compensation pension.]

NOTE 3.—[The [illegible]
satior [illegible]
duly [illegible]
allow [illegible]

NOTE 4.—[The Local Government may delegate its power under this Article to Heads of Departments in respect of pensioners whose re-employment they are authorized to order.]

NOTE 5.—[The restrictions in this Article do not apply to *ex*-policemen whose pension does not exceed Rs. 10 a month or to *ex*-inferior servants.]

(*b*) If his re-employment is in qualifying service, he may either retain his pension (subject to the proviso above stated), in which case his former service will not count for future pension, or cease to draw any part of his pension and count his previous service. Pension intermediately drawn need not be refunded.

NOTE.—[An officer counts his previous service under clause (b) if on re employment his pension remains wholly in abeyance under the proviso to clause (a)]

515. In the case of a Section-writer whose service has been allowed to qualify for pension under special orders of the Government of India, or of a press servant (*see Article 380*) re-employed, the pay of the appointment abolished is taken at the average earnings of the last six months of employment.

516. If an officer does not, within three months from the date of his re-employment, exercise the option conceded by Article 514, of ceasing to draw pension and counting his former service, he may not thereafter do so without the permission of the Local Government.

517. An officer who, under Article 514, draws pension in addition to pay shall, [illegible] office, draw so much of his pension as will [illegible] leave up to the amount which would have [illegible] ken leave of the same kind under the same circumstances while holding his abolished appointment · Provided that his allowances on leave shall never be less than his pension.

518. *Cancelled*

After Invalid Pension.

519. There is no bar to the re-employment of an officer who has regained health after obtaining Invalid pension, or if an officer is invalided as being incapacitated for employment in a part cular branch of the service, to his re-employment in some other branch of the Service. The rules in such a case as to refunding gratuity, drawing pension, and counting service, are the same as in the case of re-employment after Compensation pension.

After Superannuation or Retiring Pension.

520. An officer who is in receipt of a superannuation or retiring pension shall not be re-employed or continue to be employed in service paid from general revenues or from a local fund, except on public grounds. Sanction to re-employment or extension of the term of employment may be given as follows :—

(*i*) By the Government of India in the Administrative Department concerned, when the pensioner served before retirement in a gazetted appointment directly under the Government of India or belonged to an Imperial Service or Imperial Branch of any Service, or was a Statutory Civilian or other officer who, before retirement, held a post usually filled by officers of an Imperial Service or Branch ;

(*ii*) In other cases, by the Local Government under whose administration the pensioner is re-employed ;

(*iii*) By any authority subordinate to a Local Government to whom the Local Government may delegate its powers under this Article in respect of pensioners re-employed in establishments under the control of such authority.

521. The authority competent to fix the pay and allowances of the appointment in which the pensioner is employed shall determine whether his pension shall be held wholly or partly in abeyance. If the pension is drawn wholly or in part, such authority shall take the fact into account in fixing the pay to be allowed to him; provided that (i) where a Local Government has delegated its power under clause (iii) of Article 520 to the Head of a Department, the latter may not allow the pensioner to draw full pension in addition to the full pay of the post except when the re-employment or continued employment is for *bonâfide* temporary duty lasting for not more than a year or the pension does not exceed Rs. 10 a month, and (ii) where the Local Government has delegated its power to any other authority subordinate to itself, such authority may not allow the pensioner to draw in full a pension of more than Rs. 10 a month in addition to the full pay of the post.

NOTE.—[The restrictions in this Article do not apply to *ex* policemen whose pension does not exceed Rs 10 a month, or to *ex* inferior servants.]

Exceptions.

522. The foregoing rules do not apply—

(i) to a pension paid from a Police Superannuation Fund constituted by contributions from the Force. Such a pension may be drawn, without restriction, in addition to salary; or

(ii) to pensioners re-employed in non-pensionable service on the subordinate establishment of a State Railway. Such pensioners retain their gratuities and continue to draw their pensions, subject, in the case of pensions of all classes, to the provisions of Article 514; or

(iii) to pensioners re-employed under the Court of Wards.

523. A pensioner of any class may be employed as an Extra Departmental Agent in the Post Office, or as a Sub-Registrar under the law for the registration of documents, remunerated by fees only.

524. *Cancelled.*

Employment on the Railway Board.

524-A. When an officer who is in receipt of a pension from Indian revenues is appointed President or Member of the Railway Board, he shall be allowed to draw his pension in addition to salary. If, however, an officer still in active service is so appointed, he will be ineligible for admission to pension during his tenure of office on the Board.

SECTION III.—MILITARY PENSIONERS.

525. (a) Except where it is otherwise expressly stated (see Article 509A), the foregoing rules do not apply to a Military pensioner in Civil employ.

PART IV.

NOTE.—[An officer counts his previous service under clause (b) if on re-employment his pension remains wholly in abeyance under the proviso to clause (a).]

515. In the case of a Section-writer whose service has been allowed to qualify for pension under special orders of the Government of India, or of a press servant (*see Article 380*) re-employed, the pay of the appointment abolished is taken at the average earnings of the last six months of employment.

516. If an officer does not, within three months from the date of his re-employment, exercise the option conceded by Article 514, of ceasing to draw pension and counting his former service, he may not thereafter do so without the permission of the Local Government.

517. An officer who, under Article 514, draws pension in addition to pay shall, [illegible] so much of his pension as will [illegible] he amount which would have [illegible] f the same kind under the same circumstances while holding his abolished appointment: Provided that his allowances on leave shall never be less than his pension.

518. *Cancelled.*

After Invalid Pension.

519. There is no bar to the re-employment of an officer who has regained health after obtaining Invalid pension, or if an officer is invalided as being incapacitated for employment in a particular branch of the service, to his re-employment in some other branch of the Service. The rules in such a case as to refunding gratuity, drawing pension, and counting service, are the same as in the case of re-employment after Compensation pension.

After Superannuation or Retiring Pension.

520. An officer who is in receipt of a superannuation or retiring pension shall not be re-employed or continue to be employed in service paid from general revenues or from a local fund, except on public grounds Sanction to re-employment or extension of the term of employment may be given as follows:—

(i) By the Government of India in the Administrative Department concerned, when the pensioner served before retirement in a gazetted appointment directly under the Government of India or belonged to an Imperial Service or Imperial Branch of any Service, or was a Statutory Civilian or other officer who, before retirement, held a post usually filled by officers of an Imperial Service or Branch;

(ii) In other cases, by the Local Government under whose administration the pensioner is re-employed;

(iii) By any authority subordinate to a Local Government to whom the Local Government may delegate its powers under this Article in respect of pensioners re-employed in establishments under the control of such authority.

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Add the following as note 1 under article 521, numbering the existing note as note 2 :—

NOTE —[Where the employment s in service paid from a local fund, the authority determining whether the pension shall be wholly or partly held in abeyance shall be either—

(i) the authority administering the local fund, if *so empowered by the Local Government* by special or general orders in this behalf ; or,

(ii) in any other case, the Local Government or such other authority as the Local Government may prescribe.]

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for the earlier service has not been refunded, ay be) may be allowed for the subsequent unt of such gratuity or the present value g to Table A in Appendix 10, *plus* the shall not exceed the amount of gratuity that would have been admissible had the rvice been refunded.

tuity or the present value of such pension, ratuity, exceed the amount of gratuity or that would have been admissible if the vice had been refunded, the excess must be

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PART V.—RULES APPLICABLE TO SPECIAL DEPARTMENTS OR SPECIAL OFFICERS.

Chapter XXII.—The Governor-General, Governors, Lieutenant-Governors and Members of Council.

SECTION I.—EXISTING PENSIONS HOW AFFECTED.

532. The following is the Statute Law applicable to the Governor-General, Governors, and Members of Council who hold or enjoy pensions :—

"[illegible] that if any Governor-General, Governor, or Ord[illegible]

[illegible] of the Civil or [illegible] "under.") [illegible] of his Office of Governor-Gener[illegible] reduced by the amount of the [illegible] held or enjoyed by him."—(3 a[illegible]

NOTE.—[The audit officer concerned should, in each case, obtain from each of the officials mentioned in the above rule, when he assumes charge of his post, a statement as to whether he is in receipt of any pension, or other payment, on account of which his salary is required to be reduced under this Article.]

533. If any Ordinary Member of Council hold or enjoy any pension or any annuity payable out of the Civil or Military Fund, the salary of his office of Member of Council is to be reduced under Acts 3 and 4 Will. IV, Cap. 85, s. 77, by the amount of the pension or annuity held by him. A Good Service Pension enjoyed by Military Officers comes within the meaning of pension under the Act cited above.

SECTION II.—LIEUTENANT-GOVERNORS.

Leave Rules.

534. (*a*) Leave on Medical Certificate for not more than six months may be granted to a Lieutenant-Governor. On resuming his duties after such leave, a Lieutenant-Governor is entitled to half his salary for the period of his absence. If he is prevented from resuming his duties, he is entitled to no absentee allowances.

(*b*) A Lieutenant-Governor is not entitled to any other leave.

NOTE 1.—[Service as a Lieutenant-Governor does not qualify for any leave under the ordinary rules, but counts as continuous service for the purpose of Article 308 and does not interrupt any leave previously earned.]

NOTE 2.—[The provisions of Article 215 do not apply to a member of the Indian Civil Service who on resigning the office of Lieutenant-Governor takes furlough or special leave

under the ordinary rules If he resigns preparatory to retirement he is entitled to subsidiary leave on half average salary]

NOTE 3.—[A Lieutenant-Governor who is granted leave during the term of his office is required to conform to the rule—Article 224 of these Regulations—as regards obtaining a certificate of fitness to return to duty]

Acting Lieutenant-Governor.

535. The salary of a person appointed to officiate as Lieutenant-Governor is regulated in the same way as the salary of a person appointed to be temporary Member of Council (see Article 539).

SECTION III.—MEMBERS OF COUNCIL.

Tenure of Office.

536. The tenure by a Member of Council of his office begins from the date on which he first takes upon himself the execution of his office whether as a temporary Member appointed in India, or after the issue of His Majesty's warrant of appointment; and the resignation of his office, by a Member of Council, whose successor has not entered upon his office, takes effect from the day following that of his embarkation at any port in India, excluding Aden, or from the expiry of his five years' tenure of office, whichever date is earlier. Any time during which a Member of Council (not being himself granted leave) draws less than full pay shall not be computed as part of his five years' tenure of office.

Leave Rules.

537. The leave admissible to an Ordinary Member of the Executive Council of the Governor-General or of the Governor of Madras or Bombay or Bengal or of the Lieutenant-Governor of any Province is regulated by Statute 24 and 25 Vict., Cap. 67, s. 26, as follows :—

[illegible]

six months, his office shall be vacated.

NOTE 1 —[Service as a Member of Council does not qualify for any leave under the ordinary rules, but counts as continuous service for the purpose of Article 308 and does not interrupt any leave previously earned.

NOTE 2 —[The provisions of Article 215 do not apply to a Member of the Indian Civil Service who on resigning the office of Member of Council takes furlough or special leave under the ordinary rules. If he resigns preparatory to retirement he is entitled to subsidiary leave on half average salary]

NOTE 3 —[A Member of Council who is granted leave during the term of his office is required to conform to the rule—Article 224 of these Regulations—as regards obtaining a certificate of fitness to return to duty.]

538. Subject to any special orders by the Government of India to the contrary, leave of absence granted to an Ordinary Member of the Council

of the Governor-General (if taken out of India) commences on the day after such Member embarks at any port in India, excluding Aden, and ends on the day before he disembarks at . . . Provided always that such Member ha . . . f his office until he embarks, and that he resumes charge immediately upon his disembarkation.

Temporary Member.

539. The salary and the appointment of a temporary Member of the Executive Council of the Governor-General or of the Governor of Madras or Bombay or Bengal, or of the Lieutenant-Governor of any Province is regulated by Statute 24 and 25 Vict., Cap. 67, s 27, as follows :—

NOTE.—[The headings which are introduced to facilitate reference are not a part of the Statute.]

In case of vacancy.

Section 27. If any vacancy shall happen in the office of an Ordinary Member of the Council

emoluments and advantages appertaining to the said office during his continuance therein, every such temporary Member of Council foregoing all salaries and allowances by him held and enjoyed at the time of his being appointed to such office

In case of absence.

And if any Ordinary Member of the Council of the Governor-General or of the Council

if he hold any such office, the remaining half of such last named salary being at the disposal of the Government of India, or other Government as aforesaid.

Proviso.

Provided always that no person shall be appointed a temporary Member of the said Council who might not have been appointed as hereinbefore provided to fill the vacancy supplied by such temporary appointment.

540. A Good Service pension comes within the "allowances" which a provisional Member of Council appointed on a vacancy occurring in the office of an Ordinary Member must forego.

541. The salary of the substantive office of a temporary Member of Council appointed in the place of an Ordinary Member of Council who, by reasons of infirmity or otherwise, is rendered incapable of acting or is absent on leave, includes the Military pay or Indian Army pay of an officer holding an appoint-

ment the pay of which is a Staff salary but does not include a Good Service pension. Such a temporary Member is not liable to any deduction of salary on account of Good Service pension.

542. A public officer nominated to be an Additional Member of the Imperial Legislative Council shall receive while on deputation with the Council the pay or salary which he would have drawn from time to time if he had not been so deputed He is, in addition, entitled to draw the allowances admissible under Article 1148.

Pension Rules.

542A. A Member of the Executive Council of the Governor-General or of a Local Government, who, before appointment as such, held an appointment in which service qualifies for pension under Article 474, is entitled to count as additional service qualifying for such pension all service which, under Article 536, counts as part of his five years' tenure of office as Member of Council (including leave under Article 537) and also all service as temporary Member under Article 539. He also enjoys the advantage of the two following conditions, *viz.* —

(1) On retirement after five years of such service he is entitled :—

(*a*) to pension on the scale given in Article 474, even if he does not retire on medical certificate and has not attained the age, or rendered the full period of total service, which would have been necessary, had he retained his previous appointment, to render him eligible for superannuation or retiring pension ; and

(*b*) to an additional pension of R1,000 a year.

(2) On retiring on account of certified ill-health after not less than three years' additional service as defined in the earlier part of this Article he is entitled to a pension of R1,000 a year in addition to his invalid pension calculated on the scale in Article 474.

542B. A Member of the Executive Council of the Governor-General or ... istice or ... a High ... Commis- ... ment to pension under the following rules :—

(1) *Qualifying Service.*—The periods of service qualifying for pension are—

(*a*) All service in any of the judicial offices abovementioned, which, but for the officer's appointment to a Membership of Council, would have counted as qualifying service for a judicial pension.

(*b*) All service as Member of Council which under Article 536 counts as part of the Member's five years' tenure of office (including leave under Article 537), and also all service as temporary Member under Article 539.

(c) A special addition of 2½ years which shall be made if the service counting under clause (b) of this rule is not less than five years.

(2) *Conditions of Grant of Pension.*—Pension will be granted on retirement after five years' service as Member of Council as defined in clause (b) of rule 1, or on retirement on account of certified ill-health after less than five years' service as Member of Council, provided that in the latter case the qualifying service is not less than 6¾ years.

(3) *Amount of Pension*.—(a) On retirement after 11½ years of qualifying service the pension will be as follows:—

(i) For a Member of Council who before his appointment was Chief Justice of a High Court and whose periods of service as Chief Justice and Member of Council [excluding the 2½ years added under 1 (c) above] were not less than 5 years 9 months	1,800*l.* if the Member was previously Chief Justice of the High Court at Calcutta 1,500*l.* if he was previously Chief Justice of the High Court at Madras or Bombay, or for the North-Western Provinces.*
(ii) For a Member of Council who before his appointment was Chief Justice of the High Court, but whose periods of service as Member of Council and Chief Justice [excluding the 2½ years added under 1 (c) above] were less than 5 years 9 months; and for a Member of Council who before his appointment was Puisne Judge of a High Court	1,200
(iii) For a Member of Council who before his appointment was Chief Judge or Judge of a Chief Court	1,000
Judicial Commissioner or Additional Judicial Commissioner	750

(b) On retirement after qualifying service of less than 11½ years, but in circumstances entitling the Member to pension under rule 2, the pension will be of half the amount granted under clause (a) of this rule.

542C. 1. If a Member of the Executive Council of the Governor-General or of a Provincial Executive Council was holding, at the time of appointment, a public office as defined in Section 4 of the Superannuation Act, 1892† (other than an office in India), his service as Member of Council qualifies under the rules in this article for the grant from Indian revenues of pension, gratuity, or other retiring allowance (including the allowance admissible to legal personal representatives under 9 Edward 7, c. 10).

2. *Period of Qualifying Service.*—The period of service qualifying for such grant is from the date of taking up the appointment of Member of Council to the date of resigning it, with the addition of such intervals (not exceeding

* United Provinces of Agra and Oudh.

† 55 and 56 Vict., c. 40.

30 days in either case) as may occur between giving up another public office and taking up the appointment of Member of Council and between resigning that appointment and taking up another public office.

3. *Conditions of Grant.*—A Member of Council becomes eligible for a grant if he retires:—

A. On completing the customary term of his appointment or on attaining the age of 60 or at any time thereafter; or

B. On account of ill-health certified by a medical certificate of such a nature as appears to the Secretary of State in Council to justify a grant; or within six months of completing the customary term of his appointment for reasons of administrative convenience approved by the Secretary of State for India in Council; or

C. On transfer to another public office after holding which he retires, either immediately or after subsequent transfer to other public office or offices, in circumstances rendering him eligible for pension, gratuity, or other retiring allowance in respect of the office held before appointment as Member of Council.

4. *Time at which Pension, Gratuity or other Retiring Allowance becomes payable.*—Any grant admissible under these rules is made:—

A. *If the Member of Council retires from that office otherwise than on transfer to another public office:*—From the date of such retirement.

B. *If he retires on transfer to another public office:*—From the date on which the pension, gratuity, or other retiring allowance in respect of the public office held before appointment as Member of Council becomes payable in accordance with any Act of Parliament or rules made by the Treasury in pursuance thereof.

5 *Amount of Grant.*—The grant from Indian revenues is made in accordance with the rules framed by the Treasury under Section 7 (1) of the Superannuation Act, * 1909, subject to the condition that, for the purpose of calculating the apportionment of the total award therein mentioned and the amount of such award when it is dependent on the salary of the Member of Council and the rules applicable to him in respect of that appointment, the Member of Council is assumed to have been, during the tenure of that appointment:—

(*a*) In receipt of salary at the rate last drawn by him in his previous public office;

(*b*) Under the same regulations regarding superannuation (including gratuity admissible to legal representatives) as were last applicable to him in such office, except as regards the conditions of grant (which are governed by Rule 3 above) and the time at which pension, gratuity, or other retiring allowance becomes payable (which is governed by Rule 4 above).

* 9 Edward VII, c. 10.

6. *Reduction, Suspension, or Withdrawal of Grant.*—Any grant made under these rules is subject to reduction or suspension under 4 & 5 William IV, c. 26, s. 20, to withdrawal under 22 Victoria, c. 26, s. 11, and generally to the operation of any statute of similar effect; any reduction of a total award, of which a grant under these rules forms part, being applied proportionately.

Chapter XXIII.—Judges of the High Courts.

Statutory Rules.

543. The following rules made, under Statutes 24 and 25 Vict., c. 104, s. 6 and 5 and 6 Geo, 5, c 61, s 101, by the Secretary of State in Council of India, regulate the salaries, allowances, furloughs, retiring pensions, and (when necessary) expenses for equipment and voyage of the Chief Justices and Judges of the several High Courts established under the said Statutes. They have effect from the 25th day of April 1899, except in so far as they refer to the Chief Justice and Judges of the High Court at Patna, the rules in their case having effect from the date of establishment of that Court.

N.B.—[The headings (other than those of sections) which are introduced to facilitate reference do not appear in the Statutory rules]

Definitions.

1. In these rules, unless there is something repugnant in the subject or context,—

"Acting Chief Justice" means a Judge appointed under Section 7 of Statutes 24 and 25 Vict., Cap. 104, to perform the duties of Chief Justice of a High Court.

"Acting Judge" means a person appointed under the said Section 7 to perform the duties of a Judge of a High Court.

"Temporary Additional Judge" means a person appointed under Section 3 of the Statutes 1 and 2 Geo. V, Cap. 18, to perform the duties of a Judge of a High Court.

"Judge" includes a Chief Justice and Acting Chief Justice, and an Acting Judge and a Temporary Additional Judge, except where the contrary is expressed.

"Actual Service" includes —

(a) Time spent by a Judge on duty as Judge, or in the performance of such other functions as he may be directed to discharge by the Governor-General of India in Council;

(b) Time spent by a Judge on privilege or subsidiary leave;

(c) Duly authorised vacations (provided that the Judge is not absent on furlough or on extraordinary leave under Rule 26).

Section I.—Salaries.

2. The Chief Justice, or Acting Chief Justice, of the High Court at Calcutta, shall be paid a salary at the rate of Rs. 72,000 per annum.

3 The Chief Justice, or acting Chief Justice, of the High Courts at Madras, Bombay, Allahabad and Patna respectively, shall be paid a salary at the rate of Rs 60,000 per annum.

4. A Judge, or acting Judge, of the High Courts at Calcutta, Madras, Bombay, Allahabad and Patna respectively, shall be paid a salary at the rate of Rs. 48,000 per annum.

5. Every Chief Justice, or Acting Chief Justice, and every Judge, or Acting Judge, shall be allowed to draw, in addition to his salary, any exchange compensation allowance which may be sanctioned for public servants generally, subject always to the conditions and limitations prescribed in the rules relating to such allowance.

Section II.—Leave.

Furlough earned.

6. One year's furlough shall be placed to the credit of each Judge after the completion of the fourth, eighth and twelfth [illegible] of all furlough [illegible] not exceed thr[illegible] be taken at an[illegible] [illegible] months.

Furlough admissible.

7 Except under Rules 9 and 10, no furlough shall be granted until at credit under Rule 6. But any Judge already in the service of the Government at the time of being appointed to the High Court, who, when so appointed, had at his credit [illegible] the branch [illegible] granted fur[illegible] furlough sh[illegible] and shall no[illegible]

Conditions of grant.

8 Except under Rules 9 and 10, furlough shall not be granted until after the completion of three years' actual service from the date of the last return from furlough or from extraordinary leave

9. Under medical certificate, furlough may be granted before it is at credit under Rule 6· and although three years' actual service may not have been completed since the last return from furlough or from extraordinary leave.

9A. A Judge on long leave in Europe must, if the leave was granted or has been extended [illegible] ificate or not, satisfy [illegible] Ordinarily he must [illegible] al cases, particularly [illegible] ficate in a form to be [illegible] may be accepted. On the required evidence of fitness being furnished, the Judge will receive from the India Office permission to return to India.

10 On urgent private affairs, furlough may be granted to a Judge before it is at credit under Rule 6, and although three years of actual service have not been completed since the last return from furlough or extraordinary leave: Provided that furlough under this rule shall not exceed six months, and shall be granted only once during the whole period of a Judge's service.

Commencement and end of Furlough.

11. Furlough taken in India shall be reckoned from the date on which the Judge quits his office to the date of his resuming duty. Furlough taken out of India shall be reckoned from the date of embarkation at the port of departure from India to the date of debarkation on return to India, except in a case falling under Rule 24.

12. If furlough be taken partly in India and partly out of India, the commencement and termination of the furlough shall be respectively determined under the provisions of Rule 11 according as the furlough begins or ends in or out of India.

Subsidiary Leave.

13 For the interval between the date of quitting his office and the commencement of furlough out of India, and between the termination of furlough out of India and resuming his office, a Judge may be allowed a subsidiary leave not ordinarily exceeding thirty days, which in special cases may be extended.

Leave Allowances.

14 A Judge [illegible] if th[illegible] of In[illegible] allow[illegible] month.

Number of Furloughs admissible.

with whom rests the question of granting the furlough.

16. Applications for furlough not supported by medical certificate shall be granted usually in the following order:—

Privilege Leave—Present Rules.

(b) Once in three years, and not oftener, privilege leave may be prefixed or affixed to the vacation.

18. *Omitted*

Privilege Leave Declaration

must be accompanied by an explanation of the special circumstances under which it is made, and it shall be in the absolute discretion of the Government to grant or withhold the permission sought.

Combination of Leave.

20 *Privilege leave may be prefixed but not affixed to furlough This rule is to have effect* as from the 25th of January 1901.

Applications for Leave.

21. Applications for leave shall in all cases be submitted in such manner as the Government shall from time to time prescribe.

Payment of Leave Allowances

22. Leave allowances shall be payable monthly if payment is made in India, and quarterly if in England *

Effect of Leave on Substantive Appointment, etc.

23 No substantive appointment shall be vacated merely by reason of leave being granted under the rules

24. If a Judge overstays any leave, he shall forfeit all salary during the time of his remaining so absent; and if he overstays his leave for more than one week, his office shall be liable

* Leave allowance is now paid monthly in arrear if payment is made in England

PART V.

to be declared vacant. But a Judge on leave (other than leave under Rule 17) is not obliged to return to duty on an authorized holiday, unless another officer is officiating as Judge in consequence of his absence

A Judge may be allowed to combine vacation on full pay with leave as shown in (A) and (B) below, provided that no acting allowance is sanctioned or additional expense is incurred by the State in consequence of his absence during the vacation :—

(A) Where thé vacation of the High Court consists of one period, a Judge may be allowed to combine vacation on full pay with leave, either at the beginning or end thereof, but not both

(B) Where the annual long vacation is not continuous, but is divided into two separate portions, a Judge may be allowed either :—

(*a*) to combine one part of a vacation on full pay with leave, either at the beginning or end thereof, but not both ; or

(*b*) to combine both parts of one annual vacation on full pay with leave for the intervening period.

Effect of Leave on Pensionary Service.

25. No leave except privilege leave and leave subsidiary to furlough shall count as service for pension.

Extraordinary Leave.

26. If
to grant to
going rules
leave excee
service

Section III.—Pensions.

Chief Justice

Judges.

29 A Judge of a High Court, not being eligible for pension at a higher rate under Rule 27 or 28, shall, after an actual service of eleven-and-a-half years as Judge, receive a pension not exceeding £1,200 per annum.

Invalid Pension.

30 A Chief Justice or Judge, who retires on medical certificate after six years and nine months' actual service, shall receive a pension not exceeding one-half the amount of pension allowed for the full period of service

Previous Service

31. In the event of a Judge receiving a pension under the preceding rules he will not be entitled to any other pension or retiring allowance

…as a member
…pension under
…rules appli-
…reckoning the

33. If a Judge who, at the time of his appointment to a High Court, was a member of

PART V

33A. The words "a member of one of the Government services in India" in Rules 32 and 33 include an acting member, and for the purpose of these rules acting service in the appointment held at the time of appointment as a Judge of the High Court shall be regarded as substantive.

33B. In the event of the appointment to be a Judge of a High Court of a retired Judge who is in receipt of a pension under the preceding rules, the Secretary of State in Council shall decide in each case whether his salary shall be reduced by the amount of such pension, or by any part of such amount.

Member of the Indian Civil Service.

[illegible]

wife and children.

Transfer to another High Court.

35. If a Judge be transferred from one High Court to another, the period he shall have served in each Court shall count towards his qualification for pension.

Promotion to be Chief Justice.

[illegible]

been appointed.

[illegible]

Extent of Application.

[illegible]

Section IV.—Expenses for Equipment and Voyage.

40 For the purpose of defraying the expenses of equipment and voyage from Europe on first appointment, there shall be allowed—

To a Chief Justice or Judge of any High Court, £300

But no such allowance shall be made to any person who being in India is appointed to the office of Chief Justice or Judge, or who having been in India, is in Europe at the time of his appointment with the intention of returning to India

Reversion to the General Service.

544. (*a*) An officer subject to the rules of any of the other Chapters of these Regulations, who has for a time been removed from the operation

of such rules by reason of officiating as Judge of the High Court, shall, on return to general service, have to his credit the same amount of service towards Privilege leave as was at his credit when he began to officiate as High Court Judge.

(b) In addition to this, he is entitled to count towards Privilege leave, under the rules to which he is subject, any period that has elapsed since he last
he
ing
applicable to Judges of the High Court

545. If a Judge, who is a member of the Indian Civil Service or a Statutory Civil Servant, shall be permitted to resign his office and remain in *the service, all leave which he may have taken as a Judge of the High Court* shall be reckoned as if it had been taken under the rules for the leave of absence of members of the Indian Civil Service or Statutory Civil Servants, as the case may be.

Chapter XXIV.—Barrister and Pleader Appointments.

Barristers' Privileges.

546. No Civil officer, whether a member of the Indian Civil Service or otherwise, is entitled to any special privileges by reason of his being a *Barrister, unless, on his first admission to the service, he is appointed* to some office in which the Local Government, with the sanction of the Government of India, has declared it to be necessary on public grounds to employ a Barrister.

547. The following officers, not being members of the Indian Civil Service, are entitled to the special privileges detailed in this Chapter:—

Barrister and Pleader Judges of the Chief Courts of the Punjab and Lower Burma,

First Judges of Small Cause Courts of Presidency towns,	if Barristers.
Secretary to the Government of India in the Legislative Department,	
Judicial Commissioner or Additional Judicial Commissioner of Oudh and of the Central Provinces,	
Administrator-General and Official Trustee, Bengal,	
Judge of the Court of Small Causes, Rangoon,	
Additional Judicial Commissioner of Sind,	
Administrator-General and Official Trustee, Bombay,	
Legal Remembrancer and Secretary to the Legislative Council, Punjab,	
Administrator-General and Official Trustee, Madras,	

Leave Rules.

548. (*a*) Except in the case of the I [illegible] to the Legislative Council, Punjab, the [illegible] furlough and leave of absence of High [illegible] to 26) are also applicable to the officers [illegible]

(*b*) The allowances of these officers while on Furlough or Subsidiary leave must not exceed half their salaries at the time of proceeding on leave, and are limited also to the rate prescribed in Statutory Rule No. 14, Article 543.

[illegible] ernment of India in the L [illegible] or Additional Judicial C [illegible] ices; of the Judge of the Court of Small Causes, Rangoon; of the Administrator-General of Bengal; and of the Administrator-General and Official Trustee at Bombay or Madras, is regulated by the rules in Part III.

Special Pensions.

549. (*a*) Special pensions are admissible as follows, but the officers named in Article 547 are otherwise subject to the "Ordinary Pension" Regulations in Part IV:—

(1) After an active service of not less than 11½ years, a Retiring pension of £1,000 a year in the case of Judges of the Chief Courts of the Punjab and of Lower Burma; and £750 a year in the case of persons holding any of the other Barrister appointments specified in Article 547.

NOTE.—[(i) A Chief Court Judge who renders officiating active service as a High Court Judge is entitled to count such service towards his pension as a Chief Court Judge, and (ii) a Legal Remembrancer and Secretary of the Legislative Council, Punjab, or a First Judge of a Small Cause Court in a Presidency town, who is appointed Judge of a Chief Court and does not complete 11½ years' active service in either of the appointments, respectively, are entitled to count their active service in the Chief Court towards the pension of £750 a year admissible under this Article.]

(2) After an active service of not less than 6¾ years, an Invalid pension not exceeding one-half the amount of pension allowed for the full period of service.

NOTE.—[The above scale of pensions does not apply to Mr. C. W. Chitty, who has elected to remain under the rules previously existing.]

(*b*) The Active Service of the officers referred to in Article 547 includes, besides time spent on duty, whether in substantive or acting service, Privilege leave, Subsidiary leave, and periods of vacation during which the officer is not on Furlough or Extraordinary leave.

Compulsory Retirement.

550. Officers to whom the rules of this Chapter applied on the 25th June 1901 are exempt from the rule in Article 459 regarding retirement at 55 years of age. Officers who after that date become subject to the rules in this Chapter are required to retire on attaining the age of 60 years.

Chapter XXV.—Members of the Indian Civil Service.

Date of Arrival in India.

551. The date of an officer's first arrival in India is held to be the date on which he reports his arrival at the capital town of the Presidency or province to which he has been posted by the Secretary of State or the Government of India, or at any other station to which he may proceed under the orders of the Local Government.

552. Article 187 in Chapter IX (joining time) provides for the case of an officer being unable from illness to proceed to the seat of Government.

Rules regarding Pay and Allowances.

553. Unless there be something repugnant in the subject or context, pay and allowances are governed by the rules in Part II. Acting allowances are calculated in accordance with the rules in Articles 104 to 108.

Leave Rules.

554. The leave rules applicable are the European Service Leave Rules in Part III.

1. The rules applicable to a member of the Indian Civil Service occupying the position of a High Court Judge are laid down in Chapter XXIII

2. The grant to a member of the Indian Civil Service occupying the position of a Chief Court Judge, of privilege leave, and the conditions under which leave may be combined with vacation on full pay, are regulated by Rule 17 and 24 (A), Article 543

555. Except in the case of Judges of Chief Courts, no leave but Privilege leave and Subsidiary leave preparatory to retirement may be granted to an officer who has completed thirty-five years' service. Any leave other than Privilege leave and Subsidiary leave preparatory to retirement granted before such date ceases to have effect on the date the officer completes thirty-five years' service.

Annuity Deductions.

556. (a) Four per cent. shall be deducted at the time of payment from every officer's pay, and from such of his other public emoluments as are mentioned below :—

If the officer was in the service in 1875 or was appointed to it after passing a competitive examination held before the end of the year 1875, and belongs to the—

Bengal Establishment —Every allowance, excepting—
(1) Minimum Furlough allowance,
(2) Subsistence allowance while on Furlough,
(3) Establishment allowance
(4) Sumptuary allowance, and
(5) Travelling allowance.

Madras or Bombay Establishment.—The following allowances, *viz.* :—
(1) Acting allowance,
(2) Deputation allowance,
(3) Personal allowance,

(4) Fees,
(5) Allowances while on Privilege or Subsidiary leave,
(6) Subsistence allowance when not on leave other than Privilege and Subsidiary leave, and
(7) Local allowances other than travelling allowance and tentage.

If the officer is appointed to the service after passing a competitive examination held in or after the year 1870—

Every allowance, excepting—

(1) Minimum Furlough allowance,	(4) Sumptuary allowance,
(2) Subsistence allowance while on Furlough,	(5) Travelling allowance,
(3) Establishment allowance,	(6) Tentage

NOTE 1.—[Fees or honoraria paid by Government to Examiners for conducting examinations and rewards for passing examinations in languages are not liable to annuity deductions.]

NOTE 2.—[The deduction prescribed in this Article is not made from the salary of an Ordinary Member of the Council of the Governor-General, or of the Council of the Governor of Madras or *Bombay or Bengal, or of the Council of the Lieutenant-Governor of any Province.]*

(b) The deduction required by this Article is included in the contribution levied from an officer on Foreign Service of the first and second kind under the rules in Part VII ; when, however, an officer is on Foreign Service, and no contribution is made by him or on his behalf under Part VII, he is required to contribute four per cent. under clause (a).

Example.—The Chairman of the Commissioners of the town of Calcutta, the Municipal Commissioner for the city of Bombay, or any of the officers referred to in Article 772

Civil Fund Deductions.

557. Deductions on account of subscriptions to Civil Funds shall be made at the time of payment from the emoluments of officers according to the rules of the Fund to which the officer belongs. The Funds are—

A.—Bengal Civil Fund.	C.—Bombay Civil Fund.
B.—Madras Civil Fund.	D.—Indian Civil Service Family Pension Regulations.

NOTE.—[The rates of subscriptions to the several Funds are given in Appendix II.]

558. European officers who arrived before 1881-82 are alone allowed to subscribe to the three Civil Funds, A, B and C, but the following Native officers are allowed, on payment of equal subscriptions, to secure like benefits to those which the Civil Funds secure to Europeans :—

Bengal Establishment		*Bombay Establishment.*
(1) Mr. B. L. Gupta.	(2) Mr. C. Rustamji.	(1) Mr. S. N. Tagore.
(2) „ B. De.	(2) „ K. J. Badshah.	

559. The following officers who arrived in 1881-82, and all European officers junior to them, are required to subscribe under the "Indian Civil Service Family Pension Regulations" :—

Mr. A. H. Diack, C.V.O., Bengal, Sir William Meyer, K.C.I.E., Madras ; Mr. J. J. Heaton, Bombay.

(1) Specially admitted to the Civil Funds.
(2) *Allowed to subscribe to the "General Revenues" at Civil Fund rates.*

560. (*a*) The recovery of subscriptions due on the absentee allowances of subscribers to the Bengal, Madras, and Bombay Civil Funds, is made under the following rules :—

(1) If the officer is on leave out of India and draws his allowances in England and has not paid his subscription in advance, or made arrangements for its payment in India as it falls due, recovery will be made at the Home Treasury by deduction from his absentee allowances, unless he is a member of the Bengal or Madras Civil Fund, and has exercised the option allowed to members of those funds of postponing the payment of his subscriptions until after return to duty

N.B.—[The option allowed to subscribers to the Bengal Civil Funds of postponing payment of subscriptions on absentee allowances is limited to a period of one year.]

(2) For payment of leave allowances in any of His Majesty's colonies, warrants will be issued only on condition that the subscriptions shall be either paid in advance or taken by deduction , in the latter case the warrant to the colony should show only the net allowance payable after such deduction.

(*b*) The recovery of subscriptions due on the absentee allowances of subscribers to the Indian Civil Service Family Pension Regulations is made under the following rules :—

(1) If the subscriber is in Europe, the rules require his subscription to be paid in England in sterling, and recovery of it will therefore be made at the Home Treasury by deduction from his absentee allowances.

(2) For the payment of leave allowances in the colonies, the warrants issued will show the gross allowance payable, with instructions to recover the amount of monthly subscription due in sterling.

Retirement and Annuity.

561. An officer who has been twenty-five years in the service, counting from the date of his covenant, or from the date of the despatch of the Secretary of State announcing his appointment (whichever may have been earlier), and who has rendered twenty-one years' active service, is entitled, on his resignation of the service being accepted, to an annuity of £1,000.

562. An officer who resigns the service will, by such resignation, vacate any office under the Government which he may then be holding. But this rule does not apply to the offices of Viceroy and Governor-General of India, Governor of Madras, Governor of Bombay and Governor of Bengal.

563. The resignation of the Civil Service by a Lieutenant-Governor, Member of the Council of the Governor-General, or of the Council of a Governor or of a Lieutenant-Governor, or Judge of a High Court, shall not be accepted unless his resignation of his office is at the same time tendered and accepted.

564. An officer who, having proceeded to India and made or become liable to any payment on account of the provision for the annuity to which

he might become entitled under Article 561, is declared by a medical certificate in due form to be incapacitated for further service and is thereupon permitted to resign the service before he is entitled to such an annuity, is entitled to a gratuity or annuity as follows :—

(i) for less than five years' service—a gratuity of £500 ;

(ii) for five years' completed service—an annuity of £150, rising by £20 for each additional year up to twelve ;

(iii) for twelve years' service—an annuity of £290, rising by £30 for each additional year up to twenty-three ;

(iv) for twenty-three years' service—an annuity of £620 ;

(v) for twenty-four years' service—an annuity of £660 ;

(vi) for twenty-five years' service (of which less than twenty-one have been active service)—an annuity of £700.

564A. The power of withholding or withdrawing the whole or any part of an annuity under Article 351 shall be exercised only by the Secretary of State in Council.

Unfitness for Further Advancement.

564B. The grant of an annuity to an officer of the Indian Civil Service who is proved to be unfit for further advancement and is removed from service by the Secretary of State on the recommendation of the Local Government and the Government of India, is regulated by Article 353A.

Compulsory Retirement.

565. (a) After thirty-five years' service, counting from the date of his arrival in India, an officer shall not, except for special reasons, and with the sanction of the Secretary of State, retain his office or be appointed to any new office : Provided that if such an officer has held his office for less than five years, he may, for special reasons, with the sanction of the Government of India, be permitted to retain his office until he has held it for five years. The term " office " in this Article includes an officiating appointment.

NOTE.—[This rule does not apply to an officer holding the appointment of a Judge of a Chief Court. Such an officer is required to vacate his appointment on attaining the age of 60 years.]

(b) The period of five years begins to run from the date on which the officer first takes up the office, whether substantively or temporarily, provided that, if temporary he is confirmed without reverting to his substantive appointment ; but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.

[illegible]

Chapter XXVI.—Statutory Civil Servants.

566 The following rules regulate the pay and allowances, pension and leave of Statutory Civil Servants :—

Pay and Allowances.

1. The pay or salary of an officer holding an office, the pay of which has been fixed with a view to its being held by a member of the Indian Civil Service or a member of a Commission, is, unless otherwise specially ordered, 64 per cent of what would be the gross pay or salary of the office if it were held by a member of the Indian Civil Service.

2 The subsistence allowance of an officer when out of employ is as follows :—

	Rs.
To an officer who has rendered not more than eight years active [illegible]	250
[illegible]	320
service	400

Pension Regulations

Section 1 —In these Regulations—

" Active Service " means active service in an office ordinarily held by a member of the [illegible]

[illegible] service of the officer is not less than—	[illegible] service a period of leave out of India not exceeding—	[illegible]ounts as service a period of leave in India not exceeding—
15 years	1 year	1 year
25 "	2 years	1 "
30 "	....	2 years.

NOTE 1 —[The figures in columns 2 and 3 are not cumulative, that is, an officer may not count two years' leave in 15 years' service or more than two years' leave in 25 or 30 years' service]

NOTE 2.—[Total service in this clause means total service reckoning from the date of commencement of service qualifying for pension and includes periods of leave]

Section 2 —Except with the special sanction of the Governor-General in Council, an officer who has reached the age of 55 years shall not be appointed, either substantively or officiating, to a new office, or be permitted to retain any office which he has held either substantively or officiating, for five years.

N B —[The period of five years begins to run from the date on which the officer first takes up the office, whether substantively or temporarily, provided that, if temporary, he is confirmed without reverting to his substantive appointment, but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.]

Section 3 —Pension shall in no case exceed Rs. 5,000 a year after an active service of not less than 25 years, and Rs. 6,000 a year after an active service of not less than 30 years. All the rules in this part are subject to these maxima

Section 4 —(*a*) On his resignation of the service being accepted after not less than 25 years' active service, an officer is entitled to a retiring pension of half his average salary during the last three years of his active service

(*b*) An officer who, upon a medical certificate in the form prescribed in Article 447, is permitted to resign the service before he has completed 25 years' active service, is entitled to Invalid pension as follows :-

(1) After an active service of less than ten years, gratuity of one month's pay for each year of active service

(2) After an active service of not less than ten years, pension of Rs 1,500 a year, *plus* Rs. 150 for each complete year of active service in excess of ten.

Section 5.—(*a*) An officer removed from the service, under Section 2, after an active service of less than 25 years, is entitled to a Superannuation pension.

(*b*) On reaching the age of 55 years, an officer may retire upon a Superannuation pension, the amount of which is the same as that of an Invalid pension.

Section 6.—(*a*) An officer who filled a pensionable office before his appointment to an office ordinarily held by a member of the Indian Civil Service, may, at his option, count his whole pensionable service and receive a consolidated pension made up as follows:—

(1) That proportion of the pension to which he would have been entitled under Sections 4 and 5 if his whole service had been passed in an office ordinarily held by a member of the Indian Civil Service, which his active service in such an office or offices bears to the whole of his qualifying service.

(2) That proportion of the pension to which he would have been entitled if his whole service had been in an office not ordinarily held by a member of the Indian Civil Service, which his previous qualifying service bears to the whole of his qualifying service

(*b*) If such an officer is entitled to gratuity only, his gratuity shall be calculated as if his whole service had been passed in an office ordinarily held by a member of the Indian Civil Service.

Section 7.—The procedure upon an application for pension and upon the payment of pension is that described in *Chapter* XLIX.

Leave Regulations.

Section 1.—In these Regulations—

"Average salary" means average salary for a month, calculated for so much of the three years immediately preceding the day on which an officer gives up office as he has passed on duty, or on Privilege or Examination leave. Average salary in excess of Rs 1,400 a month is not reckoned.

"Service" means all qualifying service, whether rendered in an office ordinarily held by a member of the Indian Civil Service or otherwise and includes periods spent on leave with allowances.

Section 2.—During leave on Medical Certificate in excess of fifteen months at one time [illegible] he was last before on duty.

NOTE —[A Statutory Civil Servant who is compelled owing to ill-health to take any leave with allowances out of India is entitled to the benefits of Article 342]

Section 3.—Leave on medical certificate may be granted for three years in all, but not for more than two years at one time

Section 4 —(*a*) An officer may take either Leave on Private Affairs or Furlough as follows, but not both these kinds of leave :—

(*b*) Leave on Private Affairs may be taken, first, after not less than six years' service, and thereafter at intervals of not less than six years The duration of Leave on Private Affairs must not exceed six months at one time

(*c*) Furlough, not exceeding two years in all, may be taken, first, after not less than ten years' service, and thereafter at intervals of not less than eight years, provided that an interva [illegible] leave o [illegible] Furlou [illegible] it be [illegible] to two years.

NOTE.—[The Government of India may relax the condition requiring an interval of 18 months to elapse since last return from privilege leave of over 6 weeks' duration, before furlough can be granted under this Section, in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State]

Section 5.—Subsidiary leave, Privilege leave and Examination leave may be granted under Part III.

Section 6.—The Local Government may grant Extraordinary leave without allowances at its discretion. Subject to the provisions of Section 10, there is no limit to the length or frequency of leave under this section, and it may be granted in continuation of any leave with allowances

Section 7.—Leave taken by an officer before his appointment to an office ordinarily held by a member of the Indian Civil Service shall, for the purpose of calculating the leave admissible to him under this Chapter, be treated as leave taken under this Chapter.

Certificate.

1. Extraordinary leave cannot be changed retrospectively into Leave on Medical Certificate, but leave on Medical Certificate may be given in continuation of Extraordinary leave.

Section 9.—An officer who has reached the age of 55 years is not eligible for any leave except *Privilege leave*. *Leave, other than Privilege leave, granted to an officer before his fifty-fifth* birthday cannot extend beyond that date.

Section 10.—If an officer is absent without leave, or remains absent after the end of leave (excepting Privilege leave, in which case a week's grace is allowed), he vacates his appointment, after five years' continuous absence from duty, whether with or without leave, an officer ceases to belong to the public service.

1. A Statutory Civil Servant who takes leave other than Privilege leave, or Examination leave, has no claim to return to the particular appointment from which he took leave

Section 11.—The procedure upon application for leave is that prescribed in Part IX.

Chapter XXVII.—Ecclesiastical Officers.

SECTION I.—BISHOPS.

is re

date

amended by Royal Warrants, dated 28th July 1888 and 11th February 1901.

N.B.—[The italicised headings are introduced merely to facilitate reference and are not in the Statutory Rules]

Statutory Rules.

1. Bishops may be allowed leave of absence either on medical certificate or on furlough.

Leave on Medical Certificate.

2. The amount of leave of absence on medical certificate admissible to a Bishop is limited to two years.

3 Subject to the Limitation in Rule 2 leave of absence may be granted to a Bishop upon medical certificate for a period not exceeding one year. Leave so granted may be extended upon medical certificate to any period not exceeding eighteen calendar months.

Furlough.

4 The amount of furlough earned by a Bishop is one-eleventh of the time during which he has been on duty and the furlough due is the amount earned diminished by the amount taken.

6. *Cancelled.*

Extraordinary Furlough.

otherwise admis-
or on the recom-
nt of Madras or

The grant of such extraordinary furlough will be subject to the limitation that no further expenditure of the revenues of India be thereby entailed, and to the following conditions :—

(a) That the purpose for which the leave is granted shall be specified in the Gazette Notification granting it,

(b) That a second or subsequent period shall in no case be granted unless 33 months' active service has been rendered after the last preceding period.

6B. Extraordinary furlough under Rule 6A may be prefixed or affixed to ordinary furlough subject to a maximum limit for the combined leave of six months in all.

7. Furlough and leave on medical certificate cannot be taken in continuation of each other; but furlough granted under these rules may be retrospectively changed into leave on medical certificate

Acting Allowance of Locum Tenens.

7A. A Bishop on long leave in Europe must, if the leave was granted or has been extended on account of ill-health, whether it be technically leave on medical certificate or not, satisfy the *Medical Board at the India Office as to his fitness for return to duty.* Ordinarily he must attend at the India Office for the examination by the Board, but, in special cases, particularly if he be residing at a distance of more than 60 miles from London, a certificate in a form to be obtained from the India Office from two medical practitioners may be accepted On the required evidence of fitness being furnished the Bishop will receive from the India Office permission to return to India.

8. An Archdeacon or a Chaplain appointed to hold charge of a Diocese during the absence of a Bishop is entitled to an allowance of Rs. 500 a month in addition to the pay of his substantive office.

Absentee Allowance.

9. A Bishop while absent upon furlough or upon leave on medical certificate is entitled to full pay less Rs 500 a month, but not to any other allowances

Travelling and similar Allowances of Locum Tenens

10. An Archdeacon or a Chaplain appointed to hold charge of a Diocese during the absence of the Bishop upon leave on medical certificate, is entitled to the travelling and other similar allowances admissible to the Bishop.

Acting Allowances of Locum Tenens of Metropolitan.

PART V.

Bishop of Calcutta will receive during such absence the salary of his office less Rs. 833-5-4 per mensem

Grant of Leave.

12 Leave under these rules may be granted to the Metropolitan by the Governor-General in Council, and to the Bishops of Madras and Bombay by the Governments of those Presidencies on the recommendation of the Metropolitan.

567A. A Statutory Bishop, who at the time of his appointment as such was a member of any of the Government services in India and had at his credit furlough without medical certificate under the rules applicable to the branch of the service to which he belonged, may be granted furlough for a period not exceeding the amount so standing at his credit; provided that such furlough shall not be taken until after the completion of two years' actual service as a Bishop, and shall not exceed six months.

568. A Bishop of Madras or Bombay exercising the Episcopal Jurisdiction and Functions appertaining to the See of Calcutta during the vacancy of the See by the demise of the Bishop thereof for the time being, or otherwise, is entitled to the full pay fixed for the office, *viz.*, Rs. 3,831-6-8.

569. An Archdeacon or a Chaplain appointed to hold charge of the Diocese of Calcutta, Madras, or Bombay during a vacancy in the See is entitled to an allowance of Rs. 500 a month in addition to the pay of his substantive office, provided that the arrangement does not involve any extra expense to the State beyond what would be incurred if the Bishop were present on duty. He is also entitled to the travelling and other similar allowances admissible to the Bishop; but the grant of visitation allowance is subject to the restriction laid down in Articles 1112 and 1149.

569A. (*a*) The pension of the Bishop of Calcutta is regulated by the provisions contained in 53 George III, Cap. 155, 4 George IV, Cap. 71, and 6 George IV, Cap. 85; and subject to the conditions and limitations contained therein, he is eligible for pensions not exceeding £1,500, £1,000 or £750 a year after he has rendered active service in India as Bishop for ten, seven and five years, respectively. The pension of the Bishops of Madras and Bombay is regulated by the provisions contained in 3 and 4 Will. IV, Cap. 85; and subject to the conditions and limitations contained therein, they are eligible for a pension of £800 a year on completion of fifteen years' active service in India as Bishop.

(*b*) When a Statutory Bishop, who at the time of his appointment as such was a member of one of the permanent services in India, is permitted to retire without becoming entitled to a statutory pension, he will receive such pension as he might receive under the rules applicable to the branch of the service to which he so belonged and will reckon the period of his service as Bishop towards that pension.

570. The official status of the Bishops of Lahore, Rangoon, Lucknow and Nagpur is that of a Senior Chaplain, and they are subject to all the rules in Articles 573 to 599, except the proviso contained in Article 583 (*a*) (IV). Articles 567, 567A and 569A do not apply to them.

SECTION II.—ARCHDEACONS, AND PRESIDENCY SENIOR CHAPLAINS OF THE CHURCH OF SCOTLAND.

571. The following special allowances are granted to Archdeacons and Presidency Senior Chaplains of the Church of Scotland :—

	Substantive Officers.	Officiating Officers.
	Rs.	Rs.
Archdeacon of Calcutta, Madras or Bombay . .	$266\frac{2}{3}$	$166\frac{2}{3}$
Archdeacon of Lahore or Presidency Senior Chaplain of the Church of Scotland in Calcutta . .	200	100
Presidency Senior Chaplain of the Church of Scotland in Madras or Bombay	150	75

572. (*a*) Formal appointment of the Archdeacon by the Government [illegible]

the Government has directed the Archdeacon to undertake the Bishop's jurisdiction or to take charge of the Diocese is sufficient.

(*b*) The allowance of Rs. 500 is paid to an Archdeacon or Acting Archdeacon for holding charge of the Diocese in addition to his allowances as Archdeacon or Acting Archdeacon.

SECTION III.—CHAPLAINS.

Residence and Service.

573. (*a*) Residence (or Active Service) is reckoned, in the case of a Chaplain appointed in England, from the date of his arrival in India ; and in the case of a Chaplain appointed while resident in India, from the date on which he takes charge of his office, but he must not assume charge before the despatch from the Secretary of State appointing him is received in India. Residence includes, besides time spent on duty,—

(*i*) Privilege and Subsidiary leave.

(*ii*) Time passed out of employ in India otherwise than on leave.

NOTE.—[Probationary service, whether passed under Government or not, counts as 'Residence' subject to the provisions of Article 576, Civil Service Regulations.]

(*b*) "Service" includes "Residence" and also all time spent on leave of any description, but (except as provided in Article 576) no period before the beginning of "Residence."

Date of Arrival in India.

574. A Chaplain is held to have arrived in India on the date on which he reports his arrival either at the head-quarters of the Diocese to which he is attached (in the case of the Church of Scotland, at the head-quarters of

the Presidency to which he is appointed) or at any other station to which he may be appointed or directed to proceed.

575. (a) A Chaplain on the Bengal Establishment who is posted in England to the Lahore Diocese or to any station in the Central Provinces, or north of Allahabad, who comes to India *viâ* Bombay, or by direct steamer to Karachi, and who is instructed by the Secretary of State to enquire from the Secretary to the Government of Bombay, or, at Karachi, from the Commissioner in Sind, for orders as to his ultimate destination, is held to have arrived in India on the date on which he reports his arrival at the station to which he is directed to proceed in the orders he receives at Bombay, or at Karachi, if he travels by direct steamer to that port.

(b) A Chaplain who is *not* on the Bombay Establishment and who is *not* posted to any station in the Lahore Diocese or to any station in the Central Provinces or north of Allahabad, but who comes out to India *viâ* Bombay, is held to have arrived in India from the date on which he reports his arrival at the Presidency town of the Presidency to which he is attached, or if he receives orders at Bombay to proceed to any particular station, from the date of his arrival at that station.

(c) The report of arrival, in each instance, is to be made to the Bishop of the Diocese to which the Chaplain is attached. In the case of the Church of Scotland report of arrival is made to the Presidency Senior Chaplain of the Presidency to which the Chaplain is appointed.

Probationers.

576. A Chaplain serves on probation for two years (three years in the case of those who entered the service on or before the 22nd September 1915), at the end of which he is, if reported fit by a Medical Board in India and considered qualified by the Bishop of his Diocese (in the case of the Church of Scotland by the Presidency Senior Chaplain of the Presidency), confirmed as a Junior Chaplain. Time spent in India on service under the Additional Clergy Society, or on other approved service, may be included in the period of probation. Probationary service, which is passed under the Government, counts in all cases towards leave and gratuity, and if the Chaplain was *appointed after the 17th March 1892, it also counts towards pension.* Probationary service, which is not passed under the Government, does not count towards leave or gratuity, but if the Chaplain was appointed after the 17th March 1892, it counts towards pension.

Note.—[A clergyman must have been three years in orders and must be in priest's orders and must have attained the age of 27 years before his nomination as a probationer, or before he can count approved service not passed under Government towards probation. This condition does not apply in the case of the Church of Scotland Establishment.]

577 to 579. *Cancelled.*

Rules regarding Leave.

Note.—[A Chaplain on probation is entitled to the same leave as if he held a substantive appointment.]

580. The amount of Furlough "admissible" to a Chaplain is limited to six years. All the rules in this Section are subject to this limitation.

581. The amount of Furlough "earned" by a Chaplain is one-fourth of his Active Service, and (in the case of Chaplains appointed before the 29th July 1906) three months in addition thereto.

582. The amount of Furlough "due" to a Chaplain is the amount which he has earned, diminished by the amount of Furlough which he has enjoyed.

583. (a) To a Chaplain who has rendered three years' Continuous Service, Furlough for not more than two years may be granted as follows :—

Firstly, on medical certificate, unconditionally (see Articles 828 to 832 and 836 to 838, for the procedure rules.)

Secondly, without medical certificate, subject to the following provisos :—

(i) that the Furlough be due to him ;

(ii) that he has rendered seven years' Active Service ;

(iii) that an interval of not less than eighteen months has elapsed between his last return from privilege leave of over six weeks' duration, and the furlough or privilege leave, if any, with which the furlough is combined. In the case of privilege leave combined with other leave which does not interrupt Continuous Service (Article 22) the period of eighteen months begins to run from the date subsequent to that of the end of the combined leave ;

(iv) that the whole number of Chaplains absent on Furlough and Special leave does not exceed the limit appointed by the Government of India. Except on medical certificate or on very urgent private affairs, Furlough or Special leave may not be granted to a Church of England Chaplain if twenty per cent. of the whole number of Chaplains belonging to his Diocese (or to a Church of Scotland Chaplain if twenty per cent. of the whole number of Chaplains belonging to his Presidency) are already absent on Furlough or Special leave. The Bishop of Calcutta will report to the Government of Bengal and Bihar and Orissa and the Chief Commissioner of Assam (as the case may be) when the limit is reached, and the Bishops of Madras, Bombay, Lahore, Rangoon, Lucknow, or Nagpur, as the case may be, to their respective Local Governments. In the case of the Church of Scotland, the Presidency Senior Chaplain, Bengal, will report to the Local Governments under whom the Chaplains are serving and the Presidency Senior Chaplains of Madras and Bombay to their respective Governments.

NOTE.—[The Government of India may relax the following conditions governing the grant of furlough to a Chaplain under clause (a) of this Article, in cases in which their enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State :—

(1) three years' continuous service ;
(2) seven years' active service ;
(3) an interval of eighteen months since last return from privilege leave of over six weeks' duration]

(b) Furlough taken under this Article may, on medical certificate, be extended to not more than three years.

(c) The Furlough of a Chaplain is strictly limited to a period of three years at one time, and cannot be extended even without allowances. But the Secretary of State reserves to himself the power of allowing a Chaplain to remain in Europe beyond three years, should special and exceptional circumstances require it.

584. (a) To a Chaplain who has not rendered three years' Continuous Service, Furlough may be granted on medical certificate as follows :—

(i) If the furlough due exceeds a year—to the extent due, not exceeding two years.

(ii) If the Furlough due does not exceed a year—for not more than one year.

(b) Furlough granted for less than two years under clause (a) (i), or less than one year under clause (a) (ii), may, on medical certificate, be extended to the extent of the Furlough due not exceeding two years, or to one year, respectively.

Furlough Allowances.

585. (a) A Chaplain on Furlough is entitled to allowances as follows :—

	Ordinary Furlough.	Other Furlough.
	£	£
Archdeacon of Calcutta, Madras or Bombay, and the Presidency Senior Chaplain of the Church of Scotland at the same places.	600 a year.	480 a year.
Senior Chaplain	500 ,,	384 ,,
Junior Chaplain	350 ,,	300 ,,

An Archdeacon of Lahore, Rangoon, Lucknow or Nagpur draws no extra furlough allowance by reason of his office as Archdeacon.

NOTE 1.—[A Junior Chaplain appointed a Senior Chaplain while on furlough is entitled to the higher furlough allowance specified in this Article from the date of such appointment.]

NOTE 2.—[A Chaplain on probation while on furlough is entitled to the same furlough allowance as a Junior Chaplain.

(b) To a Chaplain proceeding on Furlough to England (not combined with privilege leave), an advance of the first quarter's allowances may be made, which advance is not recoverable in the event of his death.

(c) Ordinary Furlough includes—

(i) the first two years of each separate period of Furlough under Article 583;

(ii) so much of Furlough under Article 584 as may be due: Provided that the Chaplain has rendered six months' Continuous Active Service.

A Chaplain on Furlough or special leave does not forfeit his past leave allowances by resigning the service without returning to India.

586. A Chaplain returning from Furlough out of India is not granted an advance of allowances for more than thirty-five days beyond the date of embarkation for India.

Special Leave.

587. Special leave on urgent private affairs may be granted at any time for not more than six months:

Provided that a Chaplain who has had special leave must render six years' Active Service before he can again have such leave.

588. For the first period of a Chaplain's Special leave he is entitled to the leave allowance admissible during ordinary Furlough. In subsequent periods he is entitled to no leave allowance.

Subsidiary Leave.

589. The Subsidiary leave of a Chaplain and the beginning and ending of his furlough and special leave are regulated by the rules in Chapter XIII.

590. A Chaplain on Subsidiary leave is entitled to the same allowances as during the leave to which it is subsidiary.

591. A Chaplain may draw allowances as if he were on Privilege leave, for any part of his Subsidiary leave, for which, if he were not retiring from the service or going on furlough or on special leave, privilege leave would be admissible to him.

Privilege Leave and Extraordinary Leave.

592. Privilege leave may be granted—

(a) to a Chaplain appointed on or after the 29th July 1906, under the rules in Chapter XII;

(b) to a Chaplain appointed before the 29th July 1906, as follows:—

(i) After five months' uninterrupted duty,—for not more than one month

(ii) After ten months' uninterrupted duty,—for not more than two months.

(iii) After fifteen months' uninterrupted duty,—for not more than three months.

593. Privilege leave to the amount due may be prefixed as such to Furlough, Special leave on urgent Private Affairs, and Extraordinary leave without allowances, under the conditions prescribed in Article 233: Provided that when Privilege leave is so combined, the amount of the Privilege leave due shall be calculated under the rules in Chapter XII.

594. In applying for Privilege leave, a Chaplain must, except when the leave is combined with other leave under Article 593, record the declaration prescribed in Article 826.

1. An officer who has been granted privilege leave in combination with other leave is not permitted to resign the service until a period of at least six months has elapsed from the beginning of his combined leave.

595. A Chaplain may not take Privilege leave under Article 592 (b) in instalments.

596. A ... rent as if h ... 1914 is not ... tion with furlough or other long leave.

... allowance.

3. The Chaplain's substitute may draw the house-rent, although it is also drawn by the absentee.

597. Extraordinary leave may be granted under Article 332.

Benefices in the United Kingdom.

598. (a) A Chaplain in receipt of leave or furlough allowances who desires to accept a benefice in the United Kingdom, or to take up other employment, must obtain the previous permission of the Secretary of State in Council or of the Government of India according as his leave is taken out of or in India

(b) Should he, after duly obtaining such permission, accept a benefice, his Indian appointment will be deemed vacant on the expiry of any leave which may have been granted to him, unless before the expiry of his leave he shall have resigned the benefice after having first obtained the consent of the Secretary of State and of the Bishop of the Diocese in which the benefice is situated to his doing so. No extension of leave will under any circumstances be granted to a Chaplain drawing leave or furlough allowances who has accepted a benefice in the United Kingdom, unless he has resigned the same before the expiry of such leave or furlough with the consent before mentioned.

NOTE.—[In applying these orders in the case of a Chaplain of the Church of Scotland, the word "Presbytery" should be substituted for the words "Bishop of Diocese" in the fifth line]

Right and Title to Pension.

599. Chaplains are entitled to pension according to the following scale :—

Gratuity and Pension on Medical Certificate.

Chaplains appointed before 17th March 1892.	Per annum. £ s d.	Chaplains appointed after 17th March 1892.	£ s. d
Seven years' residence and over	127 15 0	Under ten years' residence, for each completed year, a gratuity of	80 0 0
Ten years' residence and over	173 7 6		Per annum £ s. d
Fifteen years' residence and over	292 0 0	Ten years' and over a pension of	127 15 0
		Thirteen years' and over a pension of	173 7 6
		Eighteen years' and over a pension of	292 0 0

Retiring Pension.

Chaplains appointed before 17th March 1892.	Per annum. £ s. d.	Chaplains appointed after 17th March 1892.	Per annum £ s. d
After 17 years' residence and 20 years' service . . .	365 0 0	After 20 years' residence and 23 years' service	365 0 0

NOTE 1—[(a) Gratuities are subject to a maximum of £720.

(b) The invalid pensions of £127-15-0 and £173-7-6 a year are admissible only after a trial of a temperate climate and upon a certificate from the Medical Board attached to the India Office that the officer is permanently unfit to serve in India.]

Exception—A Chaplain who, having completed the period of probation, is not confirmed

599A. A non-statutory Bishop of Lahore, Rangoon, Lucknow or Nagpur, if not borne upon the ecclesiastical establishment previous to appointment shall be entitled—

(*i*) to the pension and gratuity provided for Chaplains in Article 599, subject to the conditions that the gratuity of a Bishop invalided before completing 10 years' service shall be calculated at the rate of £120 per year of completed residence (as defined in Article 573), and that the maximum and minimum of such gratuities shall be £1,080 and £200 respectively;

(*ii*) to reckon as residence and service qualifying for retiring pension (but not for invalid pension) the number of completed years by which his age may at the time of appointment have exceeded 30 years, subject to the proviso that 5 years shall be the maximum period which can be so added.

Compulsory Retirement.

600. (*a*) A Chaplain must retire after twenty-five years' service, unless specially exempted by the Secretary of State, on the recommendation of the Governor-General in Council, or if he belongs to the Madras or Bombay Establishment, or to the Bengal (Calcutta) Establishment and is serving in the Presidency of Bengal, of the Governor in Council of his Presidency.

(*b*) The Local Government may require a Chaplain to retire at the age of 55 years, provided that he has rendered sufficient service to qualify for a retiring pension under Article 599. Chaplains who entered the service on or before the 22nd September 1915 may, however, be permitted, before being compelled to retire, to enjoy any furlough that may be due to them at the time when they reach the age above-mentioned.

NOTE—[The furlough granted under this clause is subject to the limit of two years prescribed in Article 583 (a).]

Leave after Completion of Period of Service.

601. No leave, other than Privilege leave under Article 592, may be granted to a Chaplain who has completed twenty-five years' service. Leave other than Privilege leave granted to a Chaplain before completion of twenty-five years' service ceases to have effect on such completion

NOTE —[Articles 600 and 601 do not apply to the Bishops of Lahore, Rangoon, Lucknow and Nagpur (see Article 570).]

SECTION IV.—MINISTERS OTHER THAN CHAPLAINS.

602. A Clergyman appointed under the orders of the Government to perform the duties of a Chaplain on the regular establishment is entitled to an allowance of Rs. 100 a month.

603. The allowances of a Clergyman (whether of the Additional Clergy Society or any other recognised Society) are regulated by the Local Government within an annual grant for each Government.

Chapter XXVIII.—Military Officers.[1]

SECTION I.—PAY, ALLOWANCE, AND LEAVE RULES.

604. The acting allowances of Military Officers in Civil employ are governed by the rules in Articles 104 to 116, and the leave of Military Officers subject to the Civil Leave Rules is granted under the European Service Leave Rules in Chapter XIII.

605. The Local Government may grant Furlough or leave under Military Rules or Special leave under Article 316 to a Military Officer subject to the Military Leave Rules.

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(1) The following is the rule of the Military Department for regulating the treatment of regimental officers selected for temporary employment in certain Civil Departments :—

Clause 129.—With the sanction of the Secretary of State for India, it is notified that a regimental officer selected for temporary employment with a department of the State in an appointment other than those * whose seconding is regulated by the provisions of paragraph 4 of G. G. O. No 811 of 1877, will on the expiration of a year of such temporary duty, be seconded, provided that the department employing him certifies that there is a fair likelihood of his being brought on the permanent establishment of that department; otherwise he must immediately be returned to his regiment.

* Army or personal staff appointments tenable for fixed periods.

An officer so seconded must either return to his regiment at the end of five years, or be struck off its strength on retention in a department for any period beyond that term.—(*Indian Army Circulars, Military Department, No 1451, dated 20th October 1880.*)

NOTE 1.—[The grant of furlough other than on medical certificate to a Military Officer in Civil employ is subject to the condition that a period of not less than eighteen months has elapsed since his last return from privilege leave of over six weeks' duration. This condition may, however, be relaxed by the Government of India in cases in which its enforcement would, in their opinion, cause special hardship to the officer concerned individually or be of material disadvantage to the State.]

NOTE 2.—[The grant of furlough or leave, other than privilege leave, out of India to a Military Officer subject to the Military Leave Rules carries with it the grant of subsidiary leave under the provisions of Article 322.]

606. A Local Government may also grant Short Leave (under Civil or Military rules, as the case may be) to a Military Officer subject to the Military Leave Rules.

NOTE 1.—[This Article also applies to officers of the British Service employed in a Civil Department in India.]

NOTE 2.—[Privilege leave in combination with other leave is admissible to a Military Officer in Civil employ under the conditions and limitations in Article 233, but not under the military rules promulgated with India Army Order No 64, dated 1st February 1904.]

NOTE 3.—[A Military Officer employed in the Army Department Secretariat of the Government of India, or as Private Secretary to a Lieutenant-Governor, or as an A.-D.-C. appointed from Military employment, is not entitled to privilege leave under Chapter XII of these Regulations.]

607. No other leave of absence may be granted under the Regulations in Part III to a Military Officer subject to the Military Leave Rules.

1. An officer proceeding on furlough or leave under Military Leave Rules forfeits, *ipso facto*, his lien on any acting appointment. Consequently, a Military Officer in Civil employ, with no substantive appointment in the Civil Department, loses, on proceeding on such furlough or leave, his lien on any temporary or officiating appointment in the Civil Department that he may have held *if* he has to revert to Military employ in order to obtain the leave.

608. No leave can be granted, under the rules in Part III, to a Departmental Officer or Warrant Officer, except under Article 606.

609. The allowances of a Military Officer subject to the Military Leave Rules during Subsidiary leave are regulated as if he were subject to the Civil Leave Rules: Provided that—

(*i*) If under the action of the Leave Rules such an officer has lost his lien on his appointment, he draws allowances under Military Leave Rules during his Subsidiary leave.

(*ii*) His allowances on Subsidiary leave must not be less than his allowances during the Furlough to which the leave is subsidiary.

NOTE.—[The subsistence allowance of a Military Officer subject to the Military Leave Rules is that prescribed in Article 108 (*b*).]

610. Subsidiary leave preparatory to his retirement from the service may be granted to a Military Officer subject to the Military Leave Rules, provided such leave does not vitiate his claim to retire on the date fixed.

611. Whenever the Furlough of a Military Officer subject to the Military Leave Rules begins before embarkation or ends after disembarkation, the Audit Officer should inform the Government of India in the Army Department and the account officer in charge of the officer's record of pension service of the date on which it begins or ends.

SECTION II.—COMPULSORY RETIREMENT FROM CIVIL EMPLOY.

Ordinary Rules.

612. (a) A Military or Naval Officer in Civil employ, after attaining the age of fifty-five years, shall not, except for special reasons, with the sanction of the Secretary of State, retain his office or be appointed to any new office: Provided that, if such an officer has held his office for less than five years, he may, for special reasons, with the sanction of the Government of India, be permitted to retain his office until he has held it for five years. The term "office" in this Article includes an officiating appointment, and the currency of the period of five years is not interrupted by any subsequent temporary promotion to a higher appointment.

of State.]

(b) The period of five years begins from the date on which the officer first takes up the office, whether substantively or temporarily. Provided that if temporary, he is confirmed without reverting to his substantive appointment; but the currency of the period is not interrupted by any subsequent temporary promotion to a higher appointment.

Exception.—Medical Officers of the administrative grades—namely, Surgeon-Generals and Colonels—are not compelled to retire from the service, until they attain the age of 60 years.

613. The undermentioned officers cease to be in Civil employ on attaining the age of 55 years:—

(a) Military Officers in the Survey of India, unless specially permitted by the Secretary of State, in the interests of the public service, to remain in the department for a further definite period;

(b) Officers of the Indian Medical Service below the rank of Colonel except Lieutenant-Colonels who are granted extensions of service beyond the age of 55 years until they complete 30 years' service;

(c) Departmental Officers and Warrant Officers.

614. On succession to the Colonel's allowance, a Military Officer (not holding an appointment the tenure of which is limited to five years) must vacate any Civil appointment which he then holds. But, with the sanction of the Secretary of State in Council, he is eligible for re-appointment or for employment in the same or any other appointment, at the discretion of the Government of India in the Army Department. In such a case, his Civil pay will be reduced by the amount of his Colonel's allowance, which will be included in, and not given in addition to, his consolidated salary.

Public Works Department.

615. The compulsory retirement of military officers in the Public Works Department or in the Engineering Department of State Railways, who are proved to be unfit for further advancement, is regulated by Article 353-A

and Note 3 thereunder. But any such officer, who on reaching the age of 50 years has not attained the rank of Superintending Engineer, will be liable to be called upon to vacate his appointment by the Government of India.

616. Military Officers in the Public Works, Railway and Telegraph Departments cease to be in Civil employ on attaining the age of 55 years.

617. A Military Officer serving in the Public Works or Railway Department must vacate absolutely any appointment he may hold in that Department on succession to the Colonel's allowance.

618. *Omitted.*

619. (*a*) Article 616 applies to officers of Royal Engineers serving in the Public Works and Railway Departments.

(*b*) Officers of the Royal Engineers, who have attained or hereinafter may attain the rank of General Officers, must vacate their appointments in the Public Works and Railway Departments. But if an officer at the time of so vacating office is a Chief Engineer, 1st class, or holds a post carrying that rank, he may be continued in the position which he had been required to vacate, for the remainder of the term of five years referred to in clause (c), unless in the meantime he must vacate office by some other Regulation. Officers of the Royal Engineers holding rank below that of Chief Engineer, 1st class, vacating office under this rule are not ordinarily eligible for re-appointment to the Public Works or Railway Department, but exceptions to this rule may, at the discretion of the Government of India, be made in the case of officers who, on account of specially accelerated Military promotion for distinguished service in the field, have reached the rank of Major-General without attaining the departmental rank of Chief Engineer, 1st class.

(c) No Chief Engineer of the Corps of Royal Engineers shall, without re-appointment, hold the same post for more than five years.

(*d*) The foregoing rules are applicable to officers of Royal Engineers who hold the post of Secretary or of Deputy Secretary to the Government of India in the Public Works Department

Leave after Completion of Period of Civil Employ.

620. (*a*) No leave but privilege leave may be granted to a Military Officer in Civil employ, whether subject to the Civil or Military Leave Rules, or to any Naval Officer who is more than 55 years old. Any leave, other than privilege leave, granted in the Civil Department to a Military or Naval Officer in Civil employ before he is 55 years old ceases to have effect on his fifty-fifth birthday, on which date he reverts to Military employ The absentee allowances of a Military Officer in Civil employ on leave other than privilege leave becomes a Military charge, and he becomes subject to Military

Rules on his fifty-fifth birthday, whether his leave was granted in the Military or the Civil Department.

NOTE.—[In the case of a Military or Naval Officer in Civil employ, who reverts to Military employ under the operation of the rules in this Section, privilege leave cannot be granted at the end of the service in the Civil Department for any period which will expire within the three months previous to his reversion.]

(b) [illegible]
namely,
may be,

Chapter XXIX.—Civil Veterinary Department.

NOTE.—[The rules contained in this Chapter apply only to those officers of the Civil Veterinary Department who were transferred to it from the Army Veterinary Department.]

Acting Allowance and Leave Rules.

621. Officers officiating in the Department draw the pay of their Military rank *plus* half the Civil allowance attached to that rank.

622 The leave and leave allowances of Civil Veterinary Officers are regulated by the rules in Chapter XIII applicable to Military Officers subject to the Civil Leave Rules, with the following special conditions :—

(a) Officers on ordinary furlough, or on special leave carrying allowances, draw half the pay of their military rank *plus* half their civil allowances, subject to the limits laid down in Article 314 for Military Officers subject to the Civil Leave Rules.

(b) Civil Veterinary Officers are treated, in applying the rules mentioned, as if they had, before entering the Civil Department, been subject to the leave rules for the Indian Army (1886) from the date of their arrival in India.

NOTE 1.—[For the purposes of this rule, the date of arrival in India must be held to be the date of arrival on the last tour of service.]

[illegible]

NOTE 3.—[Previous service in an appointment which has been absorbed into the Civil Veterinary Department counts for the purpose of these rules, as service (substantive or officiating, as the case may be) in that Department.]

Pension Rules.

623 The pension rules of the Civil Veterinary Department are as follows :—

(a) No officer becomes qualified for pension under the scale fixed for the Department until he has rendered ten years' service in it.

(b) Pensions are granted at the rates prescribed for the Army Veterinary Department by the Army Regulations in force for the time being *plus* an addition made on the following scale :—

	£	
After 10 years' service in the Civil Veterinary Department	72	a year.
„ 15 „ „ „ „ „	96	„
„ 20 „ „ „ „ „	120	„

(c) Leave, apart from privilege leave, counts as service qualifying towards pension to the extent of two months for every year of actual service.

(d) Retirement is optional after twenty years' service and allowed on medical certificate after fifteen years' service. An officer, who resigns the Civil Veterinary Department before retirement, forfeits all claims to pension under the scale fixed for the Department.

Officers retiring before having completed ten years' service in Civil employ are dealt with under Military rules for pension or gratuity. In the case of an officer invalided before completing ten years' service in the Civil Veterinary Department, the gratuity or pension earned by him under Military rules is increased in the same proportion as the total Civil allowances bear to the total Military allowances earned by him during his period of service in India.

NOTE.—[Previous service in an appointment absorbed in the Civil Veterinary Department counts as service rendered in that Department for the purposes of this rule.]

624. The rules in Chapter XXVIII relating to the retirement of Military Officers in Civil employ upon attaining the age of 55 years apply to Army Veterinary Officers in the Civil Veterinary Department.

625. *Cancelled.*

Family Pensions.

626. The family of a Civil Veterinary Officer recruited from the Veterinary Staff of the Army, is eligible for pension under the provisions of the Royal Warrant, "Pay and Non-effective Pay," applicable to the families of Army Veterinary Officers.

Chapter XXX.—Civil Engineers and Telegraph Officers.

SECTION I.—PAY AND LEAVE ALLOWANCES.

627. The rules in this Chapter apply, to the extent stated in the several Articles, to the following officers :—

(a) Officers of the Public Works, Railway and Telegraph Departments appointed from the Royal Indian Engineering College at Coopers Hill.

(b) Stanley Engineers.

(c) Other Civil Engineers and Telegraph Officers appointed by the Secretary of State.

(d) Indian College Engineers appointed in India.

(e) Other Civil Engineers not of purely Asiatic descent appointed in India.

NOTE.—[Section III of the Chapter applies not only to the Civil Engineers and Telegraph Officers enumerated in the Article, but also to the following classes:—

(a) Superior Civil officers of the Telegraph Department not included in clauses (a) and (c);
(b) Civil Engineers of the class described in clause (e) who are of pure Asiatic descent.]

Commencement of Service.

628. If a Coopers Hill Engineer lands in India on or before the 1st December of the year in which he passes out of College, his service counts from the preceding 1st October, unless another date should be specified in his letter of appointment

629. If a Coopers Hill Engineer is, after completing his three years' residence at College, required to go through a course of practical engineering in England under a Civil or Mechanical Engineer, his service, unless another date should be specified in his letter of appointment, will reckon from the commencement of the practical course, or from such later date as will be consistent with the regulation that he may count as service towards pension the time spent on such practical course to the extent of one year only.

630. The service of a Coopers Hill Engineer, whose case is not provided for in Article 628 or 629, and who does not land in India by the 1st December, and that of any other Civil Engineer appointed by the Secretary of State, counts from the date on which he lands in India.

631. The service of an officer appointed to the Telegraph Department, after training or competitive examination, by the Secretary of State, begins as follows:—

(i) If appointed after competitive examination, from date of covenant.
(ii) If appointed after training at Coopers Hill, from date of sailing of vessel selected by the Secretary of State, or 1st October in the year of passing out of the College, whichever is named in his letter of appointment, provided that he reaches India within two months of that date or other approximate date named in his letter of appointment; otherwise from date of arrival in India.

632. The service of an officer appointed in India begins ordinarily from the date on which he takes charge of the office to which he is first appointed.

Rules regarding Pay and Allowances and Leave.

633. Unless there be something repugnant in the subject or context, the rules in Part II govern the pay and allowances of officers to whom the rules in this Chapter apply, the acting allowance rules applicable to them being those in Chapter VI.

634. The Civil Engineers and Telegraph Officers whose leave is regulated by the European Service Leave Rules (Chapter XIII) are enumerated

in Article 297, clauses (c) and (e). The leave of all other officers is regulated by the Indian Service Leave Rules (Chapter XIV).

SECTION II.—PENSION RULES.

635. The rules in this Section apply to all officers of the classes described in clauses (a) to (c) of Article 627.

1 Officers of the Indian Telegraph Department, who may be transferred to the Indo-European Telegraph Department, retain the pensionary privileges of their own branch of the department.

NOTE 1.—[The rules in this Section apply to Mr. J H. C Kelly of the Indo-European Telegraph Department and to Mr. T. Ryan of the Indian Finance Department]

NOTE 2.—[The rules in Article 643 apply to all classes of officers of the Public Works, Railway and Telegraph Departments]

636. The pensionary claims of Indian College Engineers and of other Civil engineers (whether of purely Asiatic descent or not) appointed in India, and of Telegraph Officers not included under clauses (a) and (c) of Article 627, are governed by the ordinary rules in Part IV. But in the case of officers of this class who may rise to the rank of Superintending Engineer, or in the Indo-European Telegraph Department, of Director, the Government of India will be prepared to consider favourably their admission to the pension rules, including those contained in Article 642, applicable to the officers specified in Article 635:

Provided that Civil Engineers and Telegraph Officers who are members of the Provincial Services of the Public Works, Railway and Telegraph Departments are not eligible for the concession described in this Article.

1. The concession made under this Article does not affect the operation of the rules which determine the age from which qualifying service begins

637. The Government of India may, on special grounds, recommend for sanction of the Secretary of State the grant of an invalid pension on the scale below to an officer belonging to the classes referred to as appointed in India in Article 627, provided that he be not of purely Asiatic descent. This Article does not apply to officers of the Provincial Service.

Not less than Rs. 1,000 or more than Rs. 2,000 a year.

If the qualifying service of the officer be not less than—	*Forty fifth part of the officer's Average Emoluments.*
10 years	10
11 "	11
12 "	12
13 "	13
14 "	14

638. Unless there is something repugnant in the subject or context, the rules of Part IV apply to officers defined in Article 635, but they are modified in the points noted in the following Articles

639. The rule which excludes service under the age of twenty years does not apply to the officers defined in Article 635 or to Indian College Engineers.

640. Privilege leave and Subsidiary leave count as service. Other leave counts to the extent stated in Article 408.

641. The following special scale of pensions is admissible to the officers defined in Article 635.—

(*a*) After a service of less than ten years, an invalid gratuity on the scale laid down in Article 474 (*a*).

(*b*) After a service of not less than ten years, an invalid pension not exceeding the following amounts:—

Years of completed service.	Scale of Pension.	Maximum limit of Pension.	
		Rs	Rs.
10	20 sixtieths of Average Emoluments	1,000 a year or	83$\frac{1}{3}$ a month.
11	21 „ „ „	1,400 „	116$\frac{2}{3}$ „
12	22 „ „ „	1,800 „	150 „
13	23 „ „ „	2,200 „	183$\frac{1}{3}$ „
14	24 „ „ „	2,600 „	216$\frac{2}{3}$ „
15	25 „ „ „	3,000 „	250 „
16	26 „ „ „		
17	27 „ „ „		
18	28 „ „ „		
19	29 „ „ „		

(*c*) After a service of not less than twenty years, a retiring pension not exceeding the following amounts:—

20 to 24	30 sixtieths of Average Emoluments	4,000 a year or	333$\frac{1}{3}$ a month.
25 and above	30 sixtieths of Average Emoluments	5,000 „	416$\frac{2}{3}$ „

Special Additional Pensions.

642. One or other but not both of the following special additional pensions, over and above those allowed in Article 641, may be granted by the Local Government to officers of the classes specified in Article 635, limited in the case of the Engineer Establishment to those appointed not later than 1898 and of the Telegraph Department to those appointed not later than 1897, as rewards of approved service in the responsible positions mentioned below:—

(*a*) Additional pensions of Rs. 2,000 per annum to those who have served three years as —

(*i*) Secretary to the Government of India, Public Works Department.
(*ii*) [illegible] have been graded as such.
(*iii*) [illegible] ny capacity in the Telegraph [illegible] de.
(*iv*) Managers, North Western, Oudh and Rohilkhand and Eastern Bengal State Railways.

NOTE.—[If an officer to whom this clause applied is compelled to retire under the 55 years' rule, or on medical certificate, before he has served the full period of three years, he may, with the special sanction of the Local Government, receive a special pension, which bears the same ratio to the full pension of Rs. 2,000, as the number of complete months' service in the grades referred to in this clause bears to the full period of three years.]

(*b*) Additional pensions of Rs. 1,000 per annum to those who have served three years as—

(*i*) Superintending Engineers

(*ii*) Officers of the Indian Telegraph Department in the grades of Rs. 2,000 and Rs. 1,750 or as either of the two senior officers in the grade of Rs. 1,500.

(*iii*) Directors of the Persian and Persian Gulf Telegraphs in the Indo-European Telegraph Department.

NOTE 1.—[For the purpose of awarding these special additional pensions, Civil Engineers of the classes enumerated in Article 635, in Class I of the State Railway Revenue Establishments, the Deputy Secretary to the Government of India, Public Works Department, and Engineers holding the appointment of Under Secretary, Civil Works Branch, in that Department prior to the 6th February 1914 are treated as of equivalent rank to a Superintending Engineer.]

NOTE 2.—[Mr. T. Ryan of the Indian Finance Department will be eligible to count service for the additional pension of Rs 1,000 mentioned in this Article, from the date on which he would have reached Class III of Examiners in the late Superior Accounts Branch of the Public Works Department, if he had continued on the old scale of pay.]

NOTE 3.—[The provisions of this Article apply to officers of the Indo-European Telegraph Department appointed up to the 28th July 1896. Those appointed thereafter come wholly under Article 643]

[illegible]

NOTE 5 —[Clauses (*a*) (*iii*) and (*b*) (*ii*) of this article apply to services rendered in the specified appointments from 1st April 1914. As regards services rendered before that date, the appointments qualifying for additional pensions are :—

(*a*) For Rs. 2,000 under clause (*a*) (*iii*)

Director General and next senior officer in the Telegraph Department.

(*b*) For Rs. 1,000 under clause (*b*) (*ii*)—

Directors of Telegraphs, 1st, 2nd and 3rd classes, senior Director of Telegraphs, 4th class, and the Electrical Engineer-in-Chief]

NOTE 6.—[It is important to bear in mind that these additional pensions cannot be claimed as a matter of right, but will be granted at the discretion of the Local Government as rewards of "approved service." See special addition to certificate in Form No. 26 (Pension)]

643. For officers to whom special additional pensions under Article 642 are not admissible, the following special additional pensions may be allowed by the Local Governments :—

Additional pensions of Rs. 1,000 *per annum* to those who have rendered not less than three years of effective service in the following appointments, provided that in each case during such service the officer has shown such special energy and efficiency as may be considered deserving of the concession. In the case of officers entering Government service after the 31st December 1909, the grant of the additional pension is subject to the further condition that they must, in the event of voluntary retirement, have completed twenty-eight years of qualifying service. Voluntary retirement for the purpose of this rule should be taken as retirement under Articles 465 and 641 (*c*).

Secretary to the Government of India, Public Works Department.

Chief Engineers in the Public Works and Railway Departments.

Chief Engineer, Telegraphs, Officer of the Indian Telegraph Department in the grades of Rs. 2,250 and Rs. 2,000 or either of the two senior officers in the grade of Rs. 1,750.

Superintending Engineers, class I, Public Works and Railway Departments.

Deputy Secretary to the Government of India, Public Works Department.

Director-in-Chief of the Indo-European Telegraph Department, when the office is held by a member of either the Indian or the Indo-European Telegraph Department.

Deputy M[illegible]
ar[illegible]
St[illegible]
Rs 1,500 a month.

NOTE 1.—[The provisions of this article apply to officers employed in the Telegraph Department on the 31st March 1914. Those appointed thereafter to the "Posts and Telegraphs" Department come wholly under Article 475.]

NOTE 2.—[Note 4 below Article 642 applies also to special additional pensions admissible to officers of the Telegraph Department under this article.]

644. (*a*) An officer who holds a qualifying appointment substantively counts all active service, whether in the appointment, or in an appointment of corresponding rank and responsibility in foreign service, or on deputation on special duty or in a temporary appointment. He also counts periods of privilege leave taken by him during such service, but periods of leave other than privilege leave do not count.

(*b*) All officiating and temporary service in a qualifying appointment falling within any of the classes mentioned in clause (*a*), including periods of such service passed on privilege leave, counts with the exception of periods during which an officer officiates for another absent on privilege leave.

645. *Cancelled.*

SECTION III.—COMPULSORY RETIREMENT.

646. The tenure of the appointment of Director-General of Telegraphs is limited to five years. Extensions of this term can be sanctioned by the Secretary of State alone.

647. No Chief Engineer of the Engineer Branch of the Public Works or Railway Department, nor any officer of corresponding rank in the Superior Revenue Establishment of State Railways, nor any officer holding the office of Secretary or Deputy Secretary to the Government of India in the Public Works Department, can, without re-appointment, hold the same post for more than five years.

NOTE.—[The period of five years referred to in Articles 646 and 647 begins to run from the date on which the officer first becomes entitled to draw the full pay of the appointment whether holding it substantively or only in an officiating capacity provided that if officiating he is confirmed in the appointment without a break of service.]

648. The following rules apply to officers, whether Civil or Military, holding the appointments enumerated below:—

Secretary to the Government of India, Public Works Department.

Chief Engineers, class I, who have held one appointment with that rank for five years continuously.

(1) An officer who is granted a special extension of time in any high appointment in the Public Works, Railway or Telegraph Department, the tenure of which is limited by rule, shall not be allowed any leave during such extension except privilege leave and, should longer leave be necessary on account of ill-health, urgent private affairs, or other cause, the extension shall, *ipso facto*, cease from the departure of the officer on such leave.

(2) An officer who has served his full time in any of the above appointments, who is not given an extension, and for whom no other suitable appointment is available, or who vacates his appointment under rule (1), may be allowed any leave admissible under rule.

(3) Appointments vacated under the above rules will be treated as substantively vacant from the date of commencement of furlough whether taken by itself or as combined leave

649. The compulsory retirement of Civil Engineers of the Public Works Department or the Engineering Department of State Railways, who are proved to be unfit for further advancement, is regulated by Article 353-A. But any Civil Engineer of these Departments, who on reaching the age of 50 years has not attained the rank of Superintending Engineer, is liable to be called on to retire by the Government of India

650. All Civil Engineers in the Public Works and Railway Departments, Civilian Under Secretaries in the Public Works Secretariat of the Government of India or of a Local Government or Administration, and Civilians in the Superior Railway Revenue Establishment, and in the Superior Establishment of the Telegraph Department, are required to retire on attaining the age of 55 years.

NOTE 1.—[The above rule is applicable to all Civilians of the several establishments named whatever the source of their appointment may be]

NOTE 2 —[The Government of India are empowered in special cases to extend the services of Chief Engineers of the Public Works Department for a period not exceeding three months]

Chapter XXXI.—Law Officers.

651. The following law officers are entitled to the special privileges detailed in this chapter :—

An Advocate-General ; a Standing Counsel, an Official Trustee ; an Official Assignee.

A Receiver of a High Court ; an Officer of a High Court who holds an appointment which by law can be held only by a Barrister.

A Secretary or an Assistant Secretary in the Legislative Department to a Local Government.

A Remembrancer ; Deputy Remembrancer or an Assistant Remembrancer of Legal Affairs.

A Government Advocate and an Assistant Government Advocate.

A Clerk of the Crown, a Government Solicitor; a Government Pleader and a Government Prosecutor.

652. The leave of absence and acting allowances of a Law Officer who is a member of the Indian Civil Service, or a Statutory Civil Servant, are regulated by the rules applicable to the service to which the officer belongs.

653. A Government Pleader or Government Prosecutor is entitled to such leave of absence and allowances when on leave, and to such acting allowances as the authority who appoints him may think fit to grant, provided that no extra expense be caused to the Government.

Officers on full-time Salaries.

654. The leave of absence and acting allowances of a Law Officer who is not a member of the Indian Civil Service, or a Statutory Civil Servant, *or a Government Pleader, or a Government Prosecutor, but whose pay is* fixed, and whose whole time is retained for the service of Government, are regulated as if he were a member of the Indian Civil Service.

Officers retained on fixed Allowances.

655. The leave of absence and acting allowances of a Law Officer who is not a member of the Indian Civil Service, or a Statutory Civil Servant, or a Government Pleader, or a Government Prosecutor, whose pay is fixed, but whose whole time is not retained for the public service, are regulated by the following rules:—

Active Service

1. "Active Service" includes, besides time spent on duty, leave of absence taken under Rule 3, and Subsidiary leave of absence taken under Rule 8.

Application.

2. An application for leave of absence must be submitted through the officer who passes his pay to the authority to whom the officer is directly subordinate.

Leave during Vacation.

3. Leave of absence during the vacation of the High or Chief Court within whose jurisdiction the officer serves may be granted without deduction of pay, provided that no expense be caused by the grant of such leave.

Medical Certificate.

4. Leave may be granted on medical certificate for a period not exceeding one year, and leave so granted may, on medical certificate, be extended to twenty months.

5 Leave of absence on medical certificate may not be granted again until after three years' "Active Service."

Private Affairs.

6. Leave of absence on private affairs for a period not exceeding six months may be granted once only to an officer who has rendered six years' "Active Service."

Furlough.

7. After four years' "Active Service" Furlough without pay, but with retention of appointment, may be granted for a period not exceeding one year.

Subsidiary Leave.

8. In very urgent cases, Subsidiary leave of absence may be granted under Chapter XIII, provided that no expense be caused by the grant of such leave.

Commutation of Leave.

9. Excepting Subsidiary leave, no kind of leave may be granted in continuation of any other kind of leave; but any leave granted under these rules may be retrospectively changed for any other kind or amount of leave which might at first have been granted.

Commencement and Termination of Leave.

10. If an officer who has obtained leave of absence makes over charge of his office before noon, his leave begins on, and includes, the day on which he makes over charge; otherwise, it begins on, and includes, the following day.

11. If an officer resumes charge of his office after noon, his leave of absence ends on, and includes, the day on which he resumes charge; otherwise, it ends on, and includes, the day before he resumes charge.

Leave Allowances.

12. An officer while on leave under Rule 4, 5 or 6 is entitled to half-pay · Provided that his maximum leave allowance shall be, if paid in India, Rs. 833⅓ a month, and if paid at the Home Treasury £250 a quarter.

NOTE —[An officer compelled to take leave out of India under Rule 4, 5 or 6 owing to ill health is entitled to the benefits of Article 342. In applying that Article the word "pay" should be substituted for the word "salary"]

Acting Officers.

[illegible]

Rs. 2,000

[illegible]

(b) Provided that—

(i) The minimum salary of a Standing Counsel at Calcutta is Rs. 1,000 a month, and that of Assistant Legal Remembrancer, Punjab, Rs 450 a month

(ii) The minimum salary of a Government Advocate at Lahore, Allahabad, Rangoon, or Moulmein is three-quarters of the pay of the appointment.

Deputation Vacancy.

14. An officer officiating for an officer deputed to act in another appointment or on special duty is entitled to two-thirds of the pay of the appointment in which he officiates, *plus* one-third of the pay of his own substantive appointment if any.

NOTE —[The Government of India may, in special cases, increase the allowance under this rule to an amount not exceeding the full pay of the appointment]

Combination of Offices

15 If an officer holds more than one appointment, his salary is regulated by Chapter VIII

Officers paid by Fees.

656. Leave may be granted under the rules in the preceding Article to a Law Officer who is paid by fees, whether his whole time be retained for the service of Government or not, on condition that he makes such arrangements for the performance of his duties as are satisfactory to the authority by which he is appointed, and on condition that, in case of his obtaining leave on private affairs under Rule 6, the officiating officer shall receive the whole of the fees attached to the office

Other Officers.

657. An officiating Law Officer who is not subject to the foregoing rules, draws, as acting allowance, the difference between the allowance attached to the appointment and the portion of it drawn by the absentee for whom he officiates Provided the maximum salary (see Article 96) is not exceeded.

Extraordinary Leave.

658. Extraordinary leave under Article 332 may be granted to the officers in this Chapter.

Chapter XXXII.—State Railway Establishments.

SECTION I.—REVENUE ESTABLISHMENTS.

Classification of Service.

659. In the State Railway Revenue Establishment the different classes of service are as follows:—

(a) *Permanent pensionable,*—that is, service in all permanent appointments made before 1st September 1881, and service of officers, such as Civil Engineers and members of the Engineer and Upper Subordinate Establishment, who may be transferred to the Revenue Establishment, as Managers, etc., even after 31st August 1881.

The service of an officer in the Traffic Department (appointed before 1st September 1881), before he passed the test examination, does not qualify.

NOTE 1.—[If, after 1st September 1881, it is considered advisable to employ on a State [illegible]

status.]

(b) *Permanent non-pensionable,*—that is, service in all permanent appointments made after 31st August 1881, except as allowed for in clause (a).

(c) *Temporary*,—that is, service in appointments made from time to time for periods not exceeding twelve months according to the requirements of traffic.

(d) *Special service*,—that is, service of engine-drivers, firemen and mechanics, etc., under covenant with the Secretary of State, or who, on the expiry of the term of their covenant, have renewed their engagement under a covenant with the Government of India.

660. A subordinate officer transferred before 1st September 1881 from the temporary to the permanent Revenue Establishment of a State Railway may, with the sanction of the Local Government, count towards pension the whole or a part of so much of his temporary service as immediately preceded his qualifying service without interruption.

Ordinary Leave Rules.

661. (a) Leave on medical certificate with half-pay to the extent of sixty days in any calendar year may, in addition to any leave admissible under the Indian Service Leave Rules in Part III, be granted, at the discretion of the Manager, to drivers and other subordinate employés of the State Railway Revenue Establishment, whose service is classed as *Permanent "pensionable"* or *"non-pensionable"* under clauses (a) and (b) of Article 659, and who are not employed exclusively on in-door work, provided the illness has not been caused by the man's misconduct.

(b) It may be granted without prejudice to Privilege leave and in continuation of Privilege leave, or *vice versâ*. *(See also Rule 1 under Article 260.)*

(c) The leave thus granted is included in the leave to which the limit of three years prescribed in Article 336 applies.

662. Leave to members of superior and subordinate State Railway Revenue Establishments classed as "pensionable" or "non-pensionable" [illegible] hose referred to in the pre- [illegible] les for European or Indian [illegible]

Special Service Leave Rules.

663. Members of subordinate State Railway Revenue Establishments whose service is classed as "special" under clause (d) in Article 659, may be allowed leave as follows, at the discretion of the Manager :—

(a) Privilege leave on full pay to the extent of one month in twelve, irrespective of the conditions laid down in Article 260. Any subordinate may, however, be permitted to exercise the option of allowing his privilege leave to accumulate up to three months under the usual conditions.

(b) Leave on medical certificate on half-pay to the extent of sixty days in one calendar year, provided that the illness has not been caused by misconduct. This leave may be granted without prejudice to privilege leave, and in continuation of privilege leave, or *vice versâ*. *(See also Rule 1 under Article 260.)*

(c) In the case of deserving men, the Manager may extend the leave on medical certificate admissible under clause (b) to a maximum of six months in one calendar year.

NOTE.—[The Government of India may delegate the powers of a Manager of State Railways under this Article to Heads of Departments of State Railways.]

664. The Manager may grant furlough according to the following scale to any of the officers mentioned in the preceding Article who can be conveniently spared :—

(a) A first furlough for a period not exceeding—

12 months, after	7 years' service.		
14	ditto	8	ditto.
16	ditto	9	ditto.
18	ditto	10 or more	ditto.

(b) A second or subsequent furlough for a period not exceeding—

6 months, after	3 years' further service,			dating from the expiration of the previous furlough, or sick leave.
8	ditto	4	ditto,	
10	ditto	5	ditto,	
12	ditto	6	ditto,	
14	ditto	7	ditto,	
16	ditto	8	ditto,	
18	ditto	9	ditto,	

(c) The period of service upon which furlough may be granted is to be exclusive of time spent on leave of absence of any kind whatever except privilege leave. No second or subsequent furlough shall be granted till after a further actual service of three years, commencing from the date of the expiration of the previous furlough; and no single furlough shall be granted for a longer period than eighteen months.

(d) An officer on furlough is entitled to half the substantive pay of his appointment, excluding all allowances except personal allowances.

NOTE.—[An officer compelled to take furlough, or leave on medical certificate, out of India owing to ill-health is entitled to the benefits of Article 342. In applying that Article the term "pay" should be substituted for "salary."]

(e) The service towards first or subsequent furlough is not cancelled by the grant of sick leave; but an interval of three years of service must elapse between the return of an officer from sick leave lasting more than sixty days and the grant of any furlough that may be due to him.

[illegible]

(f) When an officer has earned either first or subsequent furlough, if from any cause it may be found inconvenient to grant him the whole of the furlough earned, an instalment may be granted, leaving the balance at his credit to be taken when convenient, subject, however, to the maximum limit of eighteen months prescribed above.

Leave in consequence of Accidents.

665. To subordinates on salaries not exceeding Rs. 250 a month, leave in India on full pay may be granted by Managers of State Railways in addi-
tion to any leave [illegible]
be absent from du[illegible]
with in the execution of duty, subject to a limit of six months and to record in the minutes of official meetings. The period of absence is treated entirely as duty and does not interrupt privilege leave or deprive the absentee of any allowance of the character of salary or local allowance.

Labourers.

666. Labourers in State Railway workshops employed upon daily wages when temporarily absent from work in consequence of injuries sustained while on duty in workshops, etc., may, under the authority of the Managers of the State Railways concerned, be granted allowances, during their absence, as under, the amount not to exceed—

(*i*) fifty rupees; (*ii*) one month's pay; (*iii*) (in cases where the absence is less than a month) the pay which the absentee would have earned during the period of leave if he were present on duty.

NOTE.—[The Government of India may delegate the powers of a Manager of State Railways under this Article to Heads of Departments of State Railways.]

Recovery of Advances.

667. (*a*) Advances whether made in India (*see Articles 61 to 66*) or by the Home Government should be recovered by monthly instalments of one-third salary except in the case of Covenanted Mechanics, Boiler Makers, etc., from whom the recoveries shall be in monthly instalments of one-sixth salary.

(*b*) In the case of Covenanted Engine-Drivers the recovery should be made in such a manner as will ensure their receiving in any month not less than Rs. 25, exclusive of overtime or other allowances.

SECTION II.—LOWER SUBORDINATES AND OFFICE AND PETTY ESTABLISHMENTS ON LINES UNDER CONSTRUCTION OR SURVEY.

668. Subject to the exception noted below, the service of all Lower Subordinates, Sub-Storekeepers, and members of the Office and Petty Establishment, appointed to or engaged for lines under construction or survey, on or after the 21st July 1880, is non-pensionable.

Exception.—The pensionable service of officers who, before the 21st July 1880, were transferred from permanently sanctioned posts, not attached to railways under construction, is in no way prejudiced by their fresh employment, and they will continue to enjoy their right to pension even if transferred from the line on which they were on that date engaged to another line under construction.

SECTION III.—OTHER OFFICES.

669. The services of all clerks appointed after the 31st January 1889 to all Consulting Engineers' and Port Storekeepers' Offices, and of all Accountants and clerks appointed after the 16th July 1889 to any of the Offices of Examiners of Guaranteed Railway Accounts, do not qualify for pension unless transferred from a permanent pensionable post.

Chapter XXXIII.—The Bengal Covenanted Pilot Service.

SECTION I.—PAY AND LEAVE RULES.

670. For the purposes of the Leave Rules, the pay of the several grades of the service shall be taken to be as follows :—

	Rs		Rs	
Branch Pilot	1,000 a month.	1st Mate Leadsman passed as Mate Pilot after 1st September 1894	175 a month.	
Master Pilot	700 ,,	1st Mate Leadsman	160 ,,	Without Exchange Compensation Allowance.
Mate Pilot appointed before 1st October 1894	450 ,,	2nd Mate Leadsman	135 ,,	
Mate Pilot appointed with effect from 1st October 1894	400 ,,	Leadsman Apprentice	107 ,,	

Furlough.

671. Furlough may be taken to the extent of four years during the entire period of service, in the following instalments, *viz.*, after ten years' service, two years, and after every subsequent eight years, one year, on an allowance of half the average pay for the last three years: Provided that no Furlough can be granted to an officer who has taken leave on medical certificate until three years after his return from leave on medical certificate, or to an officer who has taken privilege leave of over six weeks' duration until 18 months have elapsed between last return from such leave, and the furlough, or privilege leave, if any, with which the furlough is combined.

If a portion of an instalment is taken, the remainder may be added to any later instalment: Provided that not more than two years' furlough may be taken at one time.

NOTE 1.—[An officer compelled, owing to ill-health, to take leave out of India under Article 671, 672 or 673, is entitled to the benefits of Article 342. In applying that Article the word "pay" should be substituted for the word "salary."]

NOTE 2.—[The Gov [illegible]

Leave on Medical Certificate.

672. Leave on medical certificate may be taken to the extent of three years during the whole period of service, but not for more than two years at a

time, and not more than twice out of India. Such leave cannot be taken for more than one year, except after three years' continuous service immediately preceding. Leave on medical certificate cannot be counted as service for furlough, and no leave on medical certificate can be taken while any furlough is due An officer on leave under this Article is entitled to half his average pay for the first fifteen months of each period of such leave, but not for more than thirty months in all. For the rest of his leave under this Article he is entitled to a quarter of his average pay. The minimum furlough allowance during leave on medical certificate to the officer to whom any allowance is due shall be—

	Rs.
In the case of a Branch Pilot, Master Pilot, and Mate Pilot . .	100 a month
In the case of a Mate Leadsman and Leadsman Apprentice . .	50 „

Special Leave and Extraordinary Leave.

673. (*a*) Special leave on urgent private affairs may be granted at any time for not more than six months: Provided that an officer who has had Special leave must render six years' Active Service before he can again have such leave.

(*b*) For the first six months for which an officer is on Special leave, whether the six months be included in the same leave or not, he is entitled to a leave allowance of half his average pay for the last three years.

(*c*) Thereafter he is entitled to no leave allowance.

674. Extraordinary leave may be granted under Article 332.

Subsidiary Leave.

675. Subsidiary leave on the terms and conditions prescribed in Articles 321 to 331 may be prefixed and affixed to furlough, leave on medical certificate, and special leave on urgent private affairs, taken out of India.

Privilege Leave.

676. (*a*) Privilege leave may be taken either under the ordinary rules, or

(*b*) For a period of two months in every twelve (which cannot be accumulated), on half pay on a medical certificate showing that the applicant requires, through sickness, more leave than he could take under the ordinary Privilege Leave Rules. When such leave is taken in extension of ordinary Privilege leave, the period of ordinary Privilege leave first taken under clause (*a*) must be commuted to double the period on half pay under this clause. Leave taken under this clause is reckoned as Active Service, but it cannot be combined with other leave under Article 233, and if it is extended under medical certificate, the whole of the leave is treated as leave on medical certificate under Article 672.

(*c*) The leave authorised in clause (*b*) may be taken in instalments, but a Pilot may not take leave under clause (*a*) either by itself or combined with other leave under Article 233 for eleven months after his return to duty from his last leave taken under clause (*b*).

Leave after Superannuation Age.

677. A Pilot is eligible after he attains the age of 55 years for privilege leave and for any special leave on urgent private affairs to which he may be otherwise entitled. No leave, other than privilege leave or special leave granted to a Pilot before his fifty-fifth birthday, has effect after that date.

[illegible]

SECTION II.—PENSION RULES.

Retiring Pension.

678. After an actual service of thirty years in India, a Pilot is entitled to a Retiring pension according to his rank, as follows :—

	Rs
Branch Pilot	200 a month
Any lower rank	100 ,,

Invalid Pension.

679. Upon a certificate (in the form prescribed in Article 445 or 447, as the case may require) of incapacity for further service, from the Medical Board at the India Office, or from the Administrative Medical Officer in Calcutta, or from a Medical Committee over which the Administrative Medical Officer should, when practicable, preside, a Pilot is entitled to an Invalid pension, according to his rank, as follows :—

		Rs.
Branch Pilot		200 a month.
Master ,, ...		100 ,,
Mate ,, ...		60 ,,
Leadsman Apprentice	(1) Appointed before 3rd Oct. 1909 .	30 ,,
	(2) Appointed on or after ditto .	A gratuity on the scale laid down in Article 474 (*a*).

680. A Pilot retiring on an Invalid pension while absent on leave in England or in the Colonies will receive the pension of the rank which he held when his leave began, unless he has been promoted within twelve months from that date, in which case he will receive the pension of the rank to which he has been thus promoted.

Superannuation Pension.

681. A Pilot who has attained the age of 55 years may be required to retire unless the Local Government considers him efficient and permits him to remain in the service. But as the premature retirement of an efficient officer imposes a needless charge on the State, the rule should be worked with discretion. A Pilot who has attained the age of 55 years may not at his option retire from the service on a Superannuation pension. In every case the question whether retirement should be allowed is one for settlement by the Local Government.

682. The scale for Superannuation pensions is the same as that laid down in Article 679 for Invalid pensions.

Leave Counting as Service.

682A. Time passed on leave with allowances counts as service under the conditions and limitations prescribed in Article 408 of these Regulations.

SECTION III.—FAMILY PENSION RULES.

Contributions.

683. (*a*) Members of the Bengal Covenanted Pilot Service, other than those described in clause (*b*), must make the following monthly contributions towards the cost of pensions for their widows and orphans :—

Branch Pilot	Rs 40	Mate Pilot	Rs 10
Master „	„ 20	Leadsman Apprentice	„ 4

(*b*) The Pilots whose names are entered below, by monthly contribution of Rs 16 each, secure for their widows pensions of Rs. 100 a month and full pension for their children :—

Anderson, G. M.	Hudson, E. F.	Williams, W. R.
Christie, J.	Raynor, E. T.	

Amount of Pension.

684. Pensions are granted to the widows of Pilots married before their husbands retired on pension from the Service at the following monthly rates :—

	Rs		Rs.
(*i*) The widow of a Branch Pilot	100	(*iv*) The widow of a Leadsman Apprentice	15
(*ii*) „ „ Master „	50		
(*iii*) „ „ Mate „	30		

685. Pensions are granted at the following monthly rates to the children of Pilots of all ranks by wives married before their husbands retired on pension from the service :—

(*a*) To each son until the age of fifteen years	Rs. 12
(*b*) „ daughter until the age of ten years	„ 14
(*c*) „ „ over the age of ten years until marriage	„ 20

686. A wife married to a Pilot after his retirement on pension from active service and her children are entitled to no pension.

Miscellaneous Rules.

687. To entitle widows and orphans to pensions, Pilots must forward to the Port Officer certificates of their marriage, and of the births and baptisms of their children, within a month of the occurrence thereof. Notices of death are in like manner to be forwarded to the Port Officer.

688. Subscriptions by a Pilot for the purpose of securing pensions for his wife and children are refunded in the event of his resignation or dismissal.

689. Widows and female orphans above the age of 15 years must forward to the Accountant-General, Bengal, declarations, half-yearly, in May and November, that they are not married, and that they have not been married at any intervening period. The declarations are to be countersigned by the Executor to the estate of the deceased member of the Pilot Service or pensioner, or by the guardian of an orphan, and by a member of the Pilot Service, or a person exercising any of the powers of a Magistrate, or of a Minister of Religion, certifying to the truth of the declaration to the best of their knowledge and belief Forms of the declaration will be furnished on application to the Accountant-General, Bengal.

690. If a widow pensioner marries, her pension ceases during her coverture, but in the event of her again becoming a widow, she is readmitted to the pension to which she was entitled during her first widowhood unless her second husband was a member of the Pilot Service, and at his death of a higher grade than her first husband, in which case she is entitled to the pension of the higher rank.

691. No widow who may have been legally divorced or separated from her husband for adultery, or [illegible]
have quitted his protection [illegible]
though not divorced or sepa[illegible]
band's decease, may be living in a notorious state of incontinence, and no female orphan living in such a state shall be entitled to receive, or continue to receive, any pension under these rules.

SECTION IV.—RATE OF EXCHANGE FOR PENSIONS.

692. (*a*) The pension of a Pilot who was in the service prior to the 30th August 1883, if drawn in England or in the Colonies, is payable at the rate of 1*s*. 11*d*. per rupee.

(*b*) The pension of the family of a Pilot who was in service on the 15th September 1881, if drawn in England or in the Colonies, is payable at the rate of 1*s*. 11*d*. per rupee.

(*c*) The pension of a Pilot or of the family of a Pilot, who was appointed to the service after the dates named in clauses (*a*) and (*b*), is payable at the rate of exchange fixed yearly for the adjustment of financial transactions between the Imperial and Indian Governments.

Chapter XXXIV.—Andaman and Nicobar Military Police.

693. (1) The rules in this chapter apply to the subordinate officers, non-commissioned officers and men of the Military Police in the Andamans and Nicobars, including Havildars, Naiks and Sepoys employed in the civil police as Head Constables and Constables.

(2) The term "subordinate officer" includes Subadar-Majors, Subdars and Jamadars.

Leave Rules.

693-A. (*a*) Privilege leave on full pay may be granted to all ranks as under—

(*i*) Two months after thirty months' consecutive service.
(*ii*) Three months after thirty-six months' consecutive service.

(*b*) Such leave, if taken to India, may be overstayed without forfeiture of pay by such period not exceeding eight days as may intervene between the end of the leave and the date preceding that on which the next mail steamer leaves Calcutta for Port Blair.

694. Leave on private affairs on half pay may be granted to all ranks for a period not exceeding six months after five years' continuous service.

695. Leave on medical certificate under Article 336 may be granted to all ranks. During such leave absentee allowances are paid at the following rates—

Sepoys—Subsistence allowance of Rs. 6 a month.					
Naiks	,,	,,	,,	8	,,
Havildars	,,	,,	,,	10	,,

Subordinate officers—Half pay for fifteen months and subsistence allowance of Rs. 15 a month after that term.

696. Extraordinary leave under Article 339 may be granted to all ranks.

697. The total number of men absent from duty at one time on leave other than privilege leave shall not exceed ten per cent. of the Force.

698. Absence from duty while ill in hospital in the Andamans or Nicobars does not interfere with the grant of any leave admissible under this chapter and does not count as such leave. Absentee allowances are granted as follows :—

(*a*) Subordinate officers .	The allowances admissible under Article 695.
(*b*) Havildars, Naiks and Sepoys .	Full pay

699. (*a*) Policemen proceeding to India on leave of any description should ordinarily be employed on the voyage in guarding transferred convicts.

(*b*) On the expiration of their leave, they will report themselves to the Commissioner of Police, Calcutta, with a view to their employment as convict guards on the return journey.

700. Deck passages without diet by sea or river steamer and third class accommodation by rail are granted—

(*a*) To the families of subordinate officers for the initial journey to Port Blair on payment of one-third of the passage money and railway fare

(*b*) To the families of non-commissioned officers and men who have received permission from the Commandant of the Force to bring their families to the Andamans for the initial journey free of charge.

NOTE.—The Commandant's power to give such permission is limited to 10 per cent. of the total strength of non-commissioned officers and men.

(*c*) To all ranks proceeding on or returning from leave on private affairs or medical certificate free of charge.

(*d*) To the families of all ... 'amily
to and from his hoı ... from
leave of any kind f ... .nd on
payment of a single fare for the railway journey.

NOTE.—"Family" includes children, one wife and one relative.

Pension Rules.

701. Members of the Force are entitled to pensions under the Regulations in Part IV, for the calculation of ordinary pensions for Superior service. Native officers, Non-Commissioned officers and Sepoys of the Indian Army recruited direct from the Army and whose services are obtained on special application, count their previous Army service as qualifying service under the rules in Part IV, provided they complete 10 years' qualifying service in the Force. Those who retire before completing 10 years' such service are granted the military pension of their rank—their service in the police being included as qualifying under Military rules.

702. Time spent in hospital by Sepoys, Naiks and Havildars of the Force, during which they receive full pay under Article 698, does not qualify for pension.

Travelling Allowance Rules.

702-A. The rules in Part XI of these Regulations apply, with the exception that Jamadars and Subadars are entitled to second class accommodation.

Chapter XXXV.—Assam and Dacca Military Police.

703. Pensions are granted to Policemen and, in the exceptional cases specified in the rules, to their heirs in accordance with Parts IV and VI.

704. Furlough on private affairs on half Assam or Dacca pay for not more than six months, from date of departure from head-quarters to date of return thereto, may be granted by Battalion Commandants on condition that the ... ed 5 ... and

705. Leave on medical certificate for not more than six months, from date of departure from head-quarters to date of return thereto, may be granted by Battalion Cammandants to all ranks. A man taking such leave forfeits his turn for furlough and his name is placed at the bottom of the furlough roster. Leave on medical certificate for a longer period than six months may

be sanctioned by the Inspector-General of Police, but the amount of leave which may be granted with pay at one time is limited to two years.

706. Allowances on leave on medical certificate are full pay for as long a time as the man is entitled to privilege leave, and half pay for the remainder of the first six months; and, in case of extension being granted, half pay. The leave allowance of a man on leave on medical certificate taken in extension of furlough is half Assam or Dacca pay.

707. Sick leave on full pay for a period not exceeding one month may be granted by Battalion Commandants to all ranks while in hospital. In exceptional cases, *e.g.*, in consequence of wounds received in action or for other special reasons, this privilege may be extended to two months under the special sanction of the Local Government. After this period, such leave may be granted on half pay. Leave granted under this rule shall not interfere with the grant of ordinary leave on medical certificate.

708. The Battalion Commandant may grant privilege leave on urgent private affairs under the rules in Chapter XII to men whose conduct has been good.

709. The Inspector-General of Police may frame subsidiary rules not inconsistent with these rules for the guidance of Battalion Commandants in granting furlough and leave.

710. Native Commissioned officers are entitled to travelling allowance as second class officers for journeys by rail and by river steamer.

710A. Officers and men proceeding to or returning from outpost duty are allowed free passages by rail, river and road for their families. In the case of journeys by road, where carts cannot be used, the cost of one cooly for wife and one cooly for children may be allowed

711. Free passages by steamer and rail are allowed—

(*a*) to and from their homes, to men proceeding on or returning from furlough on private affairs or leave on medical certificate, but not to men proceeding on or returning from privilege leave;

(*b*) to their homes, to men who are not natives of the Province when retiring on Invalid pensions, but not to men granted Retiring or Superannuation pensions.

712. Any member of the force belonging to races foreign to Assam or Dacca who may be recruited outside the Province, may, with the written permission of the Battalion Commandant, and if quarters are available in the Police lines, bring his children, one wife and one relative to Assam or Dacca. [illegible]

reckoned on the number of foreigners only.

Return passages to their homes will be granted to the families of such officers and men dying in Assam or Dacca.

PART V.

Chapter XXXVI.—Calcutta and Suburban Police Forces.

713. The leave of absence and acting allowances of officers and men of the Calcutta and Suburban Police Forces, whose pay does not exceed Rs. 20 a month, are regulated by the following rules :—

(1) One month's leave may be granted at any time, but without pay ; such leave is only to be granted in special cases, and when good ground exists for granting the indulgence.

(2) One month's leave may be granted after eleven months' actual service without deduction of pay.

(3) Special leave for four months may be granted on half pay to any office or constable who has served for four years without taking leave of any description whatsoever.

(4) Officers and constables whose homes are more than 400 miles from Calcutta may in special cases have the leave, granted under rule (3), extended to five months, and those whose homes are more than 800 miles from Calcutta to six months.

(5) Sick leave may, at any time, be granted for one month on full pay.

(6) Sick leave on production of a certificate signed by the Police Surgeon declaring such leave to be absolutely necessary, may be granted for four months on half pay. [The longer periods granted to men, whose homes are more than 400 and 800 miles from Calcutta, in Rule (4), may be also granted to applicants under this rule.]

(7) Leave granted under Rules (1), (2), (3) and (4), cannot be claimed as a right, but may be granted at the discretion of the Commissioner of Police, provided that no inconvenience to the public service will be occasioned, and that the funds admit.

(8) The place of any officer or constable absent from duty on leave, under Rule (3), (4), or (6), may be filled up by the temporary promotion of a substitute from the next lower grade, whose place again may, in like manner, be filled up by promotion from the lower grades.

(9) Any officer or constable acting for another absent from duty under Rule (3), (4) or (6), shall draw half his own salary *plus* half that of the superior officer for whom he is acting, and any saving accruing from such arrangement shall be carried to the credit of the Leave Fund.

(10) The half salary of any officer or constable on leave, whether special or on medical certificate, will be payable only on return to duty. Should the absentee not rejoin upon the expiration of the leave granted to him, he will be liable to forfeit all claim to the half pay he would otherwise receive upon return. All sums thus forfeited are to be carried to credit of the Leave Fund.

(11) The number of men allowed to be absent on Special leave is not to exceed 10 per cent. of the effective numerical strength.

Chapter XXXVII.—Burma Military Police.

714. The rules in this Chapter apply to—

(*a*) All members of the Burma Military Police who originally enlisted on an engagement under the direct orders of the Government of India, and on a renewal of their engagement, to all members who joined the Force from the Army prior to 1st January 1889.

(*b*) All members of the Burma Military Police enlisted by the Government of Burma.

(*c*) Soldiers who join the Force from the Native Army after the 31st December 1888, or who, having joined before that date, are now serving in Lower Burma, not having been transferred from Upper Burma in the interests of the public service.

(*d*) Karen recruits

(*e*) All members not being soldiers of the Native Army on renewal of their engagements who were enlisted under the direct orders of the Government of India.

(*f*) Kachins enlisted in the Military Police.

(*g*) Salutries and Armourers.

Leave and Leave Allowances.

715. Furlough on private affairs on half Burma pay [except for members mentioned in Article 714 (*a*) who will draw full Burma pay] for not more than six months may be granted by Battalion Commandants on condition that the number absent on furlough and sick leave at any one time does not, except under the special orders of the Government of India, exceed 7½ per cent. of the strength of the Battalion.

716. Leave on medical certificate for not more than six months in the first instance may be granted by Battalion Commandants to all ranks. Extension of such leave on medical certificate beyond this period may also be sanctioned by them; but the amount of leave which may be granted with pay at one time is limited to two years

NOTE.—[A man taking leave on medical certificate forfeits his turn for furlough and his name is placed at the bottom of the furlough roster]

717. (*a*) Allowances on leave on medical certificate are :—

(i) In the case of the members mentioned in clause (*a*) of Article 714, full Burma pay for the first six months and afterwards at the rate of one quarter the Burma pay : Provided that the Local Government may in any case by special order direct that a man on leave on medical certificate after the first six months shall draw any allowance not exceeding one-half the Burma pay.

(ii) In the case of the members mentioned in clauses (*b*) to (*g*) of Article 714, half full Burma pay for the first six months and, in case

of extension being granted, not more than one-fourth full Burma pay without the sanction of the Local Government.

(*b*) The leave allowance of a man on leave on medical certificate taken in extension of furlough is one-fourth full Burma pay.

NOTE 1.—[An advance of three months' pay may be made to the men mentioned in Article 714 (*a*), going on sick leave. A man who obtains an advance of three months' pay is not eligible for another remittance for four months.]

NOTE 2.—[The language allowances, or extra pay, of Military Policemen for passing examinations in Yunnanese, Burmese, Shan, Chin and Kachin are treated as salary for the purpose of calculating leave allowances, but are not taken into account in calculating pension.]

718. Sick leave on full pay for a period not exceeding two months may be granted by Battalion Commandants to all ranks while in hospital in Burma and on half pay for any period in excess of two months. Sick leave on full pay may, however, be granted to all ranks while in hospital in Burma on account of wounds received in action until they are discharged from hospital. Leave granted under this rule does not interfere with the grant of leave to India on medical certificate.

719. Battalion Commandants may grant privilege leave on urgent private affairs under the rules in Chapter XII to men whose conduct has been good.

720. The Inspector-General of Police may frame subsidiary rules not inconsistent with these rules for the guidance of Commandants in granting furlough and leave.

Travelling Allowance.

721. Subadars and Jamadars of the Military Police both in Upper and Lower Burma are entitled to second class accommodation on all journeys by rail for which they are entitled to travelling allowance.

722. Free passages by sea, river and rail are allowed to and from their homes to men [except those mentioned in Article 714 (*f*) unless they belong to the Myitkyina Battalion having been recruited from the Bhamo district and travel *viâ* Katha] proceeding on or returning from furlough on private affairs or leave on medical certificate, but not to men proceeding on or returning from privilege leave unless the privilege leave is commuted into furlough or leave on medical certificate, when the grant of free passages or the cost thereof will be admissible.

NOTE 1.—[Charges for conveyance by road of Military Policemen proceeding on sick leave may be paid in cases where the Civil Surgeon certifies that they are unable to proceed on foot.]

NOTE 2.—[A free passage is allowed to an attendant who may be deputed by the Battalion [illegible]

should only be sent when it is thought absolutely necessary to do so, and that ordinarily the invalid should be put in charge of a comrade proceeding on leave at the same time.]

723. Free passages from the place of enlistment may be granted to Karen recruits who have to travel by rail or steamer to the headquarters of their Battalion. The passage of recruits for the Upper Burma Military Police enlisted in India as well as of gunkahars, cooks, bhisties, and transport drivers

is paid by Government from the place of enrolment to the headquarters of the Battalion.

The passages of followers enlisted in Burma for the Upper Burma Military Police may be paid with the sanction of the Inspector-General of Police, from the place of enrolment to the place where the follower is to be employed, in cases where the distance between the two places exceeds 50 miles.

Each recruit for the Arakan Hill Tracts, Lower Burma Military Police, is entitled to the actual cost of the journey from his home to Calcutta; and also free passage to Akyab.

The passage by rail and steamer of recruits enlisted in India for the Lower Burma Military Police is also paid by Government from the place of enrolment to the headquarters of the Battalion.

[illegible]

Police who are discharged on the termination of their engagements may be given travelling allowance under Article 1132, Civil Service Regulations.]

724. Any member of the Force [except those mentioned in clauses (*d*), (*f*), and (*g*) of Article 714] may, with the written permission of the Commandant and if quarters are available in the Police lines, bring his children, one wife, and one relative to Burma.

For the conveyance of families, third-class passages will be given by railway, and deck passages by steamer, in the case of all Native Officers, on payment of one-third of the passage money and fare; in the case of 20 per cent. of the Non-Commissioned Officers of each Battalion, free of charge; in the case of 5 per cent. of the privates of each Battalion, free of charge. Return passages to their homes will be granted to the families of officers and men dying in Burma.

725. No travelling allowance may be given to families of men of the Karen (now Lower Chindwin) Battalion who have been ordered on service. Indigenous Battalions are raised to avoid such expenses.

Pensions.

726. The following rules regulate the pensions of members of the Burma Military Police mentioned in Article 714 (*a*):—

(*a*) Soldiers joining the Police may elect to remain under military rules for pension. In that case no deductions from pay will be made on account of pension, and the pensions are regulated as if the soldiers held Army rank as shown below:—

1. Native Officers in receipt of Rs. 100 to Rs. 150 . . . . as Subadars.
2. " " " Rs. 50 to Rs. 65 . . . . as Jemadars.
3. Native Non-Commissioned Officers . . . . as Havildars.
4. Privates .

(b) If on joining the Police they do not elect to remain under Military Pension Rules, a deduction from pay of one-half anna in the rupee shall be made: the previous service in the Army qualifies for pension under the Civil Service Regulations, and the pensions admissible are determined by rules of those Regulations applicable to policemen. If the soldier returns to the Army from the Police, the amounts deducted are refunded and the Police service counts towards Army pension.

(c) In the case of policemen who elect for Military Rules, the claims of heirs to pension are regulated by Military Rules, and in the case of those who elect the rules of the Civil Service Regulations, heirs can claim pension only in the special cases provided for in Chapter XXXVIII.

(d) Men who joined the Force, otherwise than from the Army, are only entitled to such pensions and on such conditions as the Civil Service Rules for Policemen permit.

(e) Service in Burma is held to be "Foreign Service" within the meaning of Article 1062 of the Army Regulations, India, Volume I, in case of all men of the Native Army not being Natives of Burma, and is, therefore, so considered in the case of all men of the Upper Burma Military Police subject to the Military Pension Rules of the Native Army.

727. (a) In the case of members of the Burma Military Police mentioned in clauses (b) to (g) of Article 714, the rules in the Civil Service Regulations apply as regards pensions, except Salutries and Armourers who joined the Upper Burma Military Police from the Army before the 1st January 1889 who are subject as regard pensions to Article 726, clauses (a) to (c).

(b) Pension under the Civil Rules for the period of their past Military as well as their Police service is granted to the Native Officers and Non-Commissioned Officers of the Burma Military Police referred to in clause (a) who have been or may be recruited direct from the Army after 1888, when volunteering was closed, on the condition that they complete 10 years' qualifying service in the Burma Military Police in addition to their service in the Army; but those who retire with less than 10 years' qualifying service in the Burma Military Police will be granted pension on the Military scale according to their rank for the whole period of their service, that in the Police being included. *This concession applies only to those men whose services were obtained from the Army on special application*

PART VI.—WOUND AND OTHER EXTRAORDINARY PENSIONS.

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PART VI.—WOUND AND OTHER EXTRAORDINARY PENSIONS.

Chapter XXXVIII.—Wound and other Extraordinary Pensions.

SECTION I.—WOUNDS ON MILITARY SERVICE.

728. Gratuities and pensions to officers wounded, and to the families of officers killed, in action, or in the execution of duty otherwise than in action, and to the families of officers whose death is due to illness contracted on service with an army in the field may, in cases in which, under the Army Regulations, India, they would be admissible to the officers or men of the Regular Forces or to their families, be granted under the following rules, the grant being reported to the Secretary of State.

NOTE.—[In a case falling clearly and strictly within the letter of the rules, the Local Government may grant the pension admissible, the report to the Secretary of State being made through the usual channel.]

729. Officers of Government, being Volunteers who are called out on actual Military service, are entitled (themselves and their families) to the pensions, allowances, or gratuities admissible under Army Regulations, India, Volume IX, Section XIX: Provided that, if any such officer is wounded or killed in such actual Military service, and he or his family are in consequence thereof, entitled by the following rules or by the rules of the Service to which he belongs, to a higher pension, allowance or gratuity than is provided by the Military rules above referred to, then he or his family shall receive such higher pension, allowance, or gratuity in lieu of that provided by those rules. Provided also, in every case, that he has given to the head of his office if he is a member of an office establishment, or to his superior officer in other cases, notice of his having been called out.

730. Gratuities and pensions are granted to Civil officers wounded and to the families of such officers killed, while serving (in circumstances justifying their presence) with a Military force, and to the families of such officers whose death is due to illness contracted on service with an army in the field, according to the scale applicable to officers or men of the Army or their families, the rank of the officers being determined with reference to the actual

Military rank in the field or by the following tables, whichever is more favourable to the recipients :—

(i) Members of the Indian Civil Service :—

An officer of—	Ranks as a—
Less than 5 years' standing	Lieutenant.
More than 5 ,, ,,	Captain.
,, 12 ,, ,,	Major.
,, 18 ,, ,,	Lieutenant-Colonel.
,, 23 ,, ,,	Colonel.
,, 31 ,, ,,	Major-General.
Lieutenant-Governor or Chief Commissioner	Lieutenant-General.

(ii) Other Civil officers, not being native officers :—

An officer whose salary is—		Ranks as a—
Below Rs. 16 a month		Sepoy.
Rs. 16 a month or upwards		Naik.
,, 25	ditto	Havildar.
,, 50	ditto	Jemadar.
,, 100	ditto	Subadar.
,, 200	ditto	Lieutenant of less than 3 years' service.
,, 300	ditto	Lieutenant of more than 3 years' service.
,, 500	ditto	Captain.
,, 1,000	ditto	Major.
,, 1,500	ditto	Lieut.-Col.
,, 2,000	ditto	Colonel.
,, 2,500	ditto	Major-General.

(iii) The wound and family pensions of native Civil officers are fixed in rupees as follows :—

An officer whose salary is	Wound pension.	FAMILY PENSION.				Maximum amount of pension admissible.
		INTERMEDIATE RATE		HIGHEST RATE.		
		For widow.	For each child.	For widow.	For each child.	
	Rs.	Rs	Rs.	Rs.	Rs.	
Below Rs. 16 a month	The rates are determined in accordance with Army Regulations, India, Volume I, officers ranking as in clause (ii) above					
Rs. 16 a month or upwards						
,, 25 ditto						
,, 50 ditto						
,, 100 ditto						
,, 200 ditto	80	60	12	80	16	Half the salary of the officer.
,, 500 ditto	120	90	18	120	24	
,, 1,000 ditto	240	120	24	180	36	
,, 1,500 ditto	360	150	30	225	45	
,, 2,000 ditto	360	180	36	270	54	
,, 2,500 ditto	420	210	42	315	63	

(iv) A Viceroy of India or Governor of a Presidency ranks as a Field Marshal, General, or Lieutenant-General Commanding-in-Chief.

(v) A person who is not in the service of Government ranks according to his status in life as compared with an officer of the Regular Forces.

Place of payment.

731. A Civil officer in receipt of a wound pension cannot draw it from the Home Treasury while serving or residing in India, but must draw it at the place where his pay, absentee allowance, or pension is disbursed.

SECTION II.—SPECIAL CASES.

732. In special cases, as, for instance, when an officer is wounded in an encounter with dacoits, the Government of India may relax the condition of Article 730 as to service with a Military force. In such cases the pension or gratuity granted to a Civil officer will be calculated according to the scale laid down in the Army Regulations, India, Volume I, for wounds and injuries received in the execution of Military duty otherwise than in action, the rank of the Civil officer being determined as in Article 730.

rant Pension.]

Wound Leave.

733. An officer compelled to absent himself from duty, in consequence of wounds received in action, or of illness contracted by active service in the field (in circumstances justifying his presence) with a Military force (*i.e.*, service recognised as such by the Government of India), or of illness which was originally contracted on such service, being aggravated or reproduced by subsequent service of a similar nature, may be allowed extraordinary leave on medical certificate, irrespective of the period which has elapsed since his last return from leave of any description. Such leave will not reckon as part of the maximum admissible under general rules, and it will, except as regards the earning of Furlough, count, up to a maximum of 12 months as active service, provided that—

(*a*) it must be taken immediately in consequence of the wound or illness, *i e.*, without any intervening period of active service ,

(*b*) it is certified by the Medical Board, before which the officer appears, that the disability owing to which leave has become necessary, originated on active service in the field and was solely caused by hardship and exposure undergone or by wounds received, during such service ;

(*c*) it cannot be combined with any other kind of leave, except Leave on Medical Certificate ;

(*d*) allowances during such leave will be half average salary, subject to the maxima applicable to ordinary Furlough, and no allowances will be paid for any leave in excess of two years,

(*e*) the medical certificate must state the term for which leave is necessary in consequence of the wound or illness, and any extension of that period can be granted only on a fresh medical certificate;

(*f*) *an interval of three years must intervene between expiry of such* leave and furlough, except in the case of furlough on medical certificate, when the interval need not exceed six months.

[illegible] such service.]

SECTION III.—INJURIES RECEIVED ON DUTY.

734. (*a*) The rules in this Section are analogous to the Regulations for the grant of pensions to soldiers wounded in action and to the heirs of soldiers killed in action and provide for a pension or gratuity in cases of injury or death:—

(i) to a man so injured in the execution of a public duty as to be incapacitated for earning a livelihood;

(ii) to the family of a man killed in the execution of a public duty;

(*b*) They apply to any person employed in the service of the Government, whether permanently, temporarily, or even casually, and when remunerated by fixed pay, or *(as, for example, miners in the Salt mines) for piece-work.*

(*c*) They apply also to a village watchman (including a Municipal chowkidar in the United Provinces) or his family, even though he receives no pay from the State

735. A Wound or Extraordinary pension or gratuity is granted only when injury or death is met in the performance of a duty which is attended with extraordinary bodily risk. This condition governs the grant of pensions or gratuities under Articles 739 and 740. The Government recognises no claims on account of loss of life or bodily injury resulting from an ordinary accident. The following are examples of cases of ordinary accident:—

A Policeman falling from a horse; a Policeman on escort duty killed by sunstroke; a Lascar killed by the snapping of a hawser; a Labourer falling under a burden.

NOTE.—[As this rule is based upon the analogy of the regulations for the grant of pensions [illegible]

736. The Government does not bind itself to grant pension in every case, or, if it grants pension, to grant it for life.

737. The amount of pension is to be regulated by —

(i) the character and service of the injured or killed;

(ii) the nature of the risk undergone, and the conduct of the man in accepting it;

(iii) the nature and extent of the injury received,

(iv) the pecuniary circumstances and prospects of the claimant.

738. Injuries for the purposes of this Section are classed in four degrees:—

1st Degree.—Men losing two limbs or both eyes from wounds; or being so severely wounded as to be totally incapable of earning a livelihood and to require the care and assistance of some other person.

2nd Degree.—Men losing one limb or one eye; or being so disabled as to be incapable of earning a livelihood, though not requiring the care of another person

3rd Degree.—Men not losing a limb or an eye who have received an injury equal to the loss of a limb, or who are otherwise so disabled as to be capable of contributing in only a small degree towards earning a livelihood.

4th Degree.—Men able to contribute materially towards a livelihood, although unfit, from wounds, for the ordinary duties of the service.

739. A pension or, when a pension is not justified by the circumstances of the case, a gratuity may be granted by the Local Government or the Government of India as follows:—

Pensions.

(*a*) by the Local Government, not exceeding Rs. 10 a month.

(*b*) by the Government of India, not exceeding—

(i) Rs. 100 a month, in the case of State Railway servants.

(ii) Rs 25 a month in other cases

Gratuities.

(*c*) by the Local Government, not exceeding six months' pay and not exceeding Rs. 600.

(*d*) by the Government of India, not exceeding six months' pay or [illegible]

(*e*) by [illegible] ,000, [illegible]

740. Pensions granted under the preceding Article are subject to the following limits:—

(i) To an officer wounded in the first or second degree, not exceeding full pay.

(ii) To an officer wounded in the third or fourth degree, not exceeding half pay, or, if the officer is entitled to an Invalid pension of half pay under the ordinary rules for Superior or Inferior service, then not exceeding three-quarters pay.

(iii) To the family of an officer killed in the execution of his duty, not exceeding half the pay of the deceased officer, and not less than Rs. 2½ a month.

PART VI.

NOTE—[The term "family" includes only wife, legitimate child, father or mother, dependent upon the deceased for support. The words "for the support of the family" should be inserted in every order sanctioning a pension under this rule.]

741. (*a*) A pension granted under clause (i) or (ii) of the preceding Article will, unless the pensioner is more than sixty years old (in which case it will be permanent), continue, in the first instance, for two years only.

(*b*) At the end of eighteen months, the pensioner shall be examined afresh by a Medical Officer in charge of a Civil station, upon whose report the Local Government will decide whether the pension shall be continued or not for a further term, or permanently, and whether the pensioner shall be subjected or not to further medical examination.

742. (*a*) If a pension is granted to a family under Article 740 (iii), it [illegible] :—

[illegible] g unmarried daughter, for the same purpose ;

(iii) these failing to the father, for the same purpose ;

(iv) and failing all others, to the mother for the same purpose.

(*b*) To a male, pension is given as follows :—

(i) if the pensioner is under six years of age, till he is eighteen years old ;

(ii) if above six and under fifty years, for twelve years ;

(iii) if not under fifty years, for life.

(*c*) The pension to a female is for life or until marriage ; (1) but, on her suitable marriage, the Local Government, may at its discretion, grant her five years' pension as a dowry.

[illegible]

(*d*) A pension is given to only one member of each family, and no transfer of the pension to another member is permitted on its lapse either by the demise of the pensioner or for any other reason, or on its remaining in abeyance under the operation of the rules in Chapter XXI.

743. The Government of India have also the power to grant in any case, even where no pension or gratuity is admissible under these rules—

(*a*) a gratuity not exceeding Rs 1,000 ; or

(*b*) when injury or death is due to devotion to duty, a pension not exceeding Rs. 25 a month or a gratuity of equivalent amount.

NOTE.—The powers of the Government of India under clause (*a*) above may be exercised by the Railway Board in the case of Railway servants.

744. A Local Government may, as a special case, grant a gratuity not exceeding Rs. 20, or two months' pay, whichever is less, to a day-labourer or mechanic injured, or to his representatives if he is killed, in the execution of duty by causes beyond his control, if the injury is not such as to allow of a Wound or Extraordinary pension being granted under the foregoing rules.

NOTE —[The powers of a Local Government under this Article may be exercised by Superintending Engineers in the Public Works Department]

SECTION IV.—STATE RAILWAY RULES.

745. A Local Government having State Railways under its control and Managers of State Railways not under Local Governments may grant a gratuity to any State Railway servant who may be injured, or to the representatives of any State Railway servant who may be killed, by the working of trains or engines, otherwise than through his own negligence or wilful action: provided that such gratuity shall not exceed a sum equal to six months' pay of the servant injured or killed, or a maximum of Rs. 200. If Rs. 200 is considered insufficient, a reference must be made to the Government of India.

1. Officials of the Railway Mail Service are eligible in the same way as State Railway ser- [illegible] Managers of State Railways in respect of State Railway servants.

SECTION V.—PROCEDURE.

746. When a claim for Wound or Extraordinary pension arises, the head of the office in which a man killed or injured was employed must hold a formal inquest, taking evidence as to—

(i) the circumstances under which the injury was received, or the life lost;

(ii) the relationship (in the case of a death) and the pecuniary circumstances of the claimants.

747. The head of the office will then submit the case, with a statement of the circumstances, through his official superiors, to the Government. The application, which should be in Form No. 25 in the case of a man injured and Form No. 22 in the case of a man killed, should be accompanied by the report of the Audit Officer upon the claim.

SECTION VI.—RE-EMPLOYMENT OF WOUND PENSIONERS.

748. A Wound or Extraordinary pension granted under these Regulations, or under Military Rules to a Native Commissioned officer or a Non-Commissioned officer or soldier for wounds and injuries, may, in the event of the pensioner's subsequent employment in the Civil Department, be, during such employment, reduced or suspended by the Government which granted the pension.

NOTE.—["The withdrawal of pension is optional with the Local Government, and it should [illegible] *500 S., dated 13th September 1878.*)]

749. If, however, the Wound or Injury pension of a Native Commissioned officer or a Non-Commissioned officer or soldier includes an Invalid pension, he may, if the Wound or Injury pension is withheld, draw the Invalid pension in addition to Civil salary.

PART VII.—FOREIGN SERVICE; REGULAR ESTABLISHMENTS THE COST OF WHICH IS RECOVERED BY GOVERNMENT; SERVICE UNDER LOCAL FUNDS.

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PART VII.—FOREIGN SERVICE; REGULAR ESTABLISHMENTS, THE COST OF WHICH IS RECOVERED BY GOVERNMENT; SERVICE UNDER LOCAL FUNDS.

Chapter XXXIX.—Foreign Service.

Extent of Application.

749A. The revised rules in this Part will apply only to cases in which officers are transferred to Foreign Service after the 1st August 1913. In the case of officers transferred to Foreign Service before this date, the old rules contained in the original fifth edition of these Regulations should continue to be applied.

749B. It is to be understood that, unless the Local Government is expressly given authority to make exceptions, all deviations from the Foreign Service Rules require the sanction of the Government of India, whose powers in this respect remain unaltered.

Definition.

750. Foreign Service is of two kinds, *viz.*.—

First.—The service of an officer transferred to service under an employer who is not under the orders of Government and is allowed while in such service to maintain his claim to pension or to leave and pension in the same way as if he were still in the service of Government.

Examples.—Officers lent to Egypt, to a Native State, a Railway Company, a Port Trust, a Municipality, a District Board or other Local Fund

Second.—The service of an officer employed in connection with the management by Government of estates or funds which they have taken under their control or received in trust, and paid from the revenues of such estates or from such funds. The service must be strictly connected with the management by Government, and appointments existing apart from, or continuing after relinquishment of, Government control can be made only under the conditions of foreign service of the first kind.

Examples.—Administrators of Native States under direct management, Managers of Courts of Wards' Estates.

General Conditions applicable to Foreign Service.

751. An officer transferred to foreign service remains subject to the general and disciplinary rules which would have applied to him as a servant of Government had he not been so transferred

752. An officer who belongs to a graded service is allowed the substantive promotion which he would have received had he not been transferred. One who does not belong to a graded service may not, without the sanction of the Local Government by which he was transferred, be given substantive

Sanction to Transfer to, and Pay in, Foreign Service.

762. Transfer to foreign service is not permissible :—

(i) unless the transfer is in the public interest, that is, the service is such as should, for public reasons, be rendered by a servant of Government;

(ii) unless the officer holds, when his transfer is effected, an appointment in qualifying service on an establishment paid from General Revenues.

NOTE.—[Service under a landholder who retains the management of his own estate or under such a body as the Society for Prevention of Cruelty to Animals, or under societies for [illegible]

secured which would otherwise be unattainable.]

763. Transfers and appointments may be sanctioned by the Local Government under which the officer is serving, provided (*a*) the transfer is to foreign service in India, (*b*) the officer's pay in foreign service does not exceed Rs. 2,500 a month if he belongs to an Imperial service (Article 29 B), and in other cases Rs. 1,250 a month, and (*c*) the officer has rendered five years' service qualifying for pension. Condition (*c*) may be relaxed by the Local Government * under which the officer is serving at the time of the transfer; it does not apply to the following officers :—

(*i*) Officers subject to the leave rules in Chapter XIII and officers of the Army and the Royal Indian Marine.

(*ii*) Employés in the Survey, Forest, Medical, Veterinary and Agricultural Departments with technical qualifications.

(*iii*) Officers transferred to foreign service of the second kind.

(*iv*) Officers transferred to temporary appointments.

* NOTE.—[Local Governments should be on their guard against endeavours to use the service of Government merely as a means of entrance with pensionable status into foreign service.]

1. Temporary appointments are those which last not more than six months. In judging whether an appointment falls within this class, the duration of the appointment should be considered, not the duration of the particular officer's employment.

2. The Local Government may by general or special order—

(*a*) delegate to any authority subordinate to it power to transfer to foreign service within the province any officer whom such authority can, without reference to higher authority, appoint or transfer in the ordinary course of administration;

(*b*) delegate power to sanction transfers to temporary appointments outside the province.

3. The Government of Madras is empowered to transfer to service in Ceylon without a reference to the Government of India any officer not belonging to an Imperial service.

764. Pay and allowances in foreign service in India may be fixed within the limits specified in Article 763 by the authority sanctioning the transfer. The latter should in doing so be guided by the following general principles which should only be departed from for very special reasons, to be duly recorded :—

I.—The pay of an officer transferred to a post, the duties of which are similar to those of the appointment which he held when trans-

ferred, should be fixed at a sum which does not exceed by more than 25 per cent. his last pay in British Service, or, if he is acting in a grade or appointment from which he is unlikely to revert, his last salary.

II.—An officer transferred to an unusually responsible or difficult post or to one the duties of which differ from those of his appointment under Government, *should receive pay specially fixed with* reference to his *status* and pay in the service of Government, and the nature of the work for which he is transferred.

III.—When the transfer is to a Native State, the Local Government may allow the officer concessions not exceeding those specified in Rule II of Appendix 31. This rule is absolute and Local Governments are not empowered to allow greater concessions. In other cases, officers may be allowed travelling and conveyance allowance on such scale as the Local Government considers adequate; no other kind of allowances should ordinarily be sanctioned as they should be allowed for in fixing the pay of the officers in foreign service. In special cases in which the Local Government considers them necessary, exchange compensation and local allowances may be sanctioned, subject in the former case to the provisions of Article 41-G of the Civil Account Code, as also the payment of leave and pension contributions by the foreign employer, the value of these concessions being taken into account in fixing the pay of the officers in foreign service.

IV.—Increases of pay should be regulated as follows:—

(*a*) An officer, whose pay is fixed under rule I and who belongs to a graded service or who is on progressive pay or in a service in which pay is regulated by a time-scale, may on the occasion of each substantive promotion on his departmental list, or accrual of a periodical increment, be granted an increase equal to that which such promotion or increment would have given him in British service *plus* a sum not exceeding 20 per cent. thereon.

NOTE.—[When an officer in foreign service would have obtained, had he remained in British Service, acting promotion from which he would not have been likely to revert, his salary may be raised, with the consent of the foreign employer, to the amount which he would have drawn if he had remained in Government employ.]

(*b*) In all other cases in which pay is fixed under rule I, and in all cases in which it is fixed under rule II, no increase should ordinarily be allowed until the officer has been for three years in foreign service. After that period, and subsequently at intervals of not less than three years, increments of not more than 20 per cent. of the original pay may be allowed, if proposed by the foreign employer and if, in the opinion of the authority by whom the transfer was sanctioned, they are justified with reference to the work of the officer and the nature of his duties.

(c) In the event of a material change in the nature of the duties of an officer in foreign service his pay may be revised within the limits of its powers of sanction by the authority who sanctioned the transfer.

Contributions required for Leave and Pension.

765. (a) An officer transferred to foreign service in India contributes for both leave allowance and pension; if the transfer be to service out of India, contribution is made for pension only.

(b) Contribution is payable during leave on account of an officer who contributes for pension only. When contribution is paid for both pension and leave allowances it is payable during privi'ege leave taken in foreign service but not during other kinds of leave.

766. In the case of an officer *in foreign service of the first kind* contributions for leave allowance and pension are levied on an assumed pay, in return [illegible]r which the Government accepts the charge for the officer's leave allowances [illegible] all kinds and pension (or, in the case of foreign service out of India, pension [illegible]ly), calculated on such pay. (As regards privilege leave allowances, *see* [illegible]rticle 779 below.)

767. In the case of an officer of any of the classes mentioned in Article [illegible]3 (i) pay is assumed to be as follows whatever the actual pay and allow[illegible]ces drawn by him in foreign service may be :—

(a) If the officer is on a time-scale of pay, the pay which he would have [illegible]rawn from time to time had he remained in British service.

(b) For officers who are not on a time-scale of pay :—

	Indian Civil Service	Other Services.
	Rs	Rs
[illegible]		
[illegible]	400	350
([illegible]	100	50

Assumed pay whether calculated according to clause (a) or (b) of this [illegible]rticle is subject to the following maxima; Rs. 2,500 a month in the case of a member of the Indian Civil Service, or a Military officer subject to the Civil Leave Rules; Rs. 1,750 in the case of a Military officer subject to the Indian Army leave rules, and Rs 2,000 a month in the case of any other officer subject to the rules in Chapter XIII: provided that except in the case [illegible]
whose [illegible]
specia[illegible]
shall not exceed Rs. 1,500 a month.

Exception.—In the case of an officer promoted from a subordinate grade to service which is subject to the leave rules in Chapter XIII assumed pay is the pay he would draw from time to time on the Government list to which he belongs.

[illegible]

768. In the case of officers other than those mentioned in Article 763 (i), assumed pay is either the pay last drawn in Government service, or, if the officer belongs to a graded service, or is on a progressive or time-scale of pay, that to which he has attained or been promoted in accordance with the rule in Article 752, up to a maximum of Rs. 1,250 a month.

769. In the case of an officer *in foreign service of the second kind* contributions for leave allowance and pension are levied on actual sanctioned salary, subject to the maxima prescribed in the case of assumed pay in Articles 767 and 768. In return for these contributions the Government accepts the charge for the officer's leave allowances of all kinds and for his pension calculated on sanctioned salary.

770. Contribution is levied at the following rates :—

	For pension and leave allowance.	For pension only.
(a) In the case of officers of the classes mentioned in Article 763 (i)	$\frac{5}{16}$ $\frac{1}{4}$	$\frac{1}{8}$
(b) In the case of other gazetted and non-gazetted officers.	$\frac{1}{4}$	$\frac{1}{8}$
(c) In the case of inferior servants		$\frac{1}{16}$ *

NOTE 1.—[In the case of a member of the [illegible]

ployer]

NOTE 2.—[Percentage deductions (e g, Civil Fund in the case of a member of the Indian Civil Service) are calculated upon "assumed pay" in foreign service of the first kind and upon actual sanctioned salary in foreign service of the second kind]

NOTE 3.—[In the case of a Military officer the contribution covers the liability of Indian Revenues for temporary half-pay or half-pay pension when an officer loses his health during foreign service out of India before becoming entitled to ordinary so-called full pay pension.]

NOTE 4.—[The Chairman and Deputy Chairman of the Bombay Port Trust and the Chairman, City of Bombay Improvement Trust, contribute for pension only at the rate of ⅛th of assumed pay, their leave allowances for such leave as has been earned in its service being paid by the Trust.]

* NOTE 5.—[The Government of India pay no leave allowances to inferior servants transferred to foreign service.]

NOTE 6.—[Contributions in respect of Indian troops warrant and non-commissioned officers and men of the army departments, etc., lent for service out of India are regulated by separate orders.]

771. In addition to the contributions prescribed in these rules subscribers to the following pension funds pay to Government an additional premium of ¼th or ⅙th of the premium paid to the Fund —

(i) Bengal Uncovenanted Service Family Pension Fund . . one-fourth.

(ii) Bombay Uncovenanted Service Family Pension Fund—

(1) Subscribers who joined the fund on or before the 12th November 1900 . . . . one-fourth.

(2) Those who joined after that date . . . . one-sixth.

(iii) Bengal and Madras Service Family Pension Fund . one-sixth.

NOTE 1.—[In the case of an officer who contributes for leave, the extra premium is not payable during leave]

NOTE 2.—[Subscribers to the Uncovenanted Service Family Pension Funds transferred to service under a local fund which qualifies for pension payable from the local fund, must, while employed under the local fund, pay the additional premium prescribed in this Article]

NOTE 3.—[The premium when due from subscribers to the Bengal Fund, is collected by the Directors of the Fund and adjusted in communication with the Comptroller, India Trea- [illegible]

Remission of, and Exemption from, Contribution.

772. (*a*) The Local Government may remit contribution for any period for which an officer in foreign service is temporarily employed under Government, on duties additional to or distinct from his duties in foreign service.

(*b*) The following classes of officers are exempted from the payment of contribution under the above rules, and their pensions [and, in cases (*ii*) to (*v*) leave allowances] are calculated according to the rules applicable to Government servants :—

(*i*) Officers lent to His Majesty's Government or to British Colonies, Protectorates, etc. In such cases, if the loan is to the War Office, a share of the pension ultimately granted to the officer is paid by the War Office under separate arrangements, but if it is to a British Colony or Protectorate, pension contribution is paid during the period of the loan by the employing Government either to the Government of India, or to the India Office. When, however, an officer is allowed to take up duties under the War Office, he may in certain circumstances be required to pay a pension contribution in respect of the period of the loan.

(*ii*) Subordinates in the Revenue Survey temporarily lent to Municipalities for duty which, though paid for by them, also promotes Imperial interests.

(*iii*) Medical officers lent to charitable dispensaries or hospitals in British India. In any province, however, in which the changes in the conditions of service of Assistant Surgeons authorised by the orders in Home Department Resolution No. 1148-50, dated 22nd August 1898, have been brought into operation, contribution must be paid under the ordinary rules.

(*iv*) Officers of the Royal Indian Marine lent to Port Trusts.

(*v*) Any other officer or class of officer, who by the specific orders of the Government of India, has been exempted from the payment of contribution.

Procedure for Payment of Contribution.

773. A copy of the orders sanctioning an officer's transfer to foreign service must always be communicated to the Account Officer (referred to in

Article 774) by the authority by whom the transfer is sanctioned. The officer himself should, without delay, communicate a copy to the officer who audits his pay, and take his instructions as to the officer to whom he is to account for the contribution; report to the latter officer the time and date of all transfers of charge to which he is a party when proceeding on, while in, and on return from, foreign service; and furnish from time to time particulars regarding his salary in foreign service, leave taken by him, his postal address and any other information which that officer may require.

774. (*a*) In the case of foreign service out of India, the "Account Officer" is the Comptroller, India Treasuries.

(*b*) In the case of foreign service in India—

(1) if salary in foreign service is paid from a Government treasury and is subject to audit by an audit officer of Government, the Account Officer is such audit officer;

(2) otherwise, the Account Officer is the Accountant-General of the Province in which the Municipality, Port Trust or other body concerned is situated, or in the case of service under a Native State, the Accountant-General of the Government under whose administration the State is.

775. Ordinarily, contribution is payable directly to Government by the transferred officer himself. Government does not enter into arrangement with foreign employers or make direct demands upon them. Exceptions to this rule are:—

(*a*) Cases in which officers are lent to His Majesty's Government or to British Colonies, Protectorates, etc., and in which the contribution is payable by the borrowing Government [*see* Article 772 (*b*) (*i*).]

(*b*) Cases in which salary is payable at a Government treasury under the orders of the Accountant-General, and contribution is deducted from salary;

(*c*) Cases of members of clerical establishments in foreign service of the second kind, in which responsibility for payment of contributions and compliance with the rules rests with the officer who controls the fund or administers the trust,

(*d*) Cases in which, by special order or arrangement, contribution is recovered collectively on account of several officers employed under one foreign employer through an agent or officer who represents the employer.

776. Not later than 15 days after the end of each quarter for which salary in foreign service is earned, the officer must remit, in such manner as may be arranged with the Account Officer, the contribution payable by him for the quarter.

In any case in which contribution falls into arrear, the Account Officer should bring the fact to the officer's notice and claim interest at the rate of

4 pies a day per 100 rupees upon the amount due, from the date of expiry of the 15 days to the date on which contribution is paid up.

If any amount due, including interest, is not paid within 12 months of its accrual, the Account Officer should intimate to the officer the amount due up to date, and inform him that in consequence of the default he has forfeited his claim to pension or pension and leave allowance, as the case may be. In order to revive his claim the officer must at once pay the amount due and represent his case to the Local Government who will deal finally with it

Rules regarding Leave, and the Grant of Leave.

777. An officer holding an appointment in foreign service in India may not take leave or obtain leave allowances from Government unless he actually quits duty and proceeds on leave.

778. An officer on foreign service in India may not be granted leave otherwise than in accordance with the rules of the Government service to which he belongs. If such leave is granted to an officer the Account Officer shall on the fact coming to his notice require the leave so granted to be commuted to the leave for which the officer is eligible under rule, and call upon him to refund any allowances in excess of the amount admissible. The officer himself is personally responsible for the observance of the rule contained in this Article; by accepting leave to which he is not entitled under the rules he renders himself liable to refund allowances irregularly drawn, and in the event of his refusing to refund, to forfeit his previous service under Government, and to cease to have any claim on Government in respect of either pension or leave allowances.

779. An officer in foreign service *of the first kind* in India draws leave allowances calculated on assumed pay, save that in the case of privilege leave he is entitled to his actual pay in foreign service, the difference between such pay and assumed pay being paid by the foreign employer. In the case of foreign service *of the second kind* all leave allowances are calculated on actual sanctioned salary and paid in full by Government.

780. (*a*) Privilege leave which is certified by the Account Officer (Article 774) to be admissible may, when taken by itself, be granted to an officer in foreign service in India by his employer.

(*b*) Leave other than privilege leave taken by itself, may, in cases where the transfer has been sanctioned by the Government of India or a Local Government, be granted to an officer in foreign service in India by the Local Government under whom he was serving before his transfer; in other cases it may be granted by the authority who sanctioned the transfer.

(*c*) An officer who is in foreign service in India should submit all applications for leave, other than privilege leave taken by itself, with the report of the Account Officer, through his employer to the authority competent to sanction the leave.

781. To an officer who is in foreign service out of India leave in respect of his foreign service may, unless special arrangements as to leave have been

made on his behalf by the Government of India or the Secretary of State, be granted by his employer on such conditions as to leave and absentee allowances as the employer may determine. The officer should make himself acquainted with the rules or arrangements which are to regulate his leave before accepting foreign employment, and the Account Officer will be responsible for obtaining from him at the time of transfer a declaration showing that he has read and understood this rule. Time spent by the officer in foreign service out of India, though not constituting an interruption of service for leave under the Civil Service Regulations, does not count for such leave. Leave earned in respect of service under Government before transfer cannot ordinarily be granted to such an officer so long as he continues to be on foreign service.

Special Cases.

782. An officer of the Education Department, who is transferred by the Local Government in the public interest to a non-departmental College or School managed by a Board on which the Local Government is represented, or which is administered under a constitution and regulations approved, and of which the scale of superior appointments is sanctioned by Government, may contribute for leave allowances and pension under these Regulations.

Chapter XL.—*Cancelled.*

Chapter XLI.

Regular Establishments the cost of which is recovered by Government.

783. When an addition is made to a regular establishment on the condition that the cost shall be recovered from the persons for whose benefit the establishment is created, recoveries should be made under the following rules —

I.—The amount to be recovered should be the gross sanctioned cost of the service, and should not vary with the actual expenditure of any month.

II.—The cost of the Service should include the amounts required under Articles 769, 770 to provide for pension and leave allowances; these amounts being calculated on the sanctioned rates of pay of the members of the establishment. The remission of recovery on this account requires the sanction of the Government of India if the cost of the service exceeds Rs. 250 per month.

III.—If for any period the expenditure incurred, or to be incurred, should be considerably less than the sanctioned cost, the Local Government may reduce the amount of the recovery, the reduction being roughly proportionate to the difference.

NOTE 1.—[In the case of permanent establishments (as also temporary establishments which are filled by men already in permanent Government employ) a part of the cost of which

is recovered from persons or bodies benefited by their service, a demand for leave and pension contributions should be made in respect of the portion of the cost paid by the persons benefited the limit of Rs. 250 a month prescribed in clause II above applying only to such portion]

[illegible]

NOTE 3 —[In the case of a member of the Indian Civil Service the contribution recoverable under clause II above, to provide for pension and leave allowances, does not include the 4 per cent. annuity deduction which is payable in addition direct by the officer to the Account Officer

NOTE 4 —[The contributions for pension and leave allowances referred to in clause II above should be levied at the rates prescribed in Articles 769 and 770 only in the case of establishments sanctioned after the 1st August 1913, the rates in the old rules contained in the original fifth edition of these Regulations continuing to apply in the case of establishments that existed before that date even though the incumbents may change or additions be made to these establishments]

784 to 795. *Omitted.*

Chapter XLII.—Service under Local Funds.

SECTION I.—PENSIONS.

796. Apart from any special provisions made under the following rules service paid for from a Local Fund does not qualify for pension.

797. In the case of the Local Funds which up to the 1st April 1908 were treated as Incorporated, the Local Government may, subject to any provi- [illegible] he Trustees, Committee, or Managers [illegible] ay itself do so in the case of funds

798. The same procedure should be observed in the calculation, grant and payment of pensions for service treated as qualifying under Article 797, as is prescribed for pensions payable from General Revenues, but the pensions must be paid from and charged against the Local Fund.

NOTE.—[*See* the notes under Article 807.]

799. When part of the pensionable service of an officer qualifies for pension from the General Revenues and part from the Local Funds which up to 1st April 1908 were treated as Incorporated, his pension is paid and charged according to the Rule of Proportions: it is not admissible to disregard the pensionable Local Fund service, and award a pension only for the service paid from General Revenues: Provided that if, under this rule, less than one-fourth of the pension would be payable from either source, no distribution shall be made; in such case the other source shall bear the whole charge.

800. In the case of other Local Funds, the rule that service does not qualify does not prohibit the grant and payment of pensions in conformity with the general terms of the pension rules by the authorised administrators of the Funds. But Government is in no way responsible for the sanction or continuance of such pensions, and no standing order for their payment

may be issued to, or received by, any Government Treasury, and the procedure rules in Part X do not apply to them.

NOTE.—[The restrictions as to the payment of such pensions do not apply to pensions chargeable to the Calcutta Fire Brigade Fund]

801. Service in the following establishments paid from Local Funds is treated as qualifying, provided that pension for service under the Fund is paid from the Fund, the Rule of Proportions being applied in the case of service paid partly from the Fund and partly from other sources.—

(i) Establishments paid from Port Funds managed by Government.

NOTE.—[The rule regarding officers of the Royal Indian Marine lent to Port Trusts is given in Article 772(b) (iv)]

(ii) Members of the establishment of the Fire Brigade, Calcutta, whose pay at date of discharge exceeds Rs. 20 a month

NOTE.—[The pension of a member of the Fire Brigade who was enlisted on or after 27th December 1905 and whose pay at date of discharge does not exceed Rs 20, is regulated by Scale B in Article 503 and is paid from the Fire Brigade Fund or from the Fire Brigade Fund and the General Revenues according to the Rule of Proportions as provided above for officers on pay exceeding Rs. 20 The pension of a member of the Fire Brigade who was enlisted before 27th December 1905 and subscribed to Police Superannuation Fund, and whose pay at date of discharge does not exceed Rs 20 is, on his being invalided, regulated by Scale A in Article 503 and paid from General Revenues, provided [illegible] ment. 503 and [illegible] Revenue [illegible] ing Rs 20]

1. [illegible] uld ordinarily [illegible] f the Rule of [illegible] ioned in this [illegible] who before [illegible] of a merely temporary character, that it is solvent and able to bear the charge, and that the pension can legally be charged to it.

Pensions from the General Revenues.

802. The administrators of a Local Fund which banks with a Government Treasury may, with the permission of the Local Government, make a permanent arrangement for contributing for pensions from the General Revenues for its permanent employés, or for any specified classes of them, by paying to Government a contribution of one-ninth of the sanctioned salaries of the several appointments: provided that the bills on which the establishment charges are drawn from the treasury are subject to the audit of the Accountant-General under the rules prescribed for the audit of Government establishment charges, and that the contribution is added to the establishment bill and paid from the Local Fund by transfer credit to the General Revenues at the time the establishment bill is cashed. Arrear contributions in respect either of individual officers or classes of officers proposed with a view to render past service qualifying cannot be accepted.

1. The Municipal Corporation of the city of Bombay and the Committees of District Municipalities in the Presidency of Bombay may make a similar arrangement for contribution to pensions from the General Revenues for teachers employed in Municipal Schools, without

enforcement of the conditions of banking with a Government Treasury and of audit by the Accountant-General, provided the Accountant-General is furnished with—

(1) An annual list of the Establishment of teachers in Civil Account Form No 3 with accompaniment in Form No 4

(2) Health certificates of all new employes.

(3) Last-pay certificates of all teachers transferred from other schools.

2. (a) Teachers employed in schools maintained from Local or Municipal Funds in Bombay—

(i) who were appointed to Local (not Municipal) Fund service before the 26th June 1882. and on whose behalf contributions were made from Local Funds to the Local Fund Pension Fund : or

(ii) who were appointed or transferred from Government Service after the 26th June 1882 (the date the Local Fund Pension Fund was closed to new entrants) and before the 7th January 1889, the date of the new Foreign Service rules, and on whose behalf contributions were specially permitted by the Local Government to be paid to secure a title to pension from General Revenues under the rules in force before 7th January 1889 (*see* "Note" below), continue to be in pensionable service when they are transferred, together with the schools in which they are employed, from Local to Municipal service, and *vice versâ*.

the rules in this Chapter

(c) In case (i) any pension granted is charged to the Local Fund Pension Fund and to the General Revenues according to the Rule of Proportions

NOTE.—[Under the rules in force prior to January 1889, an officer paid from a Local Fund was allowed on first appointment with the permission of the Local Government, and upon production of the health certificate prescribed in Article 49 to subscribe for a pension from

803. An officer who is in qualifying service under Government may be transferred by the Local Government to service under a Local Fund under the same limitations and conditions as are applicable to transfers to Foreign Service. If the establishments are fixed and controlled by Government in the same way as Government establishments, the limitations and conditions are those applicable to Foreign Service of the second kind ; otherwise they are those of Foreign Service of the first kind.

804. Teachers and other members of the pensionable establishments of Government Schools, who are transferred with the schools to which they belong to service under Local Boards, continue to render service qualifying for pension from the General Revenues, and are entitled to the concession even though they may be moved from the school with which they are transferred to another school which was formerly under Government management.

Teachers appointed to schools transferred to the management of Local Boards are entitled to pension from the General Revenues if the Local Government makes a part of its contribution to the school in the form of free pensions.

805. If an officer, whose service is reckoned as pensionable under the provisions of Article 802, is transferred to the similarly pensionable establishment of another Local Fund, the transfer will not interrupt the continuity of service for pension. Transfers may also be made between such service under Local Funds and service in Government establishments.

806. Article 755(*a*) does not apply to an officer transferred to service under a Local Fund under the conditions and limitations of Foreign Service of the second kind otherwise than as a merely temporary arrangement; but it does refer to transfers to service under a Local Fund under the conditions and limitations of Foreign Service of the first kind.

Post Office Annuities.

807. With the permission of the Government, the Trustees, Committee or Managers of any Local Fund may purchase from the Post Office a pension or annuity for any of their servants for whom such pension or annuity is not otherwise admissible: Provided that such pension shall not exceed the amount which the servant might have obtained if his service had been paid from the General Revenues.

NOTE 1.—[When a pension is payable partly by Government and partly by a Local Fund, the Local Fund concerned may pay the capitalised value (calculated according to Table A in Appendix No 10) of its share of the pension into the Government Treasury instead of purchasing an annuity from the Post Office]

NOTE 2.—[illegible]

Local Fund Pension Funds.

808. The Government does not guarantee the solvency of Funds formed by the subscriptions of Local Fund officers, and established to provide pensions for the subscribers thereto.

Exceptional Cases.

809. In the following cases, service paid from Local Funds qualifies:—

(*a*) Service paid from the Cotton Frauds Improvement Fund which qualified for pension payable from that Fund prior to its exhaustion.

(*b*) Second writers and daroghas on Jail establishments in the Bombay Presidency formerly paid from a Jail Labour Fund.

(*c*) Muharirs attached to the Court of any Honorary Magistrate in the Central Provinces, and paid from Municipal Funds.

(*d*) Officers in the United Provinces transferred in connection with the introduction of the Local Self-Government scheme before the 1st April 1885 to service under Local Committees constituted under Acts III and IV of 1878.

(*e*) Officers in Assam transferred after the 10th May 1882, and before the 12th May 1884, to service under Local or District Committees constituted by the Assam Local Rates Regulation (1879)

(*f*) Officers in the Punjab transferred before the 1st July 1880 to service under District Boards constituted under Act XX of 1883.

(*g*) Service paid from the "Quetta Revenue Fund" before the 1st April 1883, from which date the charges previously paid from the Fund became charges on the General Revenues.

PART VII.

SECTION II.—LEAVE, ACTING AND TRAVELLING ALLOWANCE RULES.

810. Service under the Local Funds which up to 1st April 1908 were treated as Incorporated may qualify for leave under Part III; but the allow- ... be disbursed from the Local Funds and ... the Rule of Proportions: Provided ... said allowances would be payable from either source, the whole of the allowances shall be charged to the other source.

811. Except in the case of employés of Local Funds which under legal enactment, or under rules framed under such enactment, have special rules regulating all or any of such matters, no leave, or allowances during leave, or acting allowances to an officer paid from a Local Fund, or from any other sources under the control of a Government officer, shall, without the express sanction of the Local Government, exceed what would be admissible under the rules which apply to an officer paid from General Revenues.

NOTE.—[A Local Government may delegate its power under this Article to Heads of Departments.]

812. The salary of an officer whose substantive office is paid from a Local Fund appointed to act in an office paid from the General Revenues is calculated as it would be if his substantive office also were paid from the General Revenues.

813. Applications for leave are ordinarily made to the Managers of the Local Fund concerned; but when the officer contributes for pension and leave, or pension only, Article 780 should be complied with.

814. The travelling allowance rules in Part XI do not apply to officers paid from a Local Fund or from any sources other than General Revenues under the control of any Government officer; but the travelling allowance paid to such officers shall not, without the express sanction of the Local Government, exceed what would be admissible to similar officers under Part XI.

NOTE.—[A Local Government may delegate its power under this Article to Heads of Departments.]

PART VIII.—RECORD OF SERVICE.

GENERAL ARRANGEMENT.

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PART VIII.—RECORD OF SERVICE.

Chapter XLIII.—Record of Service.

SECTION I.—GAZETTED OFFICERS.

815. (*a*) A record of the service of gazetted officers and of Myooks and Junior Assistant Registrars in the Co-operative Department in Burma is maintained by the Audit Officer under arrangements which differ in different departments. The general arrangement to be observed is that the Service Registers should be kept by the Audit Officer who audits the salaries, and that, when an officer passes from one audit circle to another, a record of his past service should be passed on from the Audit Officer whose circle he leaves to the Audit Officer to whose circle he is transferred.

(*b*) In the case of Chaplains, the record is kept by (*i*) the Accountants General of the Provinces in which the Chaplains serve, and (*ii*) the Comptroller, India Treasuries, for the Archdeacon of Calcutta and the Presidency Senior Chaplain, Church of Scotland, Bengal.

(*c*) When a Chaplain of the Church of Scotland is posted to or relieved from the charge of a regiment, the Army Department should inform the Accountant-General concerned.

2. Examiners of Railway Accounts and the Examiner of Accounts, Military Works

SECTION II.—NON-GAZETTED OFFICERS.

816. With the exceptions noted below, every non-gazetted officer holding a substantive appointment on a permanent establishment is required to keep up a Service Book (Form No. 23) in which every step in his official life should be recorded, each entry being contemporaneously attested by the head of his office. If the officer is himself the head of an office (*e.g.*, a Postmaster or a Sub-Inspector of Police), the contemporaneous attestation should be made by his immediate superior. The following are the exceptions referred to :—

Co-operative Department in Burma. (7) Permanent subordinate non-pensionable employés on State Railways for whom a special form of record has been prescribed. (8) Inferior servants of all sorts

817. Service rolls such as those prescribed for the police in Article 823 should be maintained for all officers for whom service books are not kept except runners, boatmen and coolies in the Post Office, and the officers referred to in exceptions (1), (2), (6) and (7) under Article 816. Service rolls should invariably be submitted with the pension papers to the Audit office.

818. A Service Book is supplied at his own cost to every officer on his [illegible] e custody of the head of the office in [illegible] with him from office to office. It may [illegible] or is discharged without fault, an entry

819. It is the duty of every officer to see that his Service Book is properly kept up, and that all erasures in it are properly attested. If the book is not carefully kept up, difficulties may arise as to verification of service, when the officer applies for pension.

820. Personal certificates of character should not, unless the Local Government so directs, be entered in column (13), but if an officer is reduced to a lower substantive appointment, the cause of the reduction should always be briefly stated thus—"Reduced for inefficiency," "Reduced owing to revision of establishment," etc.

821. Every period of suspension from employment, and every other interruption in service, should be noted, with full details of its duration, by an entry written across the page, and attested by the head of the office or other attesting officer.

1. The head of the office should take efficient measures to see that these entries are made with regularity. The duty should not be left to the non-gazetted officer concerned.

822. (*a*) If the officer is transferred to Foreign Service, the head of the office or department should send his Service Book to the Accountant-General, who will return it after noting therein, under his signature, the orders of [illegible] e effect of the transfer in regard to [illegible] and any other particulars which the [illegible] be necessary in connection with the transfer. On the officer's re-transfer to the British Service, his Service Book should again be sent to the Accountant-General, who will then note therein, under his signature, all necessary particulars connected with the officer's Foreign Service.

1. No entries made in the Service Book of an officer on Foreign Service of the first kind can be attested by any officer except the Accountant-General

2. Rule 1 does not apply in the case of Public Works and Railway Subordinates (*vide rule 2 under Article 815*).

(*b*) In cases in which the salaries are audited by an Accountant-General, this Article does not apply to Foreign Service of the second kind.

SECTION III.—NON-GAZETTED POLICE SERVICE.

823. In the case of Police officers whose pay does not exceed Rs. 20, there shall be kept up for each district by the District Superintendent of Police a Service Roll in English, in which shall be recorded the date of the enrolment of each man in the Constabulary; his caste, tribe, village, age, height, and marks of identification when enrolled; his rank, promotion, reduction or other punishment; his absences from duty, on leave or without leave; the interruptions in his service; and every other incident in his service which may involve forfeiture of portions of his service, or affect the amount of his pension. The roll shall be checked by the Vernacular Roll and Order Book and the Punishment Register, and every entry in it shall be signed by the District Superintendent of Police

824. From this Roll the necessary statement of service of every applicant for pension shall be prepared, additional proofs being collected, as prescribed in Article 908, in respect of any service rendered before enrolment in the Constabulary which the applicant may be entitled to count.

PART IX.—PROCEDURE RELATING TO LEAVE.

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PART IX.—PROCEDURE RELATING TO LEAVE.

Chapter XLIV.—Applications for and Grant of Leave.

SECTION I.—APPLICATIONS.

825. Except as provided in Articles 841 to 845 and 848, an application for leave should be submitted to the Local Government, or other authority whose duty it would be to fill up the appointment of the applicant if it were vacant.

1 When a gazetted officer applies for leave, he should quote the Article or Section of these Regulations under which he considers himself entitled to the leave.

Privilege Leave.

826. An officer applying for Privilege leave must, except when the leave is combined with other leave under Article 233, record a declaration that he has no intention of retiring or of taking long leave of any kind, for three months after his return to duty. Though not absolutely debarred by this declaration from applying for permission to retire or to take long leave within the three months, he should, if he does so, explain his change of mind.

proper in each case.

2. An officer who has been granted Privilege leave in combination with other leave is not permitted to resign the service until a period of at least six months has elapsed from the beginning of his combined leave

827. In applying the preceding Article to officers of the State Railway Revenue Establishments referred to in Article 661 (*a*), the word "otherwise than as provided by Article 661 (*a*)" should be added after "kind"

Medical Certificates—General Rules.

827A. Medical Officers are debarred from recommending the grant of sick leave in any case in which there appears to be no reasonable prospect that the officer concerned will ever be fit to return to duty. In such a case, the opinion, that the officer is permanently unfit for service under Government, should be recorded in the Medical certificate.

under civil rules]

827B. All certificates of medical boards or medical officers granted under the provisions of Article 829 or 831 of the Civil Service Regulations (or under any similar rules applicable to particular classes of officers) should contain a proviso that no recommendation in them shall be evidence of a claim to any leave which may not be admissible to an officer under the terms of his contract or the rules to which he is subject.

Medical Certificates—Gazetted Officers.

828. An application from an officer in India for leave, or extension, or commutation of leave on medical certificate, must be accompanied by a certificate in the following form, or as nearly in this form as the circumstances allow :—

I, *A B*, Surgeon at (*or of*)________, do hereby certify that *C D*, of the______

829. With the cognizance of the head of his office, or if he is himself the head of his office, of the head of his department, the applicant must, except in the cases provided for in Article 831, present himself with two copies of the statement of his case at the seat of the Government under which he is serving, or at such other place as may be appointed by that Government, where a Committee of Medical officers can be assembled under the orders of the Administrative Medical Officer of the Province, and when practicable, presided over by him. From this Committee the officer should obtain a certificate as follows :—

We do hereby certify that according to the best of our professional judgment, after careful personal examination of the case, we consider the health of *C D* to be such as to render leave of absence for a period of (*x*) months absolutely necessary for his recovery.

830. Before deciding whether to grant or refuse the certificate the Committee may, in a doubtful case, detain the applicant under professional observation during a period not exceeding fourteen days. *(See Article 325.)*

831. If the state of the applicant's health be certified by a Medical officer, Commissioned or in charge of a Civil Station, to be such as to make it inconvenient for him to repair to the seat of the Government under which he is

serving, or to any other place, the authority by whom the leave is granted may accept either,—

(1) a certificate signed by any two Medical officers, Commissioned or in charge of a Civil Station, who need not belong to the same province as the applicant; or

(2) if the authority concerned considers it unnecessary to insist upon the production of two medical opinions, a certificate signed by an officer in medical charge of a Civil Station and countersigned by either the District Officer or the Commissioner of the Division.

832. The certificate obtained should then be submitted to Government for orders. The grant in Article 829 of the option of undergoing medical examination at the seat of the Government under which he is serving, or at any other place, does not confer on the applicant a right to proceed on leave without the sanction of the Government to which he is subordinate.

Medical Certificates—Non-gazetted Officers.

833. Application for leave or extension or commutation of leave on medical certificate must, in the case of an officer in Superior service, be accompanied by a certificate from the applicant's medical attendant. The certificate should distinctly state the nature of the illness, its symptoms, causes and duration, and the period of absence from duty considered to be absolutely necessary for the restoration of the applicant's health. It should be coun-

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Page 245. Article 833.

Insert the following Note under this Article:—

NOTE:—[In the case of female educational officers, the local Government may either dispense with counter signature referred to in this Article or authorise such counter-signature by doctors of their own sex.]

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he appli-

cant to appear before him, unless it appears from the ... his medical attendant that he is too ill to bear the journey, in which case such officer may, after careful investigation of the case, either countersign the certificate or refuse to do so, as he thinks fit No certificate should be submitted for countersignature without the cognizance of the head of the applicant's office.

835. *Cancelled.*

Medical Certificates—Gazetted and Non-gazetted Officers.

836. If the officer is going on leave out of India, he should take with him one copy of the medical report upon his case.

837. A duplicate of the medical report of an officer going on furlough on medical certificate or leave on medical certificate to Europe, North Africa, America, or the West Indies should be forwarded without delay direct to the Under Secretary of State for India, by the Local Government under which the officer is employed, for the information of the Medical Board attached to the India Office, so as to arrive as soon as the officer reaches his destination.

838. (a) An applicant for an extension or commutation of leave on medical certificate who is residing in Europe, North Africa, America, or the West Indies, must satisfy the Medical Board at the India Office as to the necessity for the extension or commutation.

Ordinarily he must attend at the India Office for examination at the Board; but, in special cases, particularly if he be residing at a distance of more than sixty miles from London, a certificate in a form to be obtained from the India Office and signed by two medical practitioners may be accepted. A certificate obtained oustide England and signed by foreigners must be attested by consular or other authority as bearing the signature of qualified medical practitioners

(b) An applicant for an extension or commutation of leave on medical certificate who is residing in any place out of India not mentioned in clause (a) [illegible] is to be submitted [illegible] certificates from two medical practitioners in the following form :—

We hereby certify that we have carefully examined Mr. A. B. of the .... who is suffering from .. .. (the nature of the disease and the present condition of the officer must be fully detailed), and we declare upon our honour that according to the best of our judgment and belief, he is at present unfit for duty in India, and that it is absolutely necessary for the recovery of his health that his present leave which will expire in India on .... should be extended by .... months/weeks

Date ——————

Place ——————

The certificate must be attested by the Principal Medical or other authority where the officer resides

SECTION II.—GRANT OF LEAVE.

839. Leave may be granted with retrospective effect from the date on which it is admissible.

840. Unless specially otherwise ordered, leave must begin within thirty-five days of the date on which it is granted.

841. (a) After obtaining a report from the Audit Officer upon the title of an applicant who is a gazetted officer to the leave applied for, the Local Government may grant any leave admissible under the Regulations.

NOTE.—[For the purposes of this rule, Myooks and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers]

(b) In the case of an officer who is not gazetted, leave may be granted by the authority whose duty it would be to fill up his appointment, if vacant.

The report of an Audit Officer is not required on the title to leave of an applicant who is not a gazetted officer.

(c) The Local Government may, with or without restrictions, delegate the power of granting leave to any officer who, in its opinion, can judge of

the expediency of granting the leave and who can, without reference to higher authority, make the necessary arrangements for carrying on the absentee's duties during the leave. The Local Government may at any time withdraw powers delegated under this clause.

(*d*) An officer acting under clause (*c*) must in the case of a gazetted officer, first obtain a report from the Audit Officer that the leave is admissible. If he grants the leave, he must communicate his orders to the Audit Officer by insertion in the Gazette or otherwise. In delegating its powers of granting leave in accordance with clause (*c*), the Local Government will decide whether, in the case of gazetted officers, either the grant or the refusal of the leave should be reported to it.

842. A Local Government granting leave to a member of the Indian Civil Service on the Bengal, Madras, or Bombay Establishment serving out of his own Presidency, should inform the Government of India, Madras, or Bombay, as the case may be.

843. Leave to an officer appointed by a High Court is granted by the Chief Justice, subject, in the case of gazetted officers, to the report of the Accountant-General that the officer is entitled to the leave.

844. *Cancelled.*

845. *Cancelled.*

SECTION III.—RULES REGARDING CHAPLAINS.

Church of England.

846. Subject to the exigencies of the public service, Local Governments are empowered, with the concurrence of the Bishop of the Diocese, to grant any Furlough or Special leave authorised by these Regulations to Chaplains serving within their respective jurisdictions. Priority of claim is determined in accordance with Article 310.

847. If a Chaplain who [illegible]
Establishment, but is serving [illegible]
or Special leave, the Local [illegible]
grants the leave, inform the [illegible]
may be.

848. The Bishop of the Diocese is empowered to grant Privilege leave to Chaplains under Article 592, subject to the public exigencies, of which the Bishop shall be the judge But the grant, cancelment, or extension of such leave should be reported to the Local Government concerned.

849. All applications for leave should be accompanied by a certificate from the Accountant-General, that the leave asked for is admissible, and should, as a general rule, be forwarded, through the proper channel, to the Bishop of the Diocese, who will transmit applications for Furlough or Special leave, with his remarks to the Local Government concerned. and will himself dispose of applications for Privilege leave. In cases of urgency, leave on medical certificate may be granted by the Local Government in

anticipation of the concurrence of the Bishop, who should, however, be informed without delay.

850. Except under orders of the Secretary of State, the term of Furlough or Special leave cannot be altered without the permission of the Government by which it was granted.

851. Every Chaplain who obtains leave shall supply himself with a last-pay certificate, and with a statement showing the allowances which he is entitled to draw while absent. These documents will be furnished by the Accountant-General (*see Chapter XLVI*), and no leave allowances will be payable without their production.

NOTE.—[If a Chaplain's term of twenty-five years' service expires (*see Article 601*) during his leave, or during the period to which it is stated that it may be extended, the fact should be noted on the last-pay certificate.]

852 A Chaplain shall report his return to duty to the Bishop, and to the Local Government by which his leave or furlough was granted.

853 *Cancelled*.

Church of Scotland.

854. (*a*) Leave of absence to a Chaplain of the Church of Scotland attached to a regiment, is granted in the same manner as to officers of the Corps with which he is serving, subject to the recommendation of the leave by the Presidency Senior Chaplain of the Church of Scotland.

(*b*) The leave of such a Chaplain appointed to a station, is granted by the Local Government and notified in the local Gazette.

(*c*) In the case of the Presidency Senior Chaplain of the Church of Scotland in Bengal, the leave should be granted by the Local Government and by the Government of India concurrently, and be notified in the local Gazette and in the *Gazette of India*.

SECTION IV.—* RULES REGARDING MILITARY OFFICERS.

855 (*a*) When furlough or leave or an extension of furlough or leave is granted to a Military officer in Civil employ, whether subject to the Civil or the Military Leave Rules, the Civil Audit Officer should intimate to the Account Officer in charge of the officer's record of pension service the date of the beginning and ending of the furlough or leave.

(*b*) After [illegible]
in charge of [illegible]
to Europe, N [illegible]
Secretary of State for India a statement of the officer's service in the prescribed form. The statement is not required in the case of officers proceeding on furlough under the Staff or British Leave Rules.

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* Officers in Civil employ who are subject to the Military Leave Rules are eligible for Privilege leave under the rules in Chapter XII of these Regulations.

855A. Applications from Military officers in Civil employ who are subject to Military Leave Rules for privilege leave combined with furlough or c
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leave, after consultation with the Controller of Military Accounts in charge of the officer's record of pension service.

856 (*a*) An application for furlough or leave in or out of India under Indian Military furlough or leave rules from an officer in permanent Civil employ or an officer holding an appointment in the Civil Department, the tenure of which is limited, should be submitted through the Account officer* in charge of the officer's record of pension service, who will forward it to the Local Government, stating the furlough or leave regulations to which the officer is subject, and in addition—

(i) if the applicant is subject to the Military Furlough Regulations of 1868 or 1875—the particular rule or rules of the Regulations under which the furlough is admissible;

(ii) if the applicant is subject to the Leave Rules for the Indian Army—the year of service for pension he has entered upon, and the date on which that year commenced;

(iii) if the application is for leave in India—the particular rule of the Regulations under which the leave is admissible.

(*b*) In the case of officers subject to the leave rules applicable to Regimental officers of the British Army serving in India and holding Civil appointments, applications for leave should be submitted direct to the Local Government. The Controller of Military Accounts will, on application, furnish the Civil auditors concerned with a certificate showing the rate of pay admissible during leave and how the leave may be extended or commuted.

(*c*) In the case of an officer in Civil employ proceeding on furlough under the Military Furlough Regulations of 1868 or 1875, the Account Officer in charge of the officer's record of pension service will furnish the Civil auditor concerned with the necessary certificate as in Form 1.

857. (*a*) After th 'he Local Government will, in leave on medical certificate to st Indies forward the medical statement of the officer's case to the Under Secretary of State for India.

(*b*) All reports of officers' arrival from, and departure on, furlough or leave in or out of India with dates of embarkation and debarkation, as well

* The Account Officer is defined in paragraphs 2, 3, 4 and 5 of the General Order in the Military Department No. 134, dated 8th February 1895, as modified by the General Order in that Department, No 1080 of 1895

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as those of being struck off or of resuming duty, should be forwarded to the Account Officer in charge of the officer's record of pension service.

(c) On the return of an officer from furlough or leave, it will be the duty of the Account Officer in charge of his record of pension service to satisfy himself that he has returned within his leave; and, if not, to report the case to the sanctioning authority.

858. When a Military officer subject to the Military Leave Rules applies for leave of absence on medical certificate, or proceeds to a seaport for the purpose of appearing before a Medical Board, he should communicate his intention to his immediate departmental superior when he sends in his application, or before he leaves his station, as the case may be.

859. An application from a Military officer subject to the Military Leave Rules for Special leave under Article 316 should be submitted to the Local Government for sanction with a certificate from the officer in charge of the officer's record of pension service that he is entitled to it.

860. A Military officer subject to the Military Leave Rules proceeding on Furlough or Special leave, cannot obtain a last-pay certificate or a warrant, as the case may be, until he submits to the Audit Officer a certificate in Form 1 by the Account Officer in charge of his record of pension service.

Commissioned Medical Officers.

861. (a) An application for any leave except Privilege leave and leave on medical certificate from a Commissioned Medical officer in permanent or temporary Civil employment, should be submitted by the applicant, together with the Audit Officer's certificate, to the Local Administrative Medical Officer, by whom it will be forwarded to the Director-General, Indian Medical Service.

The Director-General will countersign the application if the state of the public service admits of leave being granted, and forward it to the Local Government. If the state of the public service does not admit of leave being granted, he will abstain from countersigning the application. On the application so countersigned, or from which countersignature has been withheld, the Local Government will be in a position to pass orders. The same procedure will be followed in the case of medical officers applying for extension of furlough on private affairs.

(b) An application for any leave except Privilege leave and leave on medical certificate from a Medical officer appointed by the Government of India should be forwarded, with the Audit Officer's certificate, through the Administrative Medical officer and Local Government, to the Department of the Government of India concerned, who, after consultation with the Director-General, Indian Medical Service, will pass the necessary orders.

NOTE.—[A Local Government granting leave or extension of leave to a Commissioned Medical officer in temporary Civil employ should communicate a copy of the order to the Director of Medical Services in India.]

Chapter XLV.—Payment of Leave Allowances.

862. Leave allowances are payable in India after the end of each calendar month; but an officer on leave out of India may at his option take payment at the Home Treasury from the date of quitting India, or in the case of an officer who has quitted India during the privilege leave portion of combined leave under Article 233, from the date of commencement of such privilege leave; or if he proceeds to a Colony named in Appendix 15, he can take payment in such Colony. Any balance of leave allowances undrawn at the time that an officer returns to duty in India should be drawn there in rupees. In cases, however, where the non-drawal of leave allowances at sterling rates outside India is due to no fault of the officer concerned the Government of India may authorise the undrawn allowances to be paid in India at such sterling rates, converted into rupees at the official rate of exchange.

An officer having selected the country in which he desires to draw his leave allowances is permitted to change only once during any one period of leave.

Payment in India.

863. Except in the Public Works, Railway and Telegraph Departments, a gazetted officer on leave may draw his allowance at any treasury in India.

NOTE—[For the purposes of this Article, Myooks and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers.]

864. If a gazetted officer signs his bill himself, he must either appear in person at the place of payment, or furnish a life certificate signed by a responsible officer of Government, or some other well-known and trustworthy person. If he draws his allowances through an authorised agent, the agent, whether he has or has not a power-of-attorney, must either furnish a life certificate as aforesaid, or execute a bond to refund overpayments. A life certificate may be given periodically, a bond being given to cover intermediate payments not supported by the life certificate.

NOTE.—[The proper stamp-duty upon bonds executed under this Article is that chargeable upon Indemnity Bonds according to the First Schedule of the Indian Stamp Act, II of 1899.]

865. The leave allowances of a non-gazetted officer on leave in India or on leave out of India when he desires to draw his allowances in India can be drawn only at the treasury where his salary is paid, and under the signature of the head of his office, who is responsible for any overcharges: no other security is required.

866. The payment of the leave allowances of officers and subordinates of the Public Works and Railway Departments and of officers of the Telegraph Department during leave in India is regulated by special departmental rules.

Payment out of India.

867. An officer proceeding on leave out of India cannot draw his leave allowance at the Home or any Colonial treasury unless he is provided with a last-pay certificate or warrant in accordance with the rules laid down in Chapter XLVI.

868. When payment is made at the Home treasury or in a colony where the standard of currency is gold, rupees are converted into sterling at the rate of exchange fixed for the time being, for the adjustment of financial transactions between the Imperial and the Indian treasuries, subject to the condition that conversion into sterling shall, for the present, be effected at the minimum rate for 1*s*. 4*d*. to the rupee for Privilege Leave, and at 1*s*. 6*d* to the rupee for Leave other than Privilege leave, except when the allowance admissible in respect of such other leave is an officer's last salary, in which case the conversion shall be at the rate of 1*s* 4*d*. to the rupee. Any payments made at a different rate or otherwise erroneously, should be adjusted in subsequent payments.

[illegible]

[illegible] the rupee, each [illegible], each fraction [illegible] of more than [illegible]

869. The leave allowances of all officers are issued at the Home treasury monthly in arrear on the first day of each calendar month.

They are made up to the following quarterly dates, 31st March, 30th June, 30th September and 31st December, and they are paid in monthly instalments, the first two instalments in each quarter being the net amounts accrued, omitting shillings and pence, and the third instalment being the balance due for the quarter.

Payment is made—

(i) to the officer on his personal application; or

(ii) to his banker or other agent, duly authorised under power-of-attorney, on production of a life certificate, filled up and executed in the manner directed thereon (except in cases where proof of existence is not required owing to the banker having guaranteed the Secretary of State against loss consequent on his dispensing with the production of such proof); or

(iii) on presentation of a draft, duly filled up and signed by the officers in a form which, with the requisite form of life certificate attached, may be obtained from the India Office, on the officer's written application.

Certificate of Leave.

870. (*a*) Privilege leave allowances, when such leave is taken by itself, are not payable out of India; but in case an officer leaving India should

afterwards want to combine his leave with other leave, he should take with him a certificate in Form 9.

(b) This certificate should be furnished to those officers only who may apply for it, and the Audit Officer need make no enquiries as to the place in which an officer intends to spend his Privilege leave. A Military officer subject to the Military Leave Rules must himself obtain the certificate prescribed in Rule 1 of Article 871, and submit it to the Audit Officer with a view to the preparation of his Privilege leave certificate, should he require one

NOTE —[Duplicate of a Privilege leave certificate is not forwarded to the India Office]

871. (a) An officer proceeding on Long Leave to Europe who does not intend to draw allowances from the Home Treasury should take with him a Certificate of Leave in Form 10 from the Audit Officer in whose circle of audit his appointment is held. If he visits England, this certificate is to be presented at the India Office.

1. A Military officer subject to the Military Leave Rules proceeding on Furlough cannot obtain the certificate in this Article until he submits to the Audit Officer a certificate in Form 1 by the Account Officer in charge of his record of pension service.

(b) If the officer afterwards desires to draw his leave allowances at the Home treasury or at some Colonial treasury, he must obtain a last-pay certificate from the Audit Officer in whose circle of audit he was employed when he proceeded on leave.

872. An officer proceeding on Long Leave to North Africa, America, or the West Indies must take with him a certificate in the form prescribed in the preceding Article. If he visits England or has some occasion to apply for an extension of leave, the certificate should be presented at the India Office. If not previously presented, it must be forwarded to the India Office when permission to return to duty is applied for.

873. An officer proceeding on Extraordinary leave without allowances to Europe, North Africa, America, or the West Indies must take with him a certificate of leave in Form 11 from the Audit Officer in whose circle of audit his appointment is held. If the officer visits England, or has occasion to apply for an extension of leave, the certificate should be presented at the India Office. If not previously presented, it must be forwarded to the India Office when permission to return to duty is applied for. The Audit Officer should, when he issues this certificate, send a duplicate to the India Office.

Chapter XLVI.—Last-pay Certificates and Warrants.

SECTION I.—LAST-PAY CERTIFICATES.

874. Except as provided in Article 879, no officer can begin to draw his leave allowances at any treasury in India, or at the Home treasury, without

producing a last-pay certificate from the Accountant-General of the province to which he belongs.

i. No-demand certificates are not required by an officer going on leave.

875. Last-pay certificates (and warrants) cannot be issued to Military officers subject to the Military Leave Rules, until Article 860 has been complied with.

876. Except in respect to Colonial Warrants (Articles 888 to 891), this Section does not apply to Public Works and Railway officers whose last-pay certificates are issued under departmental rules.

Extensions and Commutations.

877. If the leave of an officer, whether in or out of India, is extended or commuted, the Audit Officer within whose jurisdiction the officer is employed must, on receiving advice of such extension or commutation, forthwith communicate it to the Audit Officer within whose jurisdiction his leave allowances are drawn. He should also communicate any other circumstances connected with the leave which may be required to be known to the Audit Officer who passes the officer's leave allowances

Leave in India.

878. When an officer proceeds on leave from one place to another in India, he should obtain a certificate in Form 16 from the Accountant-General of his Presidency or province. If during leave the officer desires to change the treasury at which he receives payment of his allowances, he must obtain a new last-pay certificate.

879. An officer on leave, who does not leave his district does not require a last-pay certificate: nor does an officer who leaves his district on leave in India without allowances.

Leave out of India.

880. When an officer proceeds out of India on leave with allowances, other than Privilege leave taken by itself, the Accountant-General who audits his pay will, as soon as the leave is gazetted or otherwise notified, send him a letter in Form 12 or 13 with enclosure in Form 14 or 15 as the case may be, requiring him to call at his office or give the necessary information.

881. If the officer calls at the Accountant-General's office, he will be paid up to the day before he leaves India, and will be given a last-pay certificate in Form 16 if he intends to draw his leave allowances at the Home treasury, and in Form 17 if he is proceeding to a Colony and intends to draw his leave allowances there.

NOTE.—[An officer on combined leave under Article 233 who proceeds out of India during the Privilege leave portion of such leave, may be granted a last-pay-certificate in view to the payment of his allowances at the Home Treasury or in a Colony from the commencement of his Privilege leave. In that event, he must draw in India allowances due up to the date of giving up charge of his office.]

882. If the officer is unable to call at the Accountant-General's office, the Accountant-General will prepare a bill for his allowances from the end of the month preceding that of his making over charge, to the day before he sails, and will (if the officer intends to draw leave allowances at the Home treasury or in a Colony) forward it with the certificate in Form 16 or 17 as the case may be, to the Treasury Officer, for delivery to the officer according to the instructions in Form 18.

NOTE.—[*See* Note under Article 881.]

883. With every such last-pay certificate a blank Form 19 will be given, on which the officer will report to the Accountant-General, from the first port at which the vessel touches, the day of his departure from India.

884. When the Audit Officer delivers, or receives from the Treasury Officer, a report in Form 20 that he has delivered a last-pay certificate to the officer concerned, he will, if the certificate is in Form 16, forward a duplicate of the certificate to the India Office.

885. When the officer proceeding to England is compelled to leave without a last-pay certificate, the necessary document should be forwarded to him, and a duplicate to the India Office, at the earliest possible date.

886. An officer proceeding to Europe should present his last-pay certificate at the India Office. When he returns to India, he should obtain a last-pay certificate from the India Office.

887. A last-pay certificate in Form 16—the 11th and 13th columns and the notes below it being omitted—is required in the case of an officer proceeding on leave out of India whose leave allowances, payable in India, are required to be paid in a circle of audit other than that under which the officer's appointment is held. If change of treasury is at any subsequent time desired, a new last-pay certificate in the same form must be issued by the Accountant-General who last paid the allowances.

Colonial Warrants.

888. (*a*) An officer, including an officer of the Public Works or Railway Department (*see Article 876*), proceeding to a Colony should submit his last-pay certificate to the Comptroller, India Treasuries, at Calcutta, or if he embarks at any port in the Provinces of Madras, Bombay, or Burma, to the Accountant-General, Madras, Bombay, or Burma, as the case may be

(*b*) The Comptroller, or the Accountant-General, as the case may be, will retain the last-pay certificate, and, in lieu thereof, issue a Warrant in Form 21 upon the Colonial authority concerned

889. Every Warrant shall be issued in triplicate. The original, bearing the payee's signature, should be forwarded to the Colonial authority concerned, the duplicate to the Secretary of State, and the triplicate should be made over to the payee. Each payment should be endorsed on the back of both the original and the triplicate Warrant, an acknowledgment of receipt of money being rendered by the payee. When no space for such entries remains, or when a Warrant is lost or destroyed, a fresh Warrant shall be issued by the

officer who issued the original Warrant, on application being made through the Colonial disbursing officer.

890. Upon his return to India, an officer should deliver up his copy of the Warrant which will serve the purpose of a last-pay certificate.

891. The Government of India recognise the proceedings of the Colonial authorities sanctioning the transfer of the payment of leave allowances from one Colony to another, but such transfer should be reported separately by the absentee to the Government of India and to the Under-Secretary of State for India.

NOTE.—[Articles 888 to 891 apply to Military officers subject to the Military Leave Rules.]

Copy of Rules to be furnished.

892. Every officer going on leave out of India should procure from the Account Office and take with him a copy of the "Memorandum of information issued for the guidance of officers proceeding on leave (other than Privilege leave taken by itself) out of India."

SECTION II.—RULES FOR PREPARING LAST-PAY CERTIFICATES.

893. In Forms 16 and 17 it should be stated to which Presidency an officer belongs, in which Presidency or province he is employed, and whether the absentee allowance is chargeable to the Civil, the Military, or the Public Works Department.

894. To enable the Home authorities to ascertain at once the Department to which the absentee allowance is to be charged, the certificates of officers proceeding on leave to Europe shall be prepared—

(i) in Black ink for officers in the employ of the Military Department.

(ii) in Blue ink for officers in the employ of the Public Works or Railway Department.

(iii) in Red ink for officers in the employ of the Civil Department.

895. Except in the case of Chaplains, allowances should be stated in rupees *a month, and not in pounds a year; and in entering "the rate of absentee* allowances," it should be stated, in the first place, without reference to the maximum or minimum applicable, and then, if a maximum or minimum applies or if the allowance is such that a future change in the official rate of exchange may render a maximum or minimum applicable, the words should be added, "subject to a maximum (or minimum) of," etc.

896. In Form 16 it must be shown whether an officer is entitled to the full amount of Furlough permitted by the rules.

NOTE.—[See Note under Article 851.]

897. In column 11 in Forms 16 and 17, the Articles of these Regulations or of the Military Furlough Regulations under which the advance is made should be mentioned.

Amended Certificates.

898. (*a*) Every corrected last-pay certificate whether original or duplicate should be marked "Amended Certificate." If it becomes necessary to amend a last-pay certificate in Form 16, it should be done by the use of a short corrigendum worded so as to show only the particular item or items in which alterations have been made; this corrigendum should be forwarded by the Accounts Officer at the earliest possible date direct to the India Office.

(*b*) The last-pay certificate is issued on the assumption of the correctness of the intended dates of making over charge and of leaving India. If these dates are changed, the required adjustment of allowances will be made when the officer returns to India, or, if necessary, sooner. No alteration may be made in the certificate as issued by the Accountant-General unless there is time to send it to him for alteration.

(*c*) In all cases of combined leave in which an officer elects to draw his Privilege leave allowances at the Home Treasury, an amended last-pay certificate should be sent to the India Office whenever the amount of Privilege leave allowances entered in the original last-pay certificate requires correction, unless the officer is known to have started on his return to India. If the amended last-pay certificate arrives too late at the India Office, it will be returned to the issuing officer in India.

Source from which Absentee Allowance is payable.

899. In making entries against the heading "Source from which," etc., the term "Indian Revenues" should be used in all certificates intended to be sent to England, as the term "Imperial Revenues" has there a different signification. If the allowance is not chargeable finally to the Government of India, the Local Administration or Fund from which it is recoverable must be expressly stated.

900. When leave allowances are chargeable according to the Rule of Proportions, the following is the service to be thus taken into account :—

(*a*) *Privilege Leave, under Articles 246 to 278* .—

Privilege leave; duty without interruption for a period eleven times as long as the Privilege leave.

(*b*) *Long Leave, European Services, under Chapter XIII* .—

Furlough on Medical certificate (Articles 308 to 311); the whole continuous service.

Furlough without medical certificate, including extensions (Articles 308 and 309); the whole continuous active service.

Special leave; active service for six years.

Subsidiary leave; as for the leave to which it is subsidiary.

(*c*) *Military Furlough Regulations of 1868* :—

Furlough without medical certificate—

First two years (Rule IX); actual service in India for eight years.
The rest; actual service in India for six years.

(*d*) *Military Furlough Regulations of 1875* :—

Furlough without medical certificate (Rule 1); proportion of service in India or under the Government of India taken into calculation in the grant of furlough.

(e) *Leave Rules for the Indian Army* :—

All leave; the whole pensionable service, but in this case, in calculating the charge to be borne by a Foreign and the British Government, the period of service, and not the aggregate salary drawn is taken into account.

(f) *Long leave, Indian Services, under Chapter XIV, and Statutory Civil Servants, under Chapter XXVI* :—

Leave on private affairs [Article 337 or 566 (Leave Regulations), Section 4 (b)]; service for six years.

Furlough [Article 338 or 566 (Leave Regulations), Section 4 (c)]—

First year, service for ten years
Second year; service for eight years
More than one year, service for eighteen years

(g) *Other cases* —

In unenumerated cases the whole service in India is counted

Arrears of Indian Pay and Allowances.

901. No entries in regard to arrears of Indian pay and allowances due to an officer proceeding on leave or on retirement to Europe should be made in his last-pay certificate. Such allowances are not paid at the Home treasury.

Completion of Service.

902. The date on which any officer will, during the currency of leave, complete the term of service, or attain the age after which by any rule he is required to retire from the service, should be shown.

Civil Fund Deductions.

903. (a) The Secretary of State recovers subscriptions on account of the different Civil Funds from subscribers absent from India on leave who draw their leave allowances in England, who either are required by the rules of their Fund to pay their subscriptions in that country during leave, or elect to do so. Particulars of the Fund deductions to be made from the absentee allowances of officers on leave drawing their leave allowances in England should be noted on the last-pay certificates; and where a subscriber elects to make payments of his subscriptions in India while on leave, or to postpone such payments until his return to India, the fact should also be noted on the last-pay certificate. *The rules under which the deductions are made, and the method by which they are calculated in the cases of the different Funds will* be found in Articles 557 to 560.

(b) The deductions to which the allowances of a member of the Indian Civil Service are subject while he is on leave on account of his annuity should invariably be stated in his last-pay certificate. *(See Article 556.)*

Chaplains.

904. A certificate in Form 30 should be attached to the last-pay certificate of a Chaplain proceeding on leave to Europe.

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(c) If there be any discrepancy, the Audit Officer will detail the nature of such discrepancy; for instance, that the post which the applicant states that he filled during a certain period is shown by the Audit Office registers to have been filled by another man.

(d) If the service claimed cannot be wholly verified from the records of the Audit Offices, reference must be made to the head of the office in which the applicant states that he served during the period in doubt.

(e) If it be found impossible to verify the service otherwise, the officer receiving the application should take the statement in writing of the applicant on plain paper [*see Indian Stamp Act, II of 1899, Schedule I, No. 4* (c)], and should also collect such collateral evidence as may be procurable; for instance, certificates, such as those given by an officer to a subordinate on his leaving an office, and the testimony of contemporary servants.

NOTE 1.—[The power to admit service verified under this clause may be exercised by *all subordinate authorities who are empowered to sanction pensions under the rules.*]

NOTE 2.—[“The Governor General in Council has recently had under consideration a case [illegible]
service. I am therefore directed to draw attention to the subject, and to request the issue of orders to all public officers, warning them to be careful, in giving certificates to their subordinates, to state the whole truth in respect of character and cause of dismissal or resignation of appointment.—(*Circular, Home Department, dated 15th June 1869.*)]

909. In the case of a gazetted officer, part of whose service has been rendered in non-gazetted appointments, the ungazetted portion of his service should be similarly verified. The statement mentioned in Article 907 (a) may, however, be sent to the Audit Officer direct or through the head of the department.

Formal Application.

910. After completing the verification in the manner prescribed in the preceding Article, the authority receiving the statement of services of a non-gazetted officer should draw up the application in Form 25, and arrange with it all the documents relied upon for verification of the service claimed, in such manner that they can be conveniently consulted, and then forward it, together with the officer's Service Book, with the statement in Form 24 duly completed up to date, through his official superiors to the Audit Officer. If an applicant for pension (not gratuity) is no longer in active service, a last-pay certificate *should be attached to the application, except when he* retires from the service while on leave in England and desires to draw his pension in England.

911. (a) The officer who submits the application should certify on the application whether the character, conduct, and past services of the applicant are such as to entitle him to the favourable consideration of the Government. If the application is for pension on the Superior scale, he must be careful to enter all period of leave, suspension, etc., which are not reckoned as service.

(b) He must also invariably record his own opinion whether the service claimed has been established, and should be admitted or not; more

especially in those cases in which it becomes necessary to resort to the procedure prescribed by clause (*e*) of Article 908, when the exact nature of the investigation made, and the conclusion at which the authority has arrived, must be especially reported.

(*c*) If the application is for an Invalid pension, and the applicant is less than sixty years old, the requisite medical certificate should be attached to the application. But if omission has been made in this respect, the authority having the power to sanction the pension may accept a certificate bearing a later date.

912. In the case of an officer in superior service, who retires before he is 60 years of age, it should be stated in the column for "any other remarks" on the third page of the application for pension whether retirement is compulsory or optional and, when compulsory, the order sanctioning retirement should be quoted and cause of inefficiency specified.

913. (*a*) A gazetted officer should submit his application through his official superiors and the Audit Officer to the Local Government or other authority empowered to sanction the pension.

NOTE.—[For the purposes of this Article, Myooks and Junior Assistant Registrars in the Co-operative Department in Burma are treated as gazetted officers.]

(*b*) The application of a gazetted officer of the classes mentioned in Articles 297 (*c*), (*d*), and (*e*) 654 and 678, whether appointed by the Secretary of State or not, should be prepared in Form 26 In the case of other gazetted officers the application should be prepared in Form 25 either by the officer himself or by the head of his department; and the rules in Article 910 apply, save that it is not necessary, if all the service has been gazetted to have the service formally verified before forwarding the application.

Submission to Government.

914. (*a*) The last officer through whom the application passes should send it to the Audit Officer, who will (after verifying the service in the manner prescribed in Article 908 or satisfying himself that it has already been so verified) submit the application to the Local Government or other authority empowered to sanction the pension with a report upon the claim for pension and the rules applicable to the case

In the case of officers whose service has been partly gazetted and partly non-gazetted, the verification statement prepared in the Audit office should be attached to the application on its submission to the sanctioning authority.

(*b*) The Audit Officer will also certify the correctness of the calculations of service and of pension, and retain the last-pay certificate (Article 910) unless the pension is to be paid in another circle of audit, in which case he will forward the certificate to the Audit Officer of that circle, along with a copy of the order sanctioning the pension.

1. If the case is plainly incorrect or incomplete, the Audit Officer should return it for correction or explanation.

2. In the column of Form 24 reserved for the remarks of the Audit Officer, or in his certificate and report on the third page of Form 26, he should note briefly his reasons for

disallowing any service claimed, and his explanation of any apparent discrepancies, and the like.

3. The Audit Officer should always call special attention to Article 470 in his report of the amount of pension admissible.

914-A. (*a*) When a non-gazetted officer for whom a service roll is maintained under Article 817 retires, the officer who maintains the service roll should proceed to verify the services of the claimant with reference to office copies of pay bills, acquittance rolls or other relevant records. [The procedure laid down in Article 908 (*e*) may also be adopted when necessary.] He should then prepare a certificate of verification, referring briefly to the documents relied upon, in support of the service claimed He will then draw up the application in Form 25, [illegible], the statement in Form N [illegible] necessary papers, throu[illegible] l to sanction the pension. If the applicant for pension is no longer in active service, a last-pay certificate should also be attached to the application. The authority competent to sanction the pension may sanction it before submission of the pension papers to the Audit office, provided that the claim in each case is for the period of continuous and verified service and the pension is clearly admissible under the strict letter of the rules All doubtful claims should, however, be kept pending until they have been certified to be admissible by the Audit officer.

(*b*) The Audit officer will, on receipt of the pension papers, exercise the necessary check on the basis of the facts entered therein and also with reference to the relevant rules If the claim is in order and has already been sanctioned by competent authority, he will arrange for its payment forthwith. In other cases, he will follow generally the procedure laid down in Article 914(*b*).

NOTE 1 —[The above procedure is also applicable *mutatis mutandis* to runners, boatmen, and coolies in the Post Office referred to in Article 817, for whom neither service books nor service rolls are required to be maintained.]

NOTE 2 —[In the case of the Police Officers on pay not exceeding Rs 20 a month the procedure laid down in entry No. 40 in Part III of Appendix I will be followed]

Premature Applications.

915. (*a*) The Government of India is ordinarily unwilling to pass orders on questions affecting the pension of an officer until he actually retires, because their premature discussion occupies valuable time almost always to no purpose, and uselessly.

(*b*) Accordingly no question about the pension of an officer who has not retired from the public service should be submitted either to the Local Government, or by the Local Government to the Government of India unless there are special reasons (which should always be set forth) for a departure from the general rule. The mere desire of an officer for a decision upon some doubtful abstract questions affecting his prospects does not justify public correspondence on his behalf. But this rule should not be read as prohibiting the consideration until an officer retires or is about to retire, of a proposal to condone a break in his service.

916. Except under orders from the Government of India or the Local Government, an Audit Officer should, as a rule, decline to advise upon any questions connected with the claim of an officer to pension until he retires or is about to retire. Memorials which relate to such questions addressed prematurely to the Secretary of State are uniformly returned.

917. Articles 915 and 916 do not prohibit the submission of a preliminary application for pension [*see Article 907* (*b*)] on behalf of an officer intending to retire immediately, while he is still in employ.

SECTION II.—POWERS OF SANCTION.

918. A pension which is certified by the responsible Audit Officer to be clearly and strictly admissible under rule may be sanctioned—

(*a*) in any case, by the Local Government,

(*b*) in the case of non-gazetted officers, by the officer who has the authority to fill the appointment vacated by the retiring officer.

NOTE 1.—[A Local Government may delegate its powers under this Article to Heads of Departments and other subordinate officers who are authorised to fill the appointment vacated by the retiring officer.]

NOTE 2.—[In cases in which an officer who has the power under clause (*b*) of the Article [illegible] concerned.]

919 to 920.—*Cancelled.*

921.—(*See Appendix I, Part II, Entry 40.*)

922. Should the amount granted to an officer be afterwards found to be in excess of that to which he is entitled under the Regulations, he will be called upon to refund such excess.

923. (*a*) If any interpretation of the rules is involved, or if any indulgence not provided for by the rules is proposed, the Local Government should submit the case, with its opinion and recommendation, to the Government of India in the Administrative Department concerned.

NOTE.—[In respect to such recommendations, *see* orders printed as Appendix 9.]

(*b*) Until the orders of the Government of India are received, a recommendation for any special indulgence should never be communicated, directly or indirectly, to the officer concerned.

(*c*) The Governments of Madras and Bombay should, upon questions of pension, communicate with the Secretary of State, through the Government of India.

(*d*) An application in Form 25 (together with the statement in Form 24) or 22, as the case may be, should accompany every special recommendation made under this Article.

924. (*a*) Pensions in excess of the amounts admissible under these Regulations, or involving any relaxation of rule, require the sanction of the Secretary of State.

NOTE.—[*See* Note under clause (*a*) of the preceding Article.]

(*b*) The Government of India have, however, been authorised to grant pensions up to a limit of Rs. 25 a month, or gratuities not exceeding the equivalent value of that amount, without reference to the Secretary of State, in any case, even where no pension or gratuity is admissible under rule, provided that the general spirit of the Regulations is observed. Provincial Governments exercise similar powers in respect of officers serving under them.

(*c*) When special circumstances appear to justify a departure from the rules laid down regarding "ordinary pensions" to Civil officers, it is generally desirable that the allowance granted should be an arbitrarily fixed sum, rather than any exact proportion of the amount to which it might be supposed that the rules afford a claim.

SECTION III.—ANTICIPATORY PENSIONS.

925. (*a*) When an officer whose pension is payable in India retires before the necessary enquiries preliminary to the settlement of the amount of his pension can be completed, the Audit Officer may, upon a declaration, as follows, by the officer, sanction the immediate disbursement of the pension to which, after the most careful summary investigation that he can make without delay, he believes the officer likely to be entitled :—

[illegible]

further promise to repay any amount advanced to me in excess of the pension to which I may be eventually found entitled.

(*b*) If the Audit Officer thinks it likely that the officer would be found entitled to a gratuity only, one-sixth of the amount of such probable gratuity may, upon a similar declaration, be disbursed to him monthly until the amount is finally settled.

(*c*) The settlement of such provisional payments should be made so as to admit of their disbursement not later than one month after the officer has ceased to hold his post.

(*d*) When the sanction under this Article is given by an Audit Officer other than the Accountant-General, he shall send a copy of his order to the Accountant-General, for the issue of the requisite orders for disbursements from the treasury concerned.

926. When an officer whose pension is payable in England retires before the necessary enquiries preliminary to the settlement of the amount of his pension can be completed, the Audit Officer, if he sees reason to believe

that there will be delay before the pension can be finally sanctioned, should, after the most careful summary investigation that he can make without delay, report to the authority who will sanction the pension, the minimum amount to which he believes the officer to be entitled. This report should be forwarded at once to the India Office by the Local Government by which the pension will in due course be sanctioned. The India Office will then, on receiving from the officer a declaration similar to that in Article 925, at discretion, sanction the immediate disbursement of the amount of pension reported to be the minimum likely to be admissible, or such smaller amount as may be deemed proper. The final pension certificate in due form should follow the provisional certificate with the least possible delay.

927. (*a*) If, upon the completion of the regular investigation, it be found that the pension thus summarily assigned differs from the pension finally settled, the difference must be adjusted in the first subsequent payments

(*b*) Provided that, if a gratuity summarily assigned under Article 925 proves to be larger than the amount found actually due upon completion of the enquiries, the officer shall not be required to refund any excess actually paid to him, except as provided in Chapter XXI.

928. (*a*) To enable the Audit Officer to exercise the jurisdiction thus entrusted to him, the head of the office or department from which the officer is removed should furnish to the Audit Officer, as soon as possible, after it becomes known to him that the officer must retire, and without waiting for his actual retirement, the fullest information that can be obtained regarding the officer's service, without correspondence which must cause delay.

(*b*) This information is to be furnished in anticipation of the regular investigation required by Article 908 or 909, which also should on no account be delayed until the officer has actually retired

929. All officers should bear in mind that delay in the payment of pensions may involve peculiar hardship, and everything should be done to prevent, or shorten to the utmost, such delays.

Chapter XLVIII.—Payment of Pensions.

SECTION I.—GENERAL RULES.

930. Apart from special orders, a pension, other than a Wound or Extraordinary pension under Part VI, is payable from the date on which the pensioner ceased to be borne on the establishment, or from the date of his application, whichever is later. The object of this latter alternative is to prevent unnecessary delay in the submission of applications. The rule may be relaxed, in this particular, by the authority sanctioning the pension when the delay is sufficiently explained.

1. The pension of an officer who, under Article 436, has received a gratuity in lieu of notice is not payable for the period in respect of which the gratuity is paid.

931. The preceding Article applies to ordinary, not to special, cases. If, under special circumstances, a pension is granted long after an officer has retired, retrospective effect should not be given to it without the special orders of the Government which granted it; in the absence of special orders such a pension takes effect only from the date of sanction.

932. In cases where considerable delay has occurred in making application for a Wound or Injury pension, it will be granted only from the date of the report by the Medical Board, and no application for a gratuity or pension will be entertained unless submitted within five years of the date of the wound or injury.

933. When a pension is stated in Rupees, it is payable at any treasury in India; or, at the pensioner's option, at the Home treasury.

[illegible]

Governments subject to the condition that in the case of persons resident in any country in which the Indian Government rupee is not legal tender, 1*s*. 9*d*. the rupee is fixed as the minimum rate at which the conversion into sterling shall be effected. The same rate of exchange applies to the issue of gratuities to persons residing in any country in which the rupee is not legal tender; but when the service of an officer to whom a gratuity is granted terminates in India, the gratuity should be paid in India.

NOTE 1.—[Ordinarily, a pensioner who has been residing in India or other country in which [illegible]

NOTE 3.—[In the event of a case arising which appears not to be covered by the foregoing rules, reference must be made to the Secretary of State.]

935. The rule in Article 934 applies to an officer under covenant who is entitled by his covenant to pension; the covenanted rate of exchange for his pay and allowances does not, unless it is expressly so stated, apply to his pension.

Transfers between England and India.

936. Transfer of a pension from an Indian treasury to the Home treasury and *vice versâ* is permitted within reasonable limits whenever desired.

NOTE.—[Frequent transfers of a pension to and from are not permissible, and the Accountant-General concerned should report to the Government of India, for special orders any case in which it appears to him that undue advantage is being taken of the rule.]

937. Application for transfer of payment from India to the Home treasury should be made to the Accountant-General within whose jurisdiction the treasury of payment is, who will grant a last-pay certificate, forwarding a duplicate, with copy of the first page of the application upon which the pension was originally granted, to the India Office.

SECTION II.—PAYMENT IN INDIA.

938. (*a*) The order granting a pension to be paid in India should be forwarded with a copy of the first page of the application in Form 25 or 26, or of the whole application if in Form 22, to the Audit Officer who submitted the application. He should compare the order with his report and then forward a copy thereof to the Accountant-General of the province in which payment is to be made.

(*b*) In the case of persons for whom the forms referred to in clause (*a*) are not used, the information required for the Pension Payment Order should be communicated in a separate letter to the Accountant-General of the province where payment is to be made.

(*c*) In the case of pensions to police officers on pay not exceeding Rs. 20 sanctioned under entry No 40 of Appendix I, Part II, the order should be forwarded to the audit officer who would have reported on the claim had his certificate not been dispensed with. He will exercise the necessary check with reference to Article 922 and endorse it as in clause (*a*) above.

939. The Accountant-General of the province in which payment is to be made will then communicate to the officer who is to pay the pension, authority to make the payment; in the case of a pension, such authority will be a Pension Payment Order in Form 27 or 28.

[illegible]

a pension on behalf of a Native State.—

[illegible]

State concerned. Such payments will be made by Government merely as an agent for the Native State.

"When such payments on account of pensions are arranged for, the form of payment order should not be the same as that used for pensions payable from Indian Revenues The order should be of the same kind as the ordinary Pension Payment Order, but should be clearly distinguished in form."]

Procedure in paying.

940. A gratuity is paid in a single sum, and not by instalments, on receipt of the Accountant-General's authority.

941. (a) A gratuity may, at the discretion of the Government of India, or with the sanction of the Government of India, on the application of the recipient, be converted either into a life annuity, or into a temporary life annuity, or into an annuity payable for a fixed number of years with remainder to the annuitant's heirs in case of his death. The amount of the life annuity or temporary life annuity will be determined by Table A printed in Appendix 10.

(b) A Local Government may exercise the power of the Government of India under clause (a) of this article in respect of gratuities sanctioned by it or by an authority subordinate to it

942. The Government of India or a Local Government will never insist on the conversion of a gratuity into an annuity, unless the expectation of life of the officer be reported by competent medical authority to be equal to the average.

943. A pension is payable in India monthly on and after the first day of the following month under the following rules :—

1. On receipt of the Pension Payment Order, the disbursing officer will deliver one half to the pensioner, and keep the other half carefully, in such manner that the pensioner shall not have access thereto

2. Each payment made is to be entered on the reverse both of the pensioner's half and of the disbursing officer's half of the Pension Payment Order, both entries being attested at the time of payment by the signature of the disbursing officer.

3 With reference to Articles 956 and 957, a pension should, under no circumstances, be paid for the first time in arrears for more than one year without special orders of the Local Government.

NOTE.—[The Local Government may delegate its powers under this rule to Commissioners of Divisions and to such other officers as it may desire.]

4. A pension is payable for the day on which the pensioner dies

5. In regard to the liability of pensions to attachment by a Civil Court, *see* section 11 of Act XXIII of 1871, which runs as follows :—

Section 11.—" No pension granted or continued by Government on political considerations, [illegible]

any such court.

Identification of Pensioner.

944. As a rule a pensioner must take payment in person after identification by comparison with the Pension Payment Order.

NOTE.—[Officers of the classes mentioned in Articles 297 (c), (d) and (e), 654 and 678, [illegible]

945. A pensioner specially exempted by the Local Government from personal appearance, a female pensioner not accustomed to appear in public, or a male pensioner who is unable to appear in consequence of bodily illness or infirmity, may receive his or her pension upon the production of a life certificate signed by a responsible officer of Government or by some other well-known and trustworthy person.

NOTE.—[The power to grant exemption under this Article from personal appearance to draw pension may be delegated by a Local Government to any officer of not lower rank than Collector of a District.]

946. A pensioner of any description who produces a life certificate signed by some person exercising the powers of a Magistrate under the Criminal Procedure Code, or by any Registrar or Sub-Registrar under the Registration Act, or by any pensioned officer who, before retirement exercised the powers of a Magistrate, or by a Chaplain, or any gazetted officer of Government or by a Munsiff or a Judicial Myook in Burma, or by any person holding a Government title, is also exempted from personal appearance.

947. (*a*) In all cases referred to in Articles 945 and 946, the disbursing officer must take precautions to prevent impositions, and must, at least once a year, require proof independent of that furnished by the life certificate of the continued existence of the pensioner.

(*b*) For this purpose he should (save in cases of exemption from personal appearance granted by the Local Government) require the personal attendance and due identification of all male pensioners who are not incapacitated by bodily illness or infirmity from so attending, and in all cases where such inability may be alleged, he should require proof thereof in addition to the proof submitted of the pensioner's existence.

1. The disbursing officer is personally responsible for any payment wrongly made. In case of doubt, he should consult the Accountant-General.

2. A pensioner of rank may be privately identified by the disbursing officer and need not be required to appear at a public office.

948. Payment of pensions to Police pensioners are made in accordance with the rules in this Section, but if the disbursing officer entertains any doubt as to the identity of such a pensioner, he may require the local Inspector of Police to identify him. The Inspector would then be responsible for the correct identification of the pensioner.

Payment to Agents.

949. (*a*) A pensioner not resident in India may draw his pension at any treasury in India through a duly authorised agent, who must either produce a certificate by a Magistrate, a Notary, a Banker, or a Minister of religion, on each occasion, that the pensioner was alive on the date to which his pension is claimed, or execute a bond to refund over-payments, and produce such a certificate as aforesaid at least once a year.

(*b*) A pensioner of any description resident in India is exempted from personal appearance if he draws his pension through a duly authorised agent approved by the Local Government, who must execute a bond to refund over-payments and produce at least once a year a life certificate signed by any of the persons authorised by Article 946 to sign such certificates.

(*c*) The pension of an officer drawing his pension through an agent who has executed a bond to refund overpayments should not be paid on account of a period of more than a year after the date of the life certificate last received,

and the Accountant General and the disbursing officer should be on the watch for authentic information of the decease of any such pensioner, and on receipt thereof, should promptly stop further payments.

Transfers in India.

950. A Local Government or an Accountant-General may, on application and on sufficient cause being shown, permit transfer of payment from one treasury in India to another. This jurisdiction may be delegated by the Local Government to any Executive authority not lower than that of the Collector or other District officer.

951. (*a*) A copy of any order issued by a Local Government or other executive authority under the preceding Article, should be forwarded to the Accountant-General, and the Collector of the district from which the payment is to be transferred should be instructed to return his half of the Pension Payment Order.

(*b*) The Accountant-General will then either issue a new payment order, or enface the payment order for payment at the new treasury, and forward it to the Treasury Officer, who will, in future, pay the pension, or, if the treasury is in another province, will move the Accountant-General of that province to do so.

952. A Treasury Officer may authorise payment in any of the outlying treasuries subordinate to his district treasury of a pension payable under proper authority, at his head-quarters, and may transfer the payment of a pension from such subordinate treasury to the district treasury, or from one subordinate treasury to another in the same district.

Certificate of Non-Employment.

953. (*a*) A pensioner drawing pension in India is required to append to his bill a certificate as follows :—

"I declare that I have not received any remuneration for serving in any capacity, either under Government or under a Local Fund, during the period for which the amount of pension claimed in this bill is due."

(*b*) In the case of a pensioner permitted under Chapter XXI to draw pension after re-employment, this certificate should be modified according to the facts.

Renewal of Pension Payment Order.

954. When the reverse of a Pension Payment Order is filled up, or when the pensioner's half is found to be worn or torn, both halves may be renewed by the Treasury Officer.

955. If a pensioner loses his half of the Pension Payment Order, a new order may be issued by the Treasury Officer, who should see that no payment is made on the half alleged to be lost by a strict observance of Rule 2 under Article 913. The necessary note should be made in the remarks column of the register in Form 39, Civil Account Code.

Lapses and forfeiture.

956. If a pension payable in India remains undrawn for more than one year, the Pension Payment Order must be returned to the Accountant-General, and the pension ceases to be payable.

957. If the pensioner afterwards appears, the disbursing officer may reclaim the Pension Payment order and renew his payments But the arrears cannot be paid (*a*) without the orders of the Accountant General, and (*b*) if the pension in arrears is to be paid for the first time or if the amount of arrears exceeds Rs. 1,000 without the previous sanction of the authority by whom the pension was sanctioned to be obtained through the Accountant General.

NOTE.—[In cases where the pension is sanctioned by the Local Government, it may delegate its powers under this Article to Heads of Departments or other subordinate authorities]

958. If the suspension of payment is attributable to error or neglect by any public officer, the Accountant-General may direct payment of the arrears without taking the orders of the Government.

Deceased Pensioners.

959. (*a*). On the death of a pensioner, payment of any arrears actually due may be made to his heirs, provided that they apply within one year of his death It cannot be paid thereafter without the sanction of the authority by whom the pension was sanctioned to be obtained through the Accountant General.

NOTE —[In cases where the pension is sanctioned by the Local Government it may delegate its powers under this Article to Heads of Departments or other subordinate authorities]

(*b*) But if the arrears do not exceed Rs. 100, and the case presents no peculiar features, the Accountant-General is empowered to pass the arrears on his own authority.

(*c*) After payment of the arrears of pension, the Pension Payment Order should be returned to the Accountant-General with a report of the date of the death of the pensioner

960. Subject to the provisions of the preceding Article, the arrears of pension of a deceased pensioner may be paid to the heirs of the deceased without the production of the usual legal authority, to the extent of Rs. 500 under the orders of the [illegible] the payment, after such enquiry in [illegible] as may be deemed sufficient. Any [illegible] paid under the orders of the Local Government on execution of an indemnity bond, with such sureties as it may require, if it is satisfied of the right and title of the claimant and considers that undue delay and hardship would be caused by insisting on the production of letters of administration.

In any case of doubt, payment should be made only to the person producing legal authority.

961. If an officer dies before actually retiring or being discharged, his heirs have no claim to anything in respect to his pension.

SECTION III.—PAYMENT IN ENGLAND.

962. When a pension is granted to an officer who desires that payment thereof from the date of its commencement should be made at the Home treasury, the Audit Officer, who audits the pay of the officer, should, on receipt of sanction to the grant of pension, issue a last-pay certificate, and forward to the India Office a duplicate thereof, together with copy of the first page of application for pension and the order of the Local Government or other authority granting the pension. The forwarding letter should always request that payment be made from some specific date, the date being ascertained from the last-pay certificate.

963. If the pension is not wholly chargeable against the General Revenues, care must be taken to state in the certificate how it is to be charged.

964. The annuities and pensions of all officers are issued at the Home treasury monthly in arrear on the 16th day of each calendar month.

They are made up to the following quarterly dates, *viz.*, to the 15th March, 15th June, 15th September and 15th December; and they are paid in monthly instalments, the first two instalments in each quarter being the net amount accrued, omitting shillings and pence, and the third instalment being the balance due for the quarter.

965. Intimation of any revision of a pension paid at the Home treasury should be made to the Secretary of State, so as to reach him before the pensioner is informed.

SECTION IV.—PAYMENT IN A COLONY.

966. The rules in this Section apply to pensions granted under the rules in any Chapter of these Regulations. The pension of a pensioner residing in any Colony named in Appendix 15 may be paid there.

Issue of Warrant.

967. The authority for payment for a pension in a Colony shall be a Warrant in Form 29 to be issued—

(i) in the case of a pension granted to an officer serving elsewhere than under the Government of Madras or Bombay, or paid from an Indian treasury not in account with the Accountant-General, Madras or Bombay;—by the Comptroller, India Treasuries.

(ii) in the case of a pension granted to an officer serving under the Government of Madras or Bombay or paid at any treasury in account with the Accountant-General, Madras or Bombay; —by the Accountant-General, Madras or Bombay, as the case may be.

968. When a pension is first granted to an officer serving otherwise than under the Government of Madras or Bombay, and the pensioner desires that it shall be paid in a Colony, or when transfer of payment of a pension heretofore paid at some Indian treasury not in account with the Accountant-General, Madras or Bombay, from India to a Colony is desired, the Accountant-General shall furnish all particulars to the Comptroller, India Treasuries, who will issue the necessary warrant.

969. When a pension is first granted to an officer serving under the Government of Madras or Bombay, and the officer desires that it shall be paid in a Colony, or, if transfer of payment of a pension hitherto paid at some treasury in account with the Accountant-General, Madras or Bombay, from India to a Colony is desired, the Accountant-General, Madras or Bombay, as the case may be, will issue the necessary warrant.

970. Every warrant shall be issued in triplicate The original, bearing the payee's signature, should be forwarded to the Colonial authority concerned, the duplicate to the Secretary of State, and the triplicate should be made over to the payee. Each payment should be endorsed on the back of both the original and the triplicate warrant, an acknowledgment of receipt of money being rendered by the payee When no space for such entries remains, or when a warrant is lost or destroyed, a fresh warrant shall be issued by the officer who issued the original warrant on application being made through the Colonial Disbursing Officer. The letter forwarding the duplicate Warrant to the Secretary of State should invariably furnish the following information, *viz.*:—

(1) Whether the pensioner is already on leave in the Colony.
(2) Date of his retirement.
(3) Date of leaving India.
(4) Date of birth.

Rate of Exchange.

971. Pensions stated in Indian money shall, in a Colony in which the Indian Government rupee is not legal tender, be paid in sterling money at the rate of exchange annually fixed for the adjustment of transactions between the British and Indian Governments, subject to the condition that 1*s*. 9*d*. the rupee is fixed as the minimum rate at which the conversion into sterling shall be effected. Any payments made at a different rate or otherwise erroneously, should be adjusted in subsequent payments.

NOTE 1.—[The same rate of exchange applies to the issue of gratuities to persons residing in any country in which the rupee is not legal tender; but when the service of an officer to whom a gratuity is granted terminates in India, the gratuity should be paid in India.]

NOTE 2.—[Notes 1 to 3 under Article 934 apply, *mutatis mutandis*, to this Article.]

NOTE 3.—[On warrants issued to persons drawing pensions stated in rupees it should be noted whether payment is subject to the minimum rate of 1*s* 9*d*. the rupee]

Transfer of Payment.

972. (*a*) Transfer of a pension from an Indian treasury to a Colony the payments in which are adjusted in the accounts of the Home treasury is permitted only once; but a pensioner can at any time have payment transferred from a Colony to an Indian treasury, or from a Colony the payments in which are adjusted in the accounts of the Home treasury to England for direct payment from the Home treasury.

(*b*) In case a pensioner desires transfer of payment of his pension from one Colony to another, the Government of India will recognise the proceedings of the Colonial authorities sanctioning such transfer which should, however, be reported separately by the pensioner to the Government of India and to the Under-Secretary of State for India.

973. Upon his return to India an officer should deliver up his copy of the warrant, which will serve the purpose of a last-pay certificate.

Chapter XLIX.—Pensions to Members of the Indian Civil Service.

SECTION I.—APPLICATIONS.

Retirement while on duty in India.

974. An officer on the Bengal Establishment who is not borne on the [illegible] r the Govern- [illegible] permission to [illegible] India in the Department under which he is serving, and the Department receiving the application will forward it, with any remarks that may be necessary, to the Home Department, which should obtain the report of the Comptroller, India Treasuries, upon the officer's claim in respect of service and active service and also as to whether there are any demands against him on account of the deduction prescribed in Article 556, or on any other account.

975. An officer on the Madras or Bombay Establishment, or on the Bengal Establishment who is borne on the cadre of the Bengal Presidency, if he be in India, shall submit his application to the Government of Madras, Bombay or Bengal, as the case may be, who will obtain the report of the Accountant-General and the No-demand Certificate as provided in Article 974.

976. Any other officer on the Bengal Establishment, if he be in India, shall submit his application to the Local Government under which he may be serving; and the Local Government will forward the application, with any observations which may be necessary, to the Government of India in the Home Department, together with a No-demand Certificate from the Accountant-General.

1 When preparing the No demand Certificate, the Accountant General should send the officer a copy of Article 981.

Retirement during leave to Europe.

977. (*a*) An officer, who wishes to retire from the Service while on leave in Europe, must submit his application to the Secretary of State.

(*b*) When an officer makes his application under this Article, whether [illegible] him in India; and he is directed to apply to the Government of India, the Government of Madras, the Government of Bombay or the Government of Bengal, as the case may be, for the annuity or gratuity to which his length of service may entitle him.

Grant of Pension.

[illegible] India, in which Department the annuity or gratuity to which the officer is entitled will be sanctioned

(*b*) The copy of the sanctioning order forwarded to the officer will be his authority for drawing his annuity or gratuity

(*c*) In the case of an officer on the Madras or Bombay Establishment, or on the Bengal Establishment if borne upon the cadre of the Bengal Presidency, the annuity or gratuity will be sanctioned by the Government of Madras, Bombay or Bengal, as the case may be.

SECTION II.—PAYMENT.

979. The annuity of an officer who leaves India by sea, when retiring from the Service at the end of subsidiary leave, begins, and his subsidiary leave ends, on the day of the departure of the vessel in which he sails

[illegible] cadres :—

1. Name of officer
2. Date on which he made over charge of his office
3. The amount of subsidiary leave granted, if any
4. Date up to (and including) which subsidiary leave allowances have been drawn.
5. What demands, if any, are outstanding against the officer]

980. The annuity of a Member of Council who has not previously resigned his seat in Council, or whose successor has not entered upon his office, commences from the day following that on which the vessel in which he leaves India sails, or from the expiry of his five years' tenure of office, whichever date is earlier.

981. An officer on resigning the Service must report the place at which the payment of his annuity is desired, and if he is leaving India, the date of the departure of the vessel in which he sails. The report must be made to the Government of India in the Finance Department in the case of an officer not borne on the cadre of the Madras, Bombay or Bengal Presidencies and to the Government of Madras, Bombay or Bengal, if he belongs to the Madras, Bombay or Bengal cadres

[illegible] y officer [illegible] in the [illegible] ured and [illegible]

982. Annuities are payable in arrear, monthly, and to date of decease.

983. (*a*) Payment of annuities and gratuities may be taken at the Home treasury in sterling money, or in India in rupees, at the following rate :—

(i) If the annuitant was on the Bengal Establishment,—10⅗ rupees for each pound sterling.

(ii) If the annuitant was on the Madras or Bombay Establishment, —10 65 rupees for each pound sterling.

Note —[The rates specified in this clause were fixed by Statute 37 Vict c. 12.]

(*b*) Provided that any annuitant who resides in India, whether permanently or temporarily, and wishes to draw his annuity in that country, may exercise the option of receiving it at the rate of exchange fixed for the adjustment of transactions between the British and Indian Exchequers.

Note.—[This rule applies to all officers whose pensions are stated in sterling, and who, being resident in Asia, take payment in India.]

984. Transfer from the Home treasury to an Indian treasury, and *vice versâ*, is permitted twice only.

985. Whenever a certificate is issued for the payment of an annuity from the Home treasury, the amount of the annuity must be stated in pounds sterling and not in rupees, and, in the case of transfer of payment from India to the Home treasury, it must be distinctly recorded that no further payment on account thereof will be made in India.

986. An officer who resigns the Service while he is in Europe, and who has completed the requisite period of service and residence, and elected to draw his annuity from the Home treasury, can obtain advances from the Secretary of State for India, pending receipt of the authorities referred to in Article 978.

987. Payment of annuities may be made in any Colony named in Appendix 15 in accordance with the procedure laid down in Articles 966 to 973.

Chapter L.—Pensions to Chaplains.

988. Application may be made to, and pensions are granted by, the Government of India, Local Governments or by the Secretary of State as the case may be.

NOTE.—[A Chaplain who proceeds to Europe on leave should give four months' notice if he decides to retire without returning to India.]

leave, and, if the latter, for what period

989. A Chaplain proceeding to England on retirement, without applying for pension, should procure a certificate in Form 30—

(i) From the Accountant General of the Province in which he is serving or has last served.

(ii) In the case of the Archdeacon of Calcutta or the Presidency Senior Chaplain, Church of Scotland, Bengal, from the Comptroller, India Treasuries.

990. A Chaplain who wishes to obtain pension from the authorities in India must, if he belongs to the Church of England, submit his application through the Archdeacon or Bishop of his Diocese, or if he belongs to the Church of Scotland through the Presidency Senior Chaplain, to the Local Government under which he is serving or has last served.

The Archdeacon of Calcutta or the Presidency Senior Chaplain, Church of Scotland, Bengal, will submit his application to the Government of India in the Department of Education.

991. *Cancelled.*

992. The Department of Education or the Local Government before accepting the resignation of a Chaplain should obtain a certificate from the Comptroller, India Treasuries, or the Accountant General concerned, showing the Chaplain's service, residence and the amount of pension to which he is entitled.

993. (*a*) In the case of the Archdeacon of Calcutta and the Presidency Senior Chaplain, Church of Scotland, Bengal, the case should be forwarded to the Finance Department of the Government of India in which Department the pension to which the Chaplain is entitled will be sanctioned.

(*b*) In the case of other Chaplains the pension will be sanctioned by the Local Government concerned.

994. A Chaplain to whom pension has been granted in India should be careful before proceeding to England to obtain the usual certificate of the last issue of pay or pension to him in India.

PART XI.—REGULATIONS RELATING TO TRAVELLING ALLOWANCES.

GENERAL ARRANGEMENT.

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PART XI.—REGULATIONS RELATING TO TRAVELLING ALLOWANCES.

Chapter LI.—Definitions and General Rules.

SECTION I.—PRINCIPLES OF CALCULATION.

995. Travelling allowance is given to an officer to cover the actual travelling expenses incurred by him in travelling in the interests of the public service. It is a fundamental principle that the allowance is not to be a source of profit, and, save as specially provided in these Regulations, no allowances are granted to meet the expenses of the families of officers accompanying them when travelling on duty.

Route for calculation of Travelling Allowance.

996. (*a*) For the purpose of calculating travelling allowance, a journey between two stations is held to be performed by the shortest of two or more practicable routes, or by the cheapest of such routes as may be equally short.

NOTE.—[Where there are alternative railway routes, and the difference between them in point of time and cost is not great, travelling allowance should be allowed for the route actually used.]

(*b*) The shortest route is that by which the traveller can most speedily reach his destination by the ordinary modes of travelling. In case of doubt the Head of the Department concerned will, in respect of journeys within his jurisdiction performed by officers under his control, declare which shall be regarded as the shortest of two or more routes

(*c*) *If an officer travels by a route which is not the shortest, but which* is cheaper than the shortest, his travelling allowance is calculated by the route by which he makes the journey

997. The Local Government, or the Head of the Department in the case of journeys within his jurisdiction performed by officers under his control, for special recorded reasons, may permit travelling allowance to be calculated by a route other than the shortest or cheapest, provided that the journey is actually performed by such route.

NOTE.—[In the case of journeys between stations which are in the jurisdiction of different Local Governments, Heads of Departments under whose orders transfers are made from one Province to another may exercise the powers of a Local Government under Articles 996 and 997]

998. The point in any station from which a journey is held to commence, or at which it is held to end, is the chief public office or any other point fixed for the purpose by the Local Government

NOTE.—[See Note under Article 1065 (iii) (1).]

When means of locomotion are supplied.

999. (1) An officer who is provided with and avails himself of means of locomotion at the expense of Government, a local fund or a Native State, and does not pay the expenses of its use or propulsion, draws travelling allowance as follows :—

(*a*) If he has not to provide separate conveyance at his own expense for his servants or luggage, he draws the daily allowance ordinarily admissible to him and is not entitled to exchange the daily rate for mileage under Article 1065. But if part of the journey is performed by other means of locomotion he may at his option draw in lieu of daily allowance the travelling allowance admissible for that part.

(*b*) If he has to provide separate conveyance at his own expense for his servants or luggage, he may, under Article 1065, exchange his daily allowance for half the mileage ordinarily admissible to him and may draw in addition the travelling allowance admissible for any part of the journey performed by other means of locomotion.

NOTE [illegible] either under the rules promul- [illegible] a local fund, when performing [illegible] ance as above only if the jour- [illegible] Otherwise they are not en- [illegible]

(2) An officer provided with the means of locomotion as in clause (1) who pays all expenses of its use or propulsion is entitled to travelling allowance under the ordinary rules, subject to the deduction therefrom of such fixed hire or charge as the Local Government, or the Head of an Imperial Department in respect of journeys within his jurisdiction performed by officers appointed by him and under his control, may fix.

(3) Table money under Article 1023 is granted to officers of all but the first class in Burma travelling by Government steam launch on transfer in addition to any allowance admissible under this Article.

999-A. The above Article does not apply to—

(*a*) Officers using motor cars supplied at the public expense under the rules promulgated in the Resolution in the Finance Department No. 250-E A., dated the 15th July 1912. The travelling allowance of such an officer is regulated by the ordinary rules, subject to the following conditions :—

(1) If he travels more than twenty miles by the motor car in a day, he will draw for the first twenty miles the mileage allowance ordinarily admissible under these Regulations, and for the remainder three-fourths of the mileage allowance so admissible.

(2) If a journey by the motor car is combined with a road journey by ordinary conveyance, the officer will draw the mileage allowance ordinarily admissible for the first twenty miles or for the portion of the journey performed by ordinary conveyance, whichever is

Military Commissioned and Departmental officers, Chaplains, the officers mentioned in Appendix 18, and any other officer who holds an appointment the pay or maximum pay of which exceeds Rs. 500.

Second.—The second class includes Warrant officers, Non-Commissioned officers, Civil Assistant Surgeons, Civil Apothecaries in Madras, Probationary and Assistant Superintendents of the Post Office, Probationary Assistant Superintende

Collectors ir

Schools in

Inspectors

spectresse

tendents

Orissa, P

the Jail

Page 286. Article 1002.

Insert the words "Female educational officers as wel female clerks, school matrons and school nurses whose pa maximum pay is not less than Rs. 50" *after the word* "Schoo *in line 7 of clause* "Second" *under this Article.*

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Assistant ... as Superintendents and Sub-Inspectors (Rs. 50-100), acting as Inspectors of the combined Excise and Salt Department, Bengal, qualified students of the Thomason College under practical training, Headmasters of Government High Schools in Assam, and any other officer, not included in the first class, who holds an appointment the pay or maximum pay of which exceeds Rs. 100.

Third.—The third class includes all officers in superior service not included in the first or second class and jail warders in the Bombay Presidency drawing more than Rs. 10 a month.

Fourth.—The fourth class includes all officers in inferior service.

NOTE 3.—[The following Police subordinates are held to be in superior service if their pay exceeds Rs. 10 a month :—

(a) Of rank higher than constable, everywhere.
(b) Of the rank of constable in the Aden and Makhi Dhand Police.
(c) Mounted constables in Sind.]

NOTE 4.—[Forest Guards are held to be officers of the fourth class even in cases where their service is specified as superior.]

from their homes, draw for journeys by rail double second class fare, and for journeys by road four annas a mile. They may also draw, under the usual rules, a daily allowance of Rs. 3 during halts when employed, at a distance exceeding five miles from their residences, on Government work, whether judicial or extra-judicial, under the orders of the district or sub-divisional magistrate.

1004. The Local Government may grant travelling allowance under these Regulations to any person, who is not a Government official and who may be required to attend any meeting of a Commission of Enquiry or of a

Board, Conference, Committee or departmental enquiry, convened under (or with reference to) its orders to transact or advise upon matters of public business or to conduct examinations held under its authority, or who may be required to perform any public duties in an honorary capacity; and may for this purpose declare, by general or special order, to what class such a person belongs and to what daily allowance he is entitled, subject to the condition that the ordinary daily allowances for officers of the first and second classes, respectively, shall not exceed Rs. 5 and Rs. 3. It may also, at its discretion, grant such a person, in lieu of travelling allowances under these Regulations, the travelling, hotel and carriage expenses actually incurred by him.

NOTE 1.—[The grant of travelling allowance under the Regulations is desirable, as far as possible, in all cases falling under this Article, as it avoids correspondence and tends to facility of audit.]

NOTE 2.—[The Local Government may delegate its powers under this Article to the Head of the Department concerned, or to the Government officer presiding over the meeting of the Commission, etc.]

1005. The Local Government may declare to what class an officer, whose whole time is not retained for the public service, or who is paid partly or wholly by fees, belongs, and to what daily allowance such an officer is entitled: provided that the ordinary maximum daily allowances for officers of the first and second classes, respectively, are Rs. 5 and Rs. 3.

1006. An officer on special duty belongs, in the absence of a special order of the Local Government to the contrary, to the class to which he belonged immediately before he was placed on such duty.

1007. An officer during transfer from an appointment in one class to an appointment in another class belongs to the class to which he would belong if holding the lower of the two appointments.

Temporary Employés.

1008. A person employed temporarily, by competent authority, is entitled to travelling allowances under the rules applicable to officers of corresponding rank with permanent appointments.

Combination of Appointments.

1009. An officer holding, either temporarily or permanently, two separate appointments is entitled only to the travelling allowance attached to one of them; but in the case of permanent allowances, the Local Government may grant such [illegible]
allowances [illegible]
by reason [illegible]
beyond wha[illegible]

1010. [illegible]
entitled to [illegible]
special order of the authority empowered to give such charge and in the following cases :—

(a) An Assistant or a Deputy Superintendent of Police placed in charge of the office of a District Superintendent may draw the travelling allowance

of a District Superintendent, and an Inspector placed in charge of the office of a District Superintendent, Assistant Superintendent or Deputy Superintendent may draw the travelling allowance of a Deputy Superintendent.

(b) An officer in the Survey of India, whatever his substantive rank may be, draws when in charge of a Survey Party, the travelling allowance of a Deputy Superintendent.

(c) A certain number of upper subordinates in the Buildings and Roads and Irrigation Branches, respectively, of the Punjab, the United Provinces, Bihar and Orissa and Bengal, according to a scale sanctioned from time to time by the Government of India in the Public Works Department, when placed in charge of districts or sub-divisions, are allowed travelling allowance at the rates admissible to Assistant Engineers, or Sub-Engineers, as may be ordered by the Local Government. Lower subordinates of the United Provinces, Buildings and Roads Branch, when similarly placed in charge of districts or sub-divisions, within the scale referred to above, draw travelling allowance at similar rates. Subordinates and Inspectors of Maintenance of the North-Western and Oudh and Rohilkhand Railways, when placed in charge of sub-divisions or sub-districts, also draw travelling allowance at the rates admissible to Assistant Engineers.

(d) A lower subordinate placed in charge of a properly constituted sub-division in Bengal, in Bihar and Orissa or in Burma may be granted the same travelling allowances as an upper subordinate when the necessity for such an arrangement arises in consequence of the paucity or absence of upper subordinates

1. The Local Government may delegate its power under this Article to the Head of a Department or Commissioner of a Division.

Chapter LII.—Mileage Allowances.

NOTE.—[The rules in this Chapter are rules of calculation only; that is, they prescribe the method of calculating travelling allowances in those cases in which they are regulated by the distance travelled. The succeeding Chapters must be referred to for a definition of the circumstances under which the title to the allowances accrues]

SECTION I.—TRAVELLING BY RAILWAY.

1011. Officers travelling by railway on duty are entitled to class accommodation according to the following scale :—

(a) *Officers of the first class.*—Highest class accommodation (by whatever name called) provided on the line by which the officer is required to travel.

(b) *Officers of the second class.*—Second or, where on the line by which the officer is required to travel second class accommodation is not provided on any of the trains, first class.

(c) *Officers of the third class* —Intermediate class, or if on the line by which the officer is required to travel no "intermediate" class accommodation is provided on any of the trains then—

(i) where there are only twoclasses,—lower class;
(ii) where there are three classes — second class, if the officer's pay or maximum pay is not less than Rs. 50; otherwise, third class.

(d) *Officers of the fourth class*.—Lowest class whether called lower, third, or fourth.

NOTE 1.—On the Darjeeling-Himalayan Railway all officers of the third class are entitled only to third class accommodation.

less than Rs 50 and who travels on a line which provides intermediate accommodation on one or more of its trains, but by a particular train which has no intermediate class, is not entitled to the above concession. He will be restricted to travelling allowance based on intermediate *class* accommodation and can draw the travelling allowance admissible for second class accommodation, only in the event of there being no third class on the train.

(b) Observers and clerks of the Meteorological Department when touring on inspection duty are entitled to second class accommodation if they actually travel by that class on account of their having valuable or delicate instruments with them

(c) Deputy Inspectors of Schools in Bengal and Bihar and Orissa, permanent or temporary, are allowed 2nd class accommodation

1012. The allowance admissible to an officer of the first, second, or third class is double the fare of the class in which he is entitled to accommodation, and to an officer of the fourth class the fare of the lowest class.

Exception —The undermentioned Revenue and Forest officers in Madras receive mileage at the following rates when travelling by railway with camp equipment, including tents, within their jurisdiction .—

	Annas.
Collectors and Conservators	6
Sub-Collectors, Assistant Collectors, Deputy Conservators, Assistant Conservators when placed in charge of Forest Divisions or employed as Instructors at the Forest College, Coimbatore, and Forest Settlement Deputy Collectors	4
Deputy Collectors and Assistant Conservators	3

1013. When an officer is entitled to or is allowed free transit by rail his travelling allowance must, save as otherwise provided in Articles 1067 to 1069, be reduced by the amount of the fare which but for such free transit he would have paid.

NOTE 1.—[This Article applies to every case not covered by a specific rule to the contrary, in which an officer is provided with a free pass, and not merely to the case of free passes granted on railways which are worked directly by Government.]

NOTE 2.—[The deduction made from travelling allowance under this Article shall ordinarily be for the full number of fares covered by the pass; that is, in the case of a 1st class

pass, one first and two third class fares, and in the case of a 2nd class pass, one second and one third class fare. If the deduction made on any bill is less, the officer drawing the bill must attach a certificate that he did not use the pass in respect to the fare or fares for which the deduction is not made]

1 Police Inspectors and Sub-Inspectors in Bombay employed exclusively on railways are not liable to have their allowances reduced when they use a free pass

1014. When an officer is entitled to travel in a higher class at a lower fare, his travelling allowance must be reduced by the amount by which the fare of the class in which he travels exceeds the fare actually paid.

Unopened Lines.

1015. (*a*) An officer of the State Railways or the Telegraph Department travelling on an unopened line of railway by trolly, material train, or engine, draws, in addition to the actual cost of haulage (if any), the following mileage allowances, *i e.*—

If an Officer of the first class	. . . .	$1\frac{1}{2}$ annas.
Ditto	second class	9 pies.
Ditto	third or fourth class . .	3 ,,

(*b*) This Article is not applicable to officers of the Consulting Engineer's Department, or to officers attached to open lines of railway.

(*c*) An officer cannot draw any other allowance in lieu of, or in addition to, this special allowance, except—

(*i*) when he makes a journey of less than twenty miles partly by trolly and partly by road in which case he can only draw daily allowance, for the whole journey; * and

(*ii*) when he remains absent from head-quarters for a night, in which case he can draw, at his option, either daily allowance, or the allowance admissible under this Article;

(*iii*) when the conditions of Article 1061 (*a*) are satisfied, in which case he may draw also the allowances admissible under that Article.

NOTE.—[The special allowance admissible under this Article is not affected by Article 990]

SECTION II.—TRAVELLING BY SEA OR RIVER.

1016. An officer when travelling by sea or in a river steamer, is allowed either free accommodation or the amount of passage money actually paid for accommodation, on the undermentioned scale:—

(*a*) *Officer of the First Class.*—First class for himself, and lowest class for two or, if his salary is not less than Rs. 1,000, three servants.

* When the journey is more than twenty miles and is made partly by road and partly by trolly, the allowances are regulated by Article 1065 (iii)

(b) *Officer of the Second or Third Class.*—Middle or second class for himself and lowest class for one servant.

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is

(c) *Officer of the Fourth Class*—Lowest class.

1017. The preceding Article is subject to the following provisos :—

(a) An officer of the second class whose pay is not less than Rs. 200, may elect for any journey to claim accommodation under clause (a), in which

Page 291. Article 1017.

Insert the following Note to this Article :—

NOTE—[Local Governments may grant, at their discretion, to assistant inspectresses of schools and female inspecting officers of similar position travelling allowance at first class rates.]

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velling on duty by sea in that capacity, may recover the actual cost ...d by them in securing reserved accommodation up to an amount not exceeding double that admissible as passage-money for themselves under Article 1016 (a).

1019. The Travelling Inspector of Emigrants, Assam, while actually engaged on the duties of Travelling Inspector, may draw first class fares for journeys by steamer.

1020. In cases of doubt or in cases in which, owing to the arrangement of the classes on the steamer, the rules, if construed strictly, involve hardship, the Local Government, or the Head of a Department in respect of non-gazetted subordinates, has power to decide what class of accommodation any particular officer should be allowed.

1021. Except as provided in Articles 1000, 1094 (Exception 1), and 1098, no more personal luggage can be carried at the expense of the State than the quantity the freight on which is included in the charge for passage.

Table-money.

1022. If board is provided on the vessel either by its owners or Commander or otherwise, the charge for such board, whether actually included in the passage-money or not, is reckoned as passage-money for the purpose of Articles 1016 to 1021, but in that case table-money is recovered from an officer of the first class (other than a native of India, hindered by caste or other scruples from availing himself of the board so provided) at the following rates for every day on which dinner is provided for him on board :—

(i) If the board includes wines and liquors, three-twentieths of salary up to a maximum of Rs. 8.

(ii) Otherwise, three-fortieths of salary up to a maximum of Rs. 4.

NOTE.—[In the case of Political Officers in the Persian Gulf and at Muskat travelling on duty in H. M.'s ships or R. I. M. vessels, table-money is recovered at the rate of three-fortieths of salary up to a maximum of Rs. 4 a day whether board includes wines or not.]

1023. If board is not provided on the vessel, or, though provided, cannot, owing to caste or other religious scruples, be availed of, an officer of the second, third, or fourth class is entitled to table-money for every day on which he dines on board—

(i) At the rate of daily allowance prescribed in Article 1063, subject to a minimum of four annas for himself and for each member of his family for whom passage money is admissible and who is not less than six years of age; and

(ii) At half such rate for each such member of his family who is less than six years of age.

Explanation.—Table-money is not recovered from an officer of the second, third, or fourth class in the case mentioned in Article 1022, nor paid to an officer of the first class in the case mentioned in Article 1023.

1024. Port Officers when travelling on detached duty are not subject to any deduction on account of table-money if board is provided on the vessel; and, if board is not provided, they are entitled to table-money at the rates of daily allowances prescribed in Appendix 25.

1025. A second class passenger is not entitled to be supplied with mess at the Commander's table, unless no other mess is provided on the steamer.

1026. When the route by which an officer is entitled to draw travelling allowance embraces a journey by sea which is not actually undertaken (whether owing to the officer's not travelling by the direct route or otherwise), table-money should be recovered from or paid to such officer for the average number of days which the passage occupies, such average, in case of doubt, being determined by the Local Government.

NOTE.—[Articles 1022 to 1026 regarding the recovery of table-money apply to voyages in the neighbourhood of India only.]

1027 and **1027A.** *Cancelled*

Government vessels.

1028. An officer is bound to travel in an Indian Government vessel, if suitable accommodation be offered to him.

1029. An officer travelling otherwise than on payment of passage-money in a vessel, the cost of which is paid by the State or Local Funds, is subject to the rules regarding scale of accommodation in Articles 1016 and 1017 and table-money in Articles 1022 and 1023. But the travelling allowance of an officer travelling in a vessel, the crew of which is paid by himself and not by the State or Local Funds, is regulated by Article 999.

1030. The rates payable to Commanders of Government vessels for the entertainment on board of officers of the first and second classes together with their families and servants, and all officers in inferior service, when such officers travel as ordinary passengers, and the rates payable for the entertainment on board a vessel of the Royal Indian Marine of officers travelling on special occasions are contained in Appendix 19.

Crossing River or Arm of the Sea by Steamer.

1031. The rules in this section apply to an officer crossing a river or arm of the sea by steamer in the course of a journey; but when such crossing occurs in the course of a railway journey, and the charge therefor is included in the railway fare, the rules in Section 1 of this Chapter are applied.

Embarking and Disembarking.

1032. In addition to passage-money an officer travelling by steamer is reimbursed the actual expenses incurred by him in embarking and disembarking, *i.e.*, the charges from the quay to the vessel, such as wharfage fees, boat-hire, and the like. Charges incurred on shore are not reimbursed.

SECTION III.—TRAVELLING BY ROAD.

1033. Travelling by road includes travelling by sea or river otherwise than on a steamer (*e.g.*, by steam launch or by boat), and travelling by canals.

Ordinary Mileage Rates.

1034. For journeys by road, mileage allowance is calculated at the following rates :—

Officers of the 1st class	8 annas	Officers of the 3rd class	2 annas
„ „ 2nd „	4 „	„ „ 4th „	1 anna

provided that (except in cases of transfer) a non-gazetted ministerial or a menial officer is only entitled to actual travelling expenses not exceeding the rate for his class. [*See Rule 1 under Article 1065 (ii).*]

1035. In calculating travelling allowance at mileage rates, fractions of a mile should be omitted, but only in the total of a bill for any one journey, and not in the various items which make up the bill

Special Mileage Rates.

1036. (*a*) The undermentioned Revenue and Forest officers in Madras receive mileage at the rates shown below when travelling on tour within their respective districts or charges :—

	Without tents. Annas.	With tents. Annas.
Collectors and Conservators	8	12
Sub-Collectors and passed Assistant Collectors, Deputy Conservators, Assistant Conservators when placed in charge of Forest Divisions or employed as Instructors at the Forest College, Coimbatore, and Forest Settlement Deputy Collectors	6	8
Unpassed Assistant Collectors, Deputy Collectors, and Assistant Conservators	4	6

(*b*) The following officers also draw mileage at the special rates shown :—

	Annas.
Junior Port Officers in Madras	8
Overseers in the Public Works and Railway Departments	2

	Annas
Assistant Inspectors of Schools, Bengal, Bihar and Orissa and Assam	6
Deputy Inspectors of Schools, Bengal and Bihar and Orissa, substantive or temporary	4
Assistant Opium Agents	8
Superintendents and Assistant Superintendents in the Northern India Salt Revenue Department	8
Chief Observers at Lahore and Allahabad and Clerks in the Calcutta, Madras and Bombay Meteorological Observatories when inspecting observatories	4
Settlement and Assistant Settlement Officers in Bengal, Bihar and Orissa and Assam and Excise Deputy Collectors in Bihar and Orissa whose pay is less than Rs. 700 a month—50 per cent extra, subject to a maximum of	8
[illegible]	4
[illegible]	6
[illegible]	3

Special Conveyance.

1037. (*a*) When an officer of a class lower than the first is required by superior authority to travel by special means of conveyance, the cost of which exceeds the daily allowance under Article 1063 when daily allowance only is admissible, or the mileage admissible under Article 1034, the actual cost of transit may be drawn in lieu of daily allowance or mileage. The bill for the actual cost of transit must be supported by a certificate signed by the superior authority and countersigned by the controlling authority, certifying that the use of the special means of conveyance was absolutely necessary, and specifying the circumstances which rendered it necessary.

(*b*) The Audit Officer will report, for the orders of the Local Government, any case in which the concession appears to have been improperly granted.

Chapter LIII.—Travelling Allowances for Journeys on Tour.

SECTION I.—GENERAL RULES.

1038. An officer other than one of those referred to in Article 1039, whose duties, whether ordinary or special, necessitate his travelling within or (under proper authority) beyond the circle of his ordinary jurisdiction is entitled to travelling allowance which may be either—

(*a*) a permanent monthly allowance ; } These may, under certain conditions,
(*b*) a daily allowance ; } be exchanged for mileage under Chapter LII.

(*c*) a conveyance allowance or actual conveyance hire.

Journeys to hill stations do not come within this rule.

1. An officer undertaking a journey to attend a Chapter of the Star of India or of the Indian Empire to which he has been summoned, travels on duty within the meaning of this Article.

2. A Chaplain proceeding to a distance from head-quarters to solemnise a marriage; or a medical officer leaving his station to attend upon the family of a public officer, which he is not bound to attend free of charge as a part of his regular duties, is not travelling on duty within the meaning of this Article.

1039. The pay of the officers named in Appendix 20 has been fixed so as to compensate them for the cost of ordinary journeys (other than journeys by rail or steamer) within their respective jurisdictions, and they are not entitled to travelling allowance for such journeys. When travelling by rail or steamer within jurisdiction, they are entitled to travelling allowance under Articles 1011 to 1032. When proceeding under proper authority beyond their jurisdiction, they are entitled to travelling allowance for their entire journey, including such part of it as is within their jurisdiction.

NOTE 1. [illegible]

travelling allowance admissible to officers of their class.]

1040. The Local Government is empowered to add to the list of officers in Appendix 20 subject to confirmation, on report of its proceedings to the Government of India

Limits of Ordinary Jurisdiction.

1041. A Local Government may fix the limits of ordinary jurisdiction for, and impose restrictions upon, the duration and frequency of the journeys on any specified duty of any officer or class of officers.

Tents.

1042. (*a*) The Local Government or the Head of an Imperial Department in respect of his subordinates, is empowered to lay down the scale of Government tents to be supplied for the use on tour of any particular officer or class of officers for office and, if it think fit, private purposes.

(*b*) When tents which are the property of Government are used only for office purposes by an officer on tour, they are carried at Government expense. When they are used partly for office and partly for private purposes, the officer using them must, save as provided in Article 1000, pay half the cost of carriage. When they are used wholly for private purposes, the officer using them must, unless the case is met by Article 1000, pay the whole cost of carriage.

1043. *Cancelled.*

SECTION II.—PERMANENT ALLOWANCES.

1044. A permanent monthly travelling allowance is granted in lieu of all other travelling allowances for journeys within an officer's circle of duty, and is drawn all the year round, whether the officer entitled to it is at the time absent from his head-quarters or not. Officers in receipt of such

allowance should deduct from the amount drawn each month, the value of the fares for any railway journeys for which they have used a free pass during the month.

Exceptions—The following officers who draw permanent monthly travelling allowance may draw single fare for a journey by rail in addition —

(a) District Inspectors of Excise in the Central Provinces, provided the Deputy Commissioner certifies that the journey by rail was necessary and that the Inspector has duly earned the monthly allowance.

(b) Sub-Inspectors of Police in Bombay employed exclusively on railways

(c) District Inspectors of Schools in the Punjab—with the special sanction of the Postmaster-General for journeys made by them as Inspectors of School Post Offices.

(d) Munshis and clerks attached to Canal Divisions of the Public Works Department and Sub-divisional clerks and munshis on the establishment of the Executive Engineer, Kumaun Government Estates, United Provinces

(e) Officers of the fourth class

1045. The Local Government may, either by a general order applying to a class of officers or by a special order, permit an officer whose circle of duty extends beyond the limits of a single district, to draw, whenever his actual travelling expenses for a duly authorised journey on duty by public conveyance exceed double the amount of his permanent allowance for the period occupied in such journey, the difference between such double permanent allowance and the allowances admissible under Chapter LII in addition to his ordinary permanent allowance for such period.

1046. An officer in receipt of a permanent monthly allowance may, when proceeding, under proper authority, beyond his jurisdiction, exchange his permanent allowance for the entire journey, including such part of it as is within his jurisdiction, for the allowances admissible under Article 1065, the daily allowance being taken to be one-thirtieth of the permanent monthly allowance.

1047. A permanent monthly [illegible] on leave or during joining time, [illegible] allowance of any other kind is dra[illegible] a permanent allowance may, at the option of the officer receiving it, be drawn in lieu of any other travelling allowances admissible under these Regulations.

1048. Permanent monthly allowances are granted to the officers named in Appendix 22 at the rates shown therein.

Additions to this Appendix can be made only with the sanction of the Government of India.*

1049. (a) The Local Government may grant to a Forest officer, in lieu of other travelling allowance, a permanent allowance, according to the following scale :—

	Rs.
To an officer in charge of a circle	150 a month.
[illegible]	
[illegible]	100 „

* The rule in this Article is to be read as superseded or revised by the Resolutions defining the powers of the Government of India and Local Governments in this matter No amendment has, however, been made in this reprint pending a general revision of the Code.

	Rs
(ii) If an Extra Assistant Conservator elsewhere than in Bombay, or a probationer for the Provincial Forest Service	75 a month
(iii) If below the rank of Extra Assistant Conservator .	50 ,,
To an officer in charge of a sub-division or range—	
(i) If not below the rank of Extra Assistant Conservator or a probationer for the Provincial Forest Service .	60 ,,
(ii) If below the rank of Extra Assistant Conservator .	20 ,,

(b) Where a charge is specially extensive, or travelling is unusually costly, the above scale may be increased, with the previous sanction of the Government of India, by twenty-five or fifty per cent.

1050. Conservators of Forests in the Madras Presidency may grant a Deputy Ranger or a Forester not in charge of a Range a permanent monthly travelling allowance not exceeding Rs. 8. Conservators of Forests and Deputy Conservators in charge of circles in the Bombay Presidency may grant a Forester, whose pay is not less than Rs. 15 per mensem and who is not in charge of a Range, a permanent monthly travelling allowance not exceeding Rs. 10.

1050A. The Government of Burma may grant a permanent monthly allowance to all officers of or below the rank of Inspector in the various Settlement and Survey establishments (including clerks and menials), as well as to Demarcation Officers and their clerical and menial establishments, subject to the conditions that the maximum in any case shall not exceed Rs. 30 and that only half rates shall be admissible during the recess season.

NOTE.—[The Local Government may delegate its power under this article to the Financial Commissioner in respect of temporary establishments which he is competent to sanction.]

1051. Munshis and clerks attached to Canal Divisions of the Public Works Department and sub-divisional clerks and munshis on the establishment of the Executive Engineer, Kumaon Government Estates, United Provinces, who are liable to be at any time required to go on tour, may, at the option of the Local Government, be granted a permanent monthly allowance of Rs. 10, in lieu of all other travelling allowance

NOTE.—[Munshis and clerks stationed beyond the external boundaries of the Hazara, Peshawar, Kohat, Dera Ismail Khan or Dera Ghazi Khan districts, receive a permanent monthly allowance of Rs. 15, with the sanction of the Local Government in each case.]

SECTION III.—DAILY ALLOWANCES—CONDITIONS.

1052. (a) A daily allowance is intended to cover the ordinary daily charges of an officer on tour; it is drawn only during absence from head-quarters on duty, including the period of halts on duty, or on an authorised holiday, during such absence.

(b) Save where otherwise expressly provided, daily allowance is inadmissible for journeys, or halts in the course of journeys, under any other Chapter of these Regulations.

1053. The period of absei rs begins on the day on which the officer actually leaves ds on the day on which he returns to them. It is not rec e or return of his camp equipage.

1054. (a) The Local Govern provisions regarding a halt at head-quarters, contained ct to the conditions and certificates therein specified (and to such other restrictions as may seem requisite, ntervening between the departure from, or arrival at, he r and of his camp equipage.

(b) In the case of officers in Sin. nt may similarly apply the provisions of Article 1059 intervening between the engagement of camp equ re from head-quarters on tour.

NOTE.—[See note under Article 1059.]

1055. No travelling allowance, oth onthly allowance, is admissible for any day on which h a distance exceeding five miles from head-quarters, a distance exceeding five miles But an officer trav e miles of head-quarters is entitled to draw the act n in payment of ferry and other tolls or railway fare

Exceptions—1 No travelling allowance, other owance, is admissible to a District or Assistant District Superint police station, otherwise than in the course of a tour, unless he t n one day. In this clause "Tour" means a journey which invol for two or more consecutive nights, and the visitation of two or

spectors
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as provided
with first class Subordinate Judges' Courts, and Veterinar of stationary dispensaries are exempted from the operation of this peons attached to Revenue Inspectors in the Madras Presidency.

NOTE.—[The term "general-duty Karkun" applies to any member on the establishment of a Mamlatdar or Mahalkari occasionally deputed to any part of a taluka for any special enquiry or purpose when the duty for any reason cannot be performed by a Circle Inspector.]

Halts during Tour.

1056. A daily allowance may not be drawn for more than ten days of a halt at one place. But general or individual exemptions from the operation of this rule may be sanctioned by the Local Government by a general rule or order, where they are satisfied—

(a) that prolonged halts are necessary in the interests of the public service, and

(b) that such halts necessitate the maintenance of camp equipage or, where no camp equipage is maintained, entail extra expense on the officer after the first ten days.

Similar exemptions, subject to the same conditions, may be granted in individual cases up to a limit of 30 days by Imperial Heads of Departments and Provincial Heads of Departments, Commissioners of Divisions, Settlement Commissioners, and Superintending Engineers to whom the Local Government may delegate authority for this purpose.

It is open to the authority sanctioning the exemption to lay down any limits or conditions, which it may think fit to impose; for instance, when an exemption is made under this Article, the full daily allowance admissible under rule may be reduced by such an amount, and may be granted for such number of days, as the sanctioning authority may deem proper in each case.

NOTE 1.—[A general-duty Karkun in Bombay draws daily allowance for the first 120 days of absence from head-quarters in each financial year, irrespective of the limitation imposed by this Article. For halts after the first 120 days, the limitation applies.]

NOTE 2.—[As regards officers in (a) the Geological Survey Department, (b) the Central Criminal Intelligence Department, and (c) the Meteorological Department, the Head of the Department exercises the powers of a Local Government under this Article.]

NOTE 3.—[The Resident at Baroda exercises the powers of a Local Government under this Article as regards officers serving under him on boundary settlement work.]

NOTE 4.—[The Chief Inspector of Mines may exempt the clerks of his office from the opera-

1057. (a) For the purpose of Article 1056 a halt is continuous unless terminated by an absence at a distance exceeding 5 miles for a period including not less than three nights.

(b) In calculating the ten days referred to in that Article any day on which the officer travels or halts outside the five miles radius is to be excluded. For such a journey or halt the officer may draw daily allowance or, if he is entitled to them, allowances under section 5, Chapter LIII.

(c) After the expiry of ten days an officer may draw travelling allowance under the ordinary rules for journeys from the halting place even though followed by a return to it.

NOTE.—[In Articles 1056 and 1057, the halting place for the purposes of Article 1055 should be considered to be the officer's temporary head-quarters.]

1058. A list of officers and establishments who have been exempted from the rule in Article 1056, conditionally or unconditionally, will be found in the Manuals of the local audit officers concerned.

Head-quarters.

1059. (a) A Local Government may, by general or special order, permit any officer or class of officers to draw, during a halt at head-quarters, the actual expense (not exceeding the daily allowance) of keeping up camp equipage (when it is necessary to do so) during a halt: provided such actual expense may not be drawn for a longer period than twenty-one days in Sind or Rajputana, and ten days in other places.

Explanation.—A halt is not interrupted for the purpose of this rule by an absence on duty from the place of halting for less than three nights.

1053. The period of absei ts begins on the day on which the officer actually leaves ds on the day on which he returns to them. It is not rec e or return of his camp equipage

1054. (*a*) The Local Govern provisions regarding a halt at head-quarters, contained ct to the conditions and certificates therein specified (and to such other *restrictions as may seem requisite*, ntervening between the departure from, or arrival at, he r and of his camp equipage.

(*b*) In the case of officers in Sin t may similarly apply the provisions of Article 1059 intervening between the engagement of camp equ re from head-quarters on tour.

NOTE—[See note under Article 1059.]

1055. No travelling allowance, oth onthly allowance, is admissible for any day on which h a distance exceeding five miles from head-quarters, a distance exceeding five miles. But an officer tra e miles of head-quarters is entitled to draw the act n in payment of ferry and other tolls or railway fare

Exceptions—1. No travelling allowance, other wance, is admissible to a District or Assistant District Superint police station, otherwise than in the course of a tour, unless he t n one day. In this clause "Tour" means a journey which invol for two or more consecutive nights, and the visitation of two or

2. In the Bombay Presidency, general-duty Ka spectors and their peons, Talatis deputed on duty outside their this in ordi- ctors as s provided of stationary peons attached

NOTE—[The term "general duty Karkun" applies to any member on the establishment of a Mamlatdar or Mahalkari occasionally deputed to any part of a taluka for any special enquiry or purpose when the duty for any reason cannot be performed by a Circle Inspector.]

Halts during Tour.

1056. A daily allowance may not be drawn for more than ten days of a halt at one place. But general or individual exemptions from the operation of this rule may be sanctioned by the Local Government by a general rule or order, where they are satisfied—

(*a*) that prolonged halts are necessary in the interests of the public service, and

(*b*) that such halts necessitate the maintenance of camp equipage or, where no camp equipage is maintained, entail extra expense on the officer after the first ten days.

(iii) An officer of the third class, two annas for every Rs. 12½, or fraction of Rs. 12½ of the pay or maximum pay of his appointment, subject to a minimum of six annas in the Bombay Presidency, or four annas elsewhere.

(iv) An officer of the fourth class, three annas if he travels over more than one province, and two annas if he travels over a single province.

Exceptions—(a) The officers mentioned in Appendix 25 are entitled to daily allowance as shown therein.

[illegible]

the Inspector General to Rs. 3

(bb) The camp clerk of the Inspector General of Irrigation draws a daily allowance of Rs 2 which may, in special cases, be increased by the Inspector General to Rs 3 The peons who accompany the latter on tour draw a daily allowance of four annas.

(c) The Vice-Consul at Jeddah and the Vice-Consul for Hodeida and Kamaran, when travelling in their Vice-Consular capacity on the public service in the Hedjaz, Red Sea, etc., are reimbursed their actual travelling expenses and receive in addition £1 per diem for subsistence.

[illegible]

(i) Clerks on salaries of less than Rs. 100—Full salary, provided the sum of salary and allowance does not exceed Rs. 150 a month.

(ii) Clerks on salaries of not less than Rs. 100, but less than Rs. 200—Half salary provided the sum of salary and allowance does not exceed Rs. 266⅔ a month.

(iii) Clerks on salaries of Rs. 200 and above—One-third salary to a maximum of Rs. 200 a month.

NOTE.—[The Sub-Assistant Surgeon and Compounders attached to the Viceroy's dispensary and the Postmaster and Postmen of the Viceroy's Camp Post Office, when accompanying His Excellency on tour, are treated for the purposes of this rule as clerks.]

(e) Permanent clerks and permanent and temporary shroffs and potdars deputed to accompany remittances to the places named below, are entitled to daily allowances at the following rates for the period of their absence on duty:—

	Clerks.	Potdars and Shroffs.
	Rs. A. P.	Rs. A. P.
(i) Bombay, Calcutta, Karachi and Rangoon .	1 4 0	1 0 0
(ii) Other places beyond their provinces . .	0 12 0	0 8 0

The Controller of Currency may however grant Rs. 1-8-0 to clerks, Rs. 1-4-0 to potdars or shroffs and annas 4 to peons when he is satisfied that the rates otherwise admissible are insufficient.

(f) Clerks and Sub-Postmasters of the camp post offices and Hospital Assistants accompanying the Lieutenant-Governor of the Punjab on tour are granted an allowance of one-third salary, subject to a maximum of Rs. 50 and a minimum of Rs. 20 a month from the date on which the camp leaves head-quarters to the date of its return. Inferior servants are entitled to [illegible] ying the Governor of Bengal and the [illegible] the Secretariat clerk attending upon the [illegible] ho accompanies the Governor of Bengal [illegible]

(g) Settlement and Assistant Settlement Officers in Bengal, Bihar and Orissa and Assam; Excise Deputy Collectors in Bihar and Orissa; Assistant Directors of Survey and officers of the Provincial Service of the Survey of India employed in Bengal, Bihar and Orissa and

Assam; and Deputy Collectors and Sub-Deputy Collectors employed on survey work in Bengal, Bihar and Orissa and Assam, are entitled to daily allowance at the following rates :—

(i) Officers on pay of Rs. 700 or upwards, Rs 7-8-0 a day.

(ii) Officers on pay of less than Rs 700 a month, 50 per cent. in excess of the rate of *their class, subject to a maximum of Rs. 5 a day. For journeys by boat in the* Chittagong and Dacca divisions, and the districts of Khulna, Jessore and the 24-Parganas, the officers may draw only such daily allowance as is shown in the Local Manuals of the Audit officers concerned (see Art. 1140).

(h) Cash sircars and potdars on the Eastern Bengal State Railway, when temporarily employed in the capacity of Assistant Pay Clerks, and travelling with cash on the line, draw travelling allowance at the same rate as Assistant Pay Clerks.

(i) The peons who accompany the Comptroller and Auditor General, the Educational Com- [illegible]

1064. With the following exceptions an officer of the Public Works Department holding an appointment in a Secretariat, or any other special appointment draws the daily allowance of his class in the Department :—

(1) The Secretary to the Government of India in the Public Works Department is entitled to a daily allowance of Rs. 10.

(2) Secretaries or Joint Secretaries to Government in the Public Works Department of Madras, Bombay, Bengal, the United Provinces, Punjab, Burma and Bihar and Orissa, when travelling with the Governor or Lieutenant-Governor, are entitled to a daily allowance of Rs. 10.

SECTION V.—MILEAGE IN LIEU OF DAILY ALLOWANCES.

When Daily Allowances are exchangeable.

1065. An officer may for any day draw in lieu of his daily allowance—

(i) if he travels by railway or steamer or both, the allowances admissible under Articles 1011 to 1015 or Articles 1016 to 1032, or both, as the case may be;

(ii) if he travels more than twenty miles by road, or if, being a non-gazetted ministerial or a menial officer, he travels by public *or hired conveyance under a certificate from the head of the* office that he was required to do so, the allowances admissible under Chapter LII ;

[illegible]

NOTE.—[On the question of the advisability of laying down a scale or limit of actual expenses within the general limits of the rates for each class, the Government of India passed the following orders —

"After a full consideration of all the reports received, the Governor General in Council has arrived at the conclusion that it is impossible to lay down any general subsidiary scale [illegible] fit to prescribe. Such restrictions or limits may, if considered advisable, amount to an absolute prohibition of the exchange of daily allowance for mileage in certain cases,....... or they may consist only in the prescribing of a subsidiary scale"]

(iii) if he travels partly by road and partly by rail or steamer, or both—

(1) in respect of the road journey, the allowance admissible under Articles 1033 to 1037, limited unless the conditions of clause (ii) of this Article are fulfilled, to the amount of the daily allowance ;

NOTE —[In determining the allowance admissible under clause (iii) (1) for a road journey other than a journey to and from an officer's head-quarters the distance actually travelled on duty shall be taken into account, without reference to the situation of any public office or other point fixed by a Local Government under Article 998, provided that the road and rail journeys are made on the same day and in continuation of each other]

(2) in respect of the journey by railway or steamer, the allowances admissible under Article 999, or Articles 1011 to 1015, or Articles 1016 to 1032, or both, as the case may be.

1066. In the case of officers whose salary does not exceed Rs. 200 a month the Local Government may, by general or special order, and subject to such conditions as it thinks fit to impose, permit any officer or class of officers to draw allowances admissible under Chapter LII for the whole period of any absence from head-quarters on condition that no daily allowance is drawn for such period, if it considers that their duty is such that the daily allowance is not sufficient to cover travelling expenses.

Officers attached to Railways.

1067. The following officers, whose duties require them to travel constantly by railway, are not entitled to allowances under Articles 1011 to 1015, except in cases of transfer from one line to another, but are granted daily allowances for any day on which they are absent from their station for more than eight consecutive hours, in addition to a free pass, or if they are not allowed a free pass, the fares for themselves and for the servants and baggage accompanying them which a free pass would cover :—

All officers and men of Railway Police.

All officers attached to Open Lines of State Railways except the Train [illegible] shments.

[illegible]

Government Telegraph Officers employed on the maintenance of telegraph lines along railways.

Medical subordinates attached to Open Lines of Guaranteed or State Railways.

Other officers to whom the concession may from time to time be extended.

1. Inspectors of maintenance on State Railways are not entitled to draw allowances under this Article, except when they are, under special circumstances, absent from head-quarters [illegible] head [illegible] this [illegible] struction) lines]

[illegible] this Article.

[illegible] a road or steamer journey [illegible] place distant five miles or [illegible] allowances under Articles [illegible]

[illegible] must be neglected by the officer in calculating the duration of absence from his station for the purpose of claiming daily allowance under this Article]

Postal (Mail) Officers.

1068. Superintendents and Assistant Superintendents, Railway Mail Service, Inspectors General, Railway Mail Service and Sorting, and Inspectors of Sorting are entitled, for journeys by railway within the limits of the railways to which they are attached, to free conveyance, and to their daily allowance for any day on which they are absent from head-quarters for not less than six consecutive hours. The same rule applies to journeys by postal conveyance performed by the Superintendent of Mails, Kalka-Simla line, within the limits of that line. Inspectors of Sorting are also entitled to draw a single fare of the lowest class for a servant, if actually paid.

Superintendents and Assistant Superintendents who are employed in the Foreign Mail Division, or who are not attached to any railways or lines, or who are on deputation beyond the limits of the railways and lines to which they are attached, are entitled to special daily allowances at Rs. 6 and Rs. 4, respectively, for a day of not less than six consecutive hours.

NOTE.—[In case of transfer, the officers mentioned in this Article are entitled to travelling allowance under Article 1013.]

1069. Superintendents and Assistant Superintendents, Railway Mail Service, Inspectors General, Railway Mail Service and Sorting, and Inspectors of Sorting may also draw daily allowance, if they are absent from head-quarters for a continuous period of six hours, forming part of one day and part of the next: Provided that if further daily allowance on account of any other journeys is earned under the preceding Article on both the days, it shall be drawn for only one of the two days.

Officers in the Survey of India Department.

1070. (*a*) The following special rules apply to officers in the Survey of India :—

(i) A Survey officer may, for a journey in the field, exchange his daily allowance for the allowance admissible under Chapter LII only when he is specially authorized by the Surveyor General or Administrative Superintendents, and when he has to travel by public or hired conveyance or is employed on special duty.

(ii) Whenever for a journey to or from the field or any other journey in which an officer has to travel with camp equipment, the actual travelling expenses of a Survey officer, including charge by public or hired conveyance, the cost of carriage to and from such conveyance, for himself, his servants and baggage, not exceeding the limit named in the table below, exceed the amount admissible under Chapter LII, he may for such journey, in lieu of the amount so admissible, draw such actual expenses on a bill prepared in sufficient detail and countersigned by the Surveyor General or Administrative Superintendents : —

—	When obliged to travel with camp equipment	Otherwise
Servants.	No	No
For an officer of the Imperial Service of not lower rank than an officer in charge of a party or for an Extra Deputy Superintendent	6	3
[illegible]	4	2
[illegible] Rs. 250	3	1
For any other officer (including probationers) of the Upper Subordinate Service	2	1
For an officer of the Lower Subordinate Service or for a Sub-*Assistant Surgeon*	1	1
[illegible]	Mds	Mds.
[illegible]	35	12
[illegible]	25	8
[illegible] carrying a pay of Rs. 250	15	5
For any other officer (including probationers) of the Upper Subordinate Service	10	3
For an officer of the Lower Subordinate Service (including writers) on Rs. 50 pay and over or for a Sub-Assistant Surgeon on Rs. 50 or over	8	2
For any other officer of the Lower Subordinate Service (including writers) or for a Sub-Assistant Surgeon drawing less than Rs. 50	5	2

NOTE.—[In applying this rule a journey must be treated as a whole. An officer cannot draw actual expenses under this rule for a part of a journey and ordinary rates for the remainder.]

(iii) When the actual expenses for a whole month for carriage in the field of camp equipment and baggage, limited as in the preceding clause, exceed half the daily allowance admissible for that month, a Survey officer may appropriate half his daily allowance to pay for camp equipment and extra servants, and in lieu of the other half of the daily allowance may recover such actual expenses by bills prepared and countersigned as in the preceding clause. When coolies are employed, camp equipment and baggage must be limited to half these weights.

Officers in the Madras Survey.

(*b*) The above rules apply also to officers in the Madras Survey (including those doing duty as Land Records Superintendent), with the two following modifications, namely, the Director of Survey and the Director of Land Records exercise the functions of the Surveyor General or Administrative Superintendents, and the following table is substituted for the table in clause (*a*) :—

—	When obliged to travel with camp equipment.	Otherwise.
Servants	No	No.
For an Assistant Director of the 1st, 2nd, 3rd or 4th class, and for an Assistant Director of the 5th class when in charge of a survey party	6	3
For an Assistant Director of the 5th class when not in charge of a survey party	4	2
For a Sub-Assistant	3	1
Camp Equipment and Baggage	Mds.	Mds
For an Assistant Director of the 1st, 2nd, 3rd or 4th class and for an Assistant Director of the 5th class when in charge of a survey party	35	12
For an Assistant Director of the 5th class when not in charge of a survey party	25	8
For a Sub-Assistant	15	5
For Head Surveyors, Deputy Surveyors, Writers—		
(*a*) whose salaries are not less than Rs 50 . . .	8	2
(*b*) whose salaries are less than Rs. 50	5	

1071. Clause (*a*) (ii) of Article 1070 applies to officers of the Geological Survey, the bill in their case being countersigned by the Director.

Other Special Cases.

1072. (*a*) An Inspector of Post Offices may not exchange his daily allowance for mileage on journeys by road. When travelling by rail or sea, or in a river steamer, he draws the single fare of his class and a single fare (when actually paid) of the lowest class for one servant in addition to his daily allowance. Daily allowance is, however, not admissible when the officer is granted table-money or avails himself of board provided on the steamer.

(b) An Income-tax Assessor in the interior of Bengal and in Bihar and Orissa and Assam is not entitled to exchange his daily allowance for mileage.

Inferior Servants.

1073. An inferior servant if entitled to daily allowance under Article 1038, may, for a journey by railway, draw his daily allowance in addition to railway fare. An inferior servant named in Appendix 20 may draw daily allowance in addition to the rail or steamer fare admissible under Article 1039 for an authorised journey beyond jurisdiction, but not for one within jurisdiction.

NOTE 1—[The daily allowance admissible under this Article is not to be drawn when [illegible]

[illegible] exceed 20 miles]

SECTION VI.—CONVEYANCE ALLOWANCES.

1074. When an officer has a large amount of travelling at or within a short distance from head-quarters, for which travelling allowance is inadmissible under this Chapter, a permanent conveyance or horse allowance is granted to him, which is drawn throughout the year.

1075. Conveyance allowances are granted to the officers named in Appendix 26.

Additions to this Appendix can be made only with the sanction of the Government of India.* A Local Government may however grant a special daily conveyance allowance to an Assistant or Sub-Assistant Surgeon for the periods during which, on account of epidemics, he has an unusual amount of travelling to do.

How affected when on Tour or on Leave.

1076. (a) Save as provided in Article 1077 (b), a permanent conveyance allowance is not forfeited during absence from head-quarters, and may be drawn in addition to any other travelling allowance admissible under rule.

(b) It is, however, inadmissible, except in the undermentioned cases, during joining time and leave.

[illegible] consider necessary to impose

Exception 3.—Inspectors and Sub-Inspectors of Excise in the Bombay Presidency and Inspectors of the combined Salt, Excise and Opium Department in Sind may draw conveyance allowance during joining time on condition that no extra expense is therby caused to the State.

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* The rule in this Article is to be read as superseded or revised by the Resolutions defining the powers of the Government of India and Local Governments in this matter No amendment has, however, been made in this reprint pending a general revision of the Code.

Public Works, Railway, Telegraph, Forest and other Departments.

1077. (*a*) A conveyance allowance not exceeding the amount shown in each case in the following table may be granted to a subordinate named in [illegible] first column by the authority specified in the third column if such sub- [illegible] at or near head-quarters.

[illegible] ever daily allowance or road mile- [illegible]

[illegible] applied to such [illegible] these

Subordinate to whom conveyance or horse allowance may be granted.	Amount of allowance.	[illegible] grant allowance.
Public Works Department.	Rs	
* Upper Subordinate	30	Manager and Engineer-in Chief, State Railways; Superintending Engineer of Irrigation, Buildings and Roads, or Military Works Branch.
[illegible] Inspectors on the North- [illegible] charges.	30	
[illegible] Punjab	15	
Segyi of Irrigation Circle, Burma (on condition that a horse is maintained)	15	
† Lower Subordinate	15	
Assistant Surgeon‡ or Civil Apothecary	15	
Sub-Assistant Surgeon	7½	
Ditto (in exceptional cases)	15	Local Government
Apprentice Overseer	15	Principal, Thomason College.
Cashier	15	Local Government.
Military Works Department.		
§ Storekeepers	7½	Director General of Military Works.
Telegraph Department.		
Upper Subordinates and Inspecting Telegraph Masters and Signallers other than those sent out on casual inspection duty.	30	Director-General of Telegraphs and in the case of the Indo-European Telegraph Department, the Director-in-Chief of that Department.
Sub-Inspectors at Hindubagh, Loralai, Fort Sandeman, Dera Ismail Khan and Edwardesabad.	Not exceeding Rs. 22-8	Director-General of Telegraphs.
Forest Department		
Sub-Assistant Surgeon	7½	Government of Bengal
Revenue Department		
Lower Subordinates on the establishment of the Executive Engineer, Tarai and Bhabar Government Estates, United Provinces.	15	Commissioner of Kumaun in the case of lower subordinates on the establishment of the Executive Engineer, not belonging to the Public Works Department, and Superintending Engineer in the case of lower subordinates transferred from the Public Works Department.

1078. (*a*) Managers of State Railways may grant a conveyance or horse allowance to subordinate employés on open lines of railway, in cases where the use of a trolly is, in their opinion, a source of danger or of inconvenience, whether with reference to the physical features of the line or to the passage of public trains.

(*b*) The allowance, which is not to exceed Rs. 30 a month for an officer who ranks with an Upper Subordinate, and Rs. 15 a month for an officer who ranks with a Lower Subordinate, should be given on the understanding that an employé who draws it is on no account to be allowed the use of a trolly on the length in question, and cannot draw ordinary travelling allowance while in receipt of this allowance.

1. Sub-Inspectors of maintenance of the Bolan Railway, who are prohibited from using trollies, may be given allowances not exceeding Rs. 30 a month under this Article.

1079. Subject to the restriction contained in the note under entry 26 in Appendix 25, a horse allowance of Rs 20 a month may be granted by the Local Government to any Income-tax Assessor employed in the mufassal of Bengal, or in Bihar and Orissa, or in Assam.

SECTION VII.—CONVEYANCE HIRE.

1080. *Cancelled.*

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† Lower Subordinates in the Bombay Public Works Department, or Military Works Services [illegible]

Rs. 22 8 a month

Lower Subordinates in the Lushai Hills and in Burma generally receive a horse allowance of Rs. 22-8 a month, for those in the Chin Hills and in Tibet the rate is Rs. 30 a month

Lower Subordinates of the Military Works Services serving in the Loralai District and at Dalbandin and Kacha in the Chagai District beyond Nushki draw a horse allowance of Rs. 22 8 a month

[illegible]

allowance of Rs 30 a month

The senior and the second Military Assistant Surgeon at Lahore (Nowlakha), the Military Assistant Surgeon in charge of the Carriage and Wagon Department employés at Moghalpura, and the Military Assistant Surgeon in charge of the Railway hospital at Shaharanpur North Western Railway, draw a horse allowance of Rs. 25 a month

§ The Storekeeper at Aden draws Rs. 17 8 a month.

1081. The Local Government may grant to any officer summoned temporarily on duty to a Presidency town or to Rangoon such conveyance allowance not exceeding Rs. 3 a day as it thinks fit, provided that an officer may not draw conveyance allowance under this rule if or while he is entitled to a daily travelling allowance.

1082. Conveyance hire is granted in the special cases shown in Appendix 27 at the rates and under the conditions therein indicated.

Chapter LIV.—Other Journeys.

SECTION I.—JOINING FIRST APPOINTMENT.

1083. Travelling allowance is not ordinarily granted to any person for the journey to join a first appointment in the public service, but in the case of non-gazetted subordinates, whether permanent or temporary, the Local Government may, either by a special order in each individual case, or by a general order in respect of any particular class of officers, allow travelling allowance, the rate admissible being that of the class (Article 1002) to which the appointment the officer proceeds to join belongs. The Local Government may delegate its powers of sanction in individual cases to any subordinate authority.

Exceptions.—In the following cases travelling allowances are admissible for joining a first appointment :—

[illegible]

Schools of Art and other Government schools who are appointed as draftsmen in the Survey of India Department,

Pensioner re-employed.

1084. The authority competent to sanction the re-appointment may grant travelling allowance to a pensioner or an officer thrown out of employment by reduction of establishment or abolition of appointment, for such part of the journey to take up a new office on re-appointment to the public service, as falls within India.

Journeys by Sea.

1085. The Local Government may grant a free passage for so much of a journey to join an appointment as is performed by sea to any person who is

appointed by it or by the Government of India to an office which he cannot join except by sea.

NOTE—[A Local Government may delegate its power under this Article to subordinate authorities in respect of officers appointed by them.]

1086. The Government of Bombay, the Director General of Military Works, and the Superintendent of Port Blair, may grant a free passage for the family of any person engaged in India, for service as a subordinate at Aden and Port Blair, respectively.

Officers appointed in Europe.

1087. The rules regarding (*a*) passage to India and outfit allowances (in case of appointment in Europe) and (*b*) return to Europe (on termination of appointment), of certain high officers, which have been framed by the Secretary of State, are given in Appendix 28.

NOTE —[The rule regarding a Chief Justice or Judge of any of the High Courts is included in Statutory Rule No. 40 in Article 543.]

1088. Officers appointed in Europe to the public service in India are ordinarily allowed by the Secretary of State a free passage to India.

1089. *Cancelled.*

1090. A Chaplain who, during his period of probation, is declared by a Medical Board to be permanently incapacitated for further service in India is entitled on retirement to a free passage to his country, provided that he has not before retirement taken leave on medical certificate. A probationer removed from the service for misconduct of any kind, or who [illegible] in cases not involving misconduct when satisfied that the circumstances justify this concession.

1091. An officer appointed to the Bengal Pilot Service is granted an Outfit Allowance of £20.

Journeys from Port.

1092. An officer who is appointed by the Secretary of State, while resident in Europe, and who is not one of the high officers referred to in Article 1087, is entitled to travelling allowance at the rates laid down in Chapter LII from the capital town of the Presidency to which he is attached, to the first station to which he is posted.

1093. (*a*) If such an officer disembarks in India at any port other than the capital town of the Presidency to which he is attached, he is entitled to travelling allowance from such port to the first station to which he is posted, limited to the amount to which he would have been entitled under the preceding Article if he had disembarked at such capital town.

(b) But if an officer is directed by the Secretary of State to proceed to a particular port, he is entitled to travelling allowance from that port.

NOTE.—[For the purposes of the preceding Articles, an officer attached to any Province other than Bombay or Madras, is held to be attached to the Bengal Presidency.]

SECTION II.—JOURNEYS ON TRANSFER.

1094. An officer is entitled to travelling allowance at the rates prescribed in Chapter LII for a journey on transfer from one station to another, if he is transferred for the public convenience, and not at his own request, or in consequence of misconduct, and if he is entitled to pay or salary during the time occupied in such journey. He is also entitled to the following concessions :—

(a) Free transport on transfer of personal effects by goods train, steamer or other craft up to a maximum of 40, 20 and 10 maunds, respectively, for the first, second and third class officers as defined in Article [illegible] or wherever tents ar [illegible] .ent but have to be p [illegible] nber of tents so carried being subject to a scale to be prescribed by the Local Government as suitable to officers of a particular class.

NOTE.—[In the case of [illegible] personal effects by boat a certificate [illegible]

(b) Free transport by train, steamer or other craft of one horse for a third or second class officer and two horses for a first class officer, including, whether separately charged for or not, the cost of conveyance of one syce and one grass-cutter for each horse, when—

(i) The distance travelled exceeds 80 miles ; and

(ii) The officer's duties involve touring or similar work necessitating his keeping his own horses.

(c) Free transport of a motor car, instead of two horses, for a first class officer, including whether separately charged for or not the cost of conveyance of a chauffeur or cleaner, subject to the following conditions :—

(i) That the distance travelled exceeds 80 miles ;

(ii) That the car is actually carried by rail, steamer or other craft ;

(iii) That the rates allowed for the transport of the car are those charged by railway or steamer companies for carrying cars at owner's risk ; and

(iv) That the officer holds an appointment in which the possession of a motor car is advantageous from the point of view of his efficiency.

Inferior servants should not be transferred save in exceptional cases in which there may be special reasons for a transfer.

Exceptions.—1. Police officers below the rank of Assistant Superintendent transferred from one station to another in the same district are not entitled to travelling allowance except for journeys by rail or steamer in which case they are also entitled according to their class to the further concessions described in clauses (*a*) and (*b*) above. For journeys by road they may be allowed the actual cost of conveyance of their necessary baggage. In Burma and Assam such officers when so transferred are, however, allowed their actual expenses for journeys by boat on production of a certificate from the District Superintendent that this is the ordinary mode of travelling for persons of their class, and that the amount charged is reasonable.

2. In the United Provinces, Tahsildars and Revenue and Judicial ministerial officers in superior service, transferred from one tahsil to another, or to or from the district head-quarters (sardar) station from or to a tahsil in the same district, are allowed actual expenses not exceeding the allowances admissible under Chapter LII

NOTE 1 —[Officers of the Forest Department whether belonging to the superior or to the subordinate staff, deputed to attend the annual course of instruction at the Forest School at Dehra Dun or the Burma Vernacular Forest School, members of the subordinate police force in the United Provinces selected for training at the Police Training School, and Hospital Apprentices and medical pupils, attending under orders a medical school or college, are considered to be transferred for the public convenience from one station to another, but may not be granted, except in the case of Burman students deputed to the Forest School at Pyinmana, travelling allowance for their families under Article 1098].

NOTE 2.—[Sub-Registers in Sind, who are remunerated entirely by fees, are entitled to travelling allowance when, on public grounds, they are transferred from one station to another]

NOTE 3 —[An officer eligible to draw travelling allowance under Article 1098 has the option of electing either that or this Article, whichever may happen to be to his advantage]

1095. The officers mentioned in Article 1067 draw allowances under that Article for journeys on transfers between stations within the limits of the line to which they are attached. They are not, however, entitled to daily allowance for halts made in the course of the journey, unless such halts are made in connection with their duty.

1096. The rules in Articles 1070 (*a*) (ii) and 1070 (*b*) for Survey officers apply also to journeys on transfer.

NOTE —[Survey officers may, at their option, exchange the allowances admissible under this Article for those admissible under Article 1094 or 1098]

Transfer of Subordinates.

1097. (*a*) An officer of the classes specified below is, in case of transfer, entitled to free passage or refund of passage-money for each member of his family actually travelling with him, at the rates admissible for himself or at half those rates, according as, by the rules of the vessel, full or half passage-money is payable for such member :—

(i) Departmental Officers and Warrant Officers ;

(ii) Non-Commissioned Military Officers ;

(iii) European Soldiers ; and

(iv) Officers of the second or third class whose pay is less than Rs. 200.

(*b*) If, however, any member of the family of such an officer is prevented by good and sufficient cause from travelling with him, the officer who
...r such member :
...f the date of his

1098. A non-gazetted officer, whose salary after transfer does not exceed Rs. 400 a month, is, if the transfer is to a station more than 200 miles distant by the ordinary route, entitled to travelling allowances as follows :—

(*A*) For a journey by steamer or railway :—

(*i*) The amount actually paid in fares for the officer himself, his family and servants, subject to the following limits :—

(*a*) For himself and family—four full fares of the class of accommodation to which he is ordinarily entitled.

(*b*) For servants—three full fares of the lowest class.

(*ii*) For the carriage of personal effects by railway, allowances on the following scale :—

Salary of officer.	Allowance.
Rupees 100 or less	1½ times a third class fare.
More than Rs. 100	One second class fare.

(*iii*) The actual cost of carriage of personal effects by cargo steamer within the limits of the following scale :—

Salary of officer.	Weight of luggage.
Rupees 100 or less	5 Maunds.
More than Rs 100 but not more than Rs. 200	8 „
More than Rs 200	12 „

(*iv*) When the officer's duties involve touring or similar work necessitating his keeping his own horse, the free transport of one horse.

(*B*) For a journey by road, four times the rate of mileage to which he is ordinarily entitled, no separate charge being allowed for the cost of carriage of personal effects.

(*C*) If any member of the officer's family does not travel with him, his or her journey may be charged for within these limits ; provided that he or she follows the officer within six months of the date of his transfer or precedes him by a period not exceeding one month.

NOTE 1.—[In the case of transfer from one place to another which involves travelling in the hills, the Local Government may, at its discretion, relax the limit of 200 miles imposed by this Article]

NOTE 2.—[The head of the office to which the subordinate is transferred should satisfy himself that the persons for whom travelling allowance is claimed under clause (*a*) (*i*) are members of the subordinate's family within the meaning of that term as defined in Article 25.]

1. Civil Sub-Engineers of the Public Works Department, though admitted to gazetted rank, are entitled to draw travelling allowance under the provisions of this Article.

2. This Article does not apply to officers in inferior service who are entitled to travelling allowances for such journeys under ordinary rules.

1098A. Jail warders and head warders who are not in superior service when transferred from one jail to another, inferior servants permanently employed in the survey and settlement parties in the Madras Presidency when transferred from one district to another, Peons (Rs. 10-12) of the combined

Excise and Salt Department, Bengal, Patwaris in the Central Provinces when transferred on promotion to or reversion from the post of Revenue Inspectors from one district to another, and police constables when transferred from one district to another, are entitled to travelling allowance as follows, if they travel with their families :—

(1) By railway or steamer	Double fare of the lowest class
(2) By road or boat	Two annas a mile by road and one anna a mile by boat.

Transfer not on Public Grounds, and for Misconduct.

1099. (*a*) When an officer is transferred otherwise than for the public convenience, a copy of the order of transfer shall be sent to the Audit Officer of the circle of audit in which he is serving, with an endorsement stating the reason of the transfer. In the absence of such an endorsement the Audit Officer shall assume that the officer has been transferred for the public convenience.

(*b*) In the case of non-gazetted officers a certificate from the head of the office may be accepted in lieu of the copy of the order prescribed by clause (*a*).

1100. The authority competent to order the transfer may, if it thinks fit, by special order, permit an officer transferred for misconduct to draw travelling allowance.

Transfers from the Army.

1101. A military officer joining an appointment in the Civil Department may draw travelling allowance subject to the conditions laid down in this Section.

1102. A Non-Commissioned officer of the Native Army, who elects at request for service in the Forest Department, under the rules in force in that department, is entitled to travelling allowance to join his appointment for the journey from his station to the head-quarters of the Forest division to which he is posted, even though the conditions laid down in this Section are not fulfilled.

Appointment changed in Transit.

1103. An officer whose appointment is changed while he is in transit from one appointment to another, is entitled to travelling allowance from his old station to the place (on the route to the station to which he was proceeding) at which he receives his further orders, and thence to his new station.

When leave intervenes.

1104. An officer is entitled to travelling allowance under this Section if, after giving over charge of his office, he takes privilege or examination leave before joining his new office.

1105. An officer transferred during privilege or examination leave is entitled to travelling allowance from his old station, or from the place where he receives the order of transfer, whichever is less.

NOTE.—[An officer who receives the order of transfer at the new station to which he is transferred is entitled to any of the concessions embodied in clauses (a), (b) and (c) of Article

1094 on production of a certificate that the expense of removing his personal effects from his old station was incurred subsequent to the intimation of transfer]

[illegible]

station.

1107—1109. *Cancelled.*

SECTION III.—JOURNEYS TO HILL STATIONS.

1110 Special rules—not incorporated in these Regulations—are prescribed for officers and establishments moving with the head-quarters of a Government to and from a hill sanitarium.

1111. *Cancelled.*

1112. When an officer is permitted for his own convenience to conduct his duties at a hill station, neither he, nor any of the establishment which accompanies him, is entitled to travelling allowance for the journey to or from such station.

1113. *Cancelled*

Other officers.

1114 Officers other than those mentioned in the Hill Allowance Rules (*see Article 1110*), who require to go to a hill station on duty, are, under the ordinary rules, entitled to travelling allowance for the journey there and back and to daily allowances for the period of halt there on duty. But Local Governments and heads of departments have power to refuse, and should refuse, travelling allowance to an officer who visits a hill station on duty if he prolongs his visit beyond the period required for the performance of the duty.

[illegible] this Article.]

1115. An Audit Officer should retrench the travelling allowance, for a journey to and from a hill station, of an officer who remains at the hill station for more than ten days, unless the head of the department or, where the officer is himself the head of a department, the Local Government officially intimates that the presence of the officer was required on duty throughout the period, or that he was permitted to extend his stay during authorised holidays immediately following his period of duty, the duration of which should be stated

SECTION IV.—JOURNEYS TO ATTEND EXAMINATIONS.

1116. An officer is entitled to travelling allowance twice, but not more than twice, for each standard, for journeys to and fro, consequent on attendance at—

(1) an obligatory departmental examination,

(2) in the case of Military officers in civil employ, an examination for promotion in military rank,

(3) an examination held under any rules in force for a reward for passing in the vernacular language of any frontier or hill tribe,

(4) in the case of officers in Burma, an elementary examination in Chinese, or

(5) in the case of Civil Assistant Surgeons or Sub-Assistant Surgeons, an examination for promotion to a higher grade

NOTE.—[The Local Government may extend the provisions of this Article to any departmental examination, even though it be not obligatory.]

1117. If a candidate appears to have culpably neglected the duty of preparing himself for an obligatory departmental examination during the period available for the purpose, the Head of a Department may disallow the travelling allowance to which he would otherwise have been entitled under Article 1116.

1118. The Local Government may disallow travelling allowance to a candidate who fails to obtain a reward for passing in the language of a frontier or hill tribe, if such candidate does not attain to such reasonable standard as the Local Government prescribes.

1119. A civil officer or a military officer in civil employ who obtains a reward for proficiency in an Oriental language, or who for the first time obtains a Degree of Honour in any language in the Second Division, is entitled to travelling allowance to and from the place of examination

1120. *Cancelled.*

SECTION V.—JOURNEYS OCCASIONED BY LEAVE OR RETIREMENT.

1121. Save as provided in this Section, or by special order of the Government of India, an officer is not entitled to travelling allowance for a journey on proceeding on, rejoining from, or during leave of any kind ; or on retirement or dismissal from the public service.

1121A. (i) Except as provided for in clauses (ii) and (iii), the grant of a free passage to or from England, in cases not provided for under the ordinary rules, requires the sanction of the Secretary of State.

(ii) The Government of India may grant passages, including, if necessary, travelling expenses by rail to the port of embarkation, in urgent cases where in their opinion it is very desirable that an officer, or the dependents of an officer, should leave India, and where the pecuniary circumstances of the individuals concerned are such that they are unable to leave without such assistance.

(iii) The Government of India may also sanction where they think the circumstances specially warrant it, a return passage for any officer entitled to a return passage on the termination of his agreement, whose services are retained in the public interest beyond the original period of his engagement ; the Government of India may also sanction an extension of an original concession in regard to free passages home for an officer's family.

Leave on Medical Certificate.

1122. A Military officer in civil employ is entitled to the same privilege when [illegible] combined with [illegible] employ; but t[illegible]oy, when proceeding on or returning from leave to use the certificate in (Military) Form E, giving the right to travel in the next higher class of carriage to that for which he purchases a ticket. This can only be used by officers in military employ

1123. A Military Sub-Assistant Surgeon employed in the civil department is entitled, when proceeding on *sick leave, leave on private affairs, furlough, or combined leave, for not less than six months,* to the same advantages in respect to travelling allowance as if [illegible] this Article does not entitle a Military S[illegible] when proceeding on or returning from [illegible] Form E referred to in Article 1122.

1124. The provisions of the Military Transport Regulations applicable to Departmental Officers and Warrant Officers proceeding on or returning from leave on medical certificate, not combined with privilege leave apply also to such officers in civil employ.

1125. A Civil Sub-Assistant Surgeon from another province serving in Burma is entitled to a free passage for himself and his family to his home, when proceeding on leave on medical certificate.

1126. Non-Commissioned officers and men of the Military Police companies at Dacca, Bhagalpur, Ranchi, and Hooghly, taking furlough, leave on private affairs or leave on medical certificate, are entitled to free passage by river and rail to and from their homes.

Recall from leave.

1127. An officer recalled to duty before the expiry of leave, is entitled, if the return to duty is compulsory (*see Article 199*) and if the leave is curtailed by one month or more, to travelling allowance for the journey from the place at which the order of recall reaches him, or, if such place be out of India, to free passage to India, and travelling allowance from the port of debarkation, to the station to which he is recalled. If the amount of the leave curtailed is less than one month, the foregoing privileges may be given or withheld at the discretion of the authority recalling the officer, or of the Secretary of State, according as the leave is in or out of India.

1. The officer in charge of a Survey Party may grant at his discretion travelling allowance to Native Surveyors and Subordinates who are recalled to duty from departmental leave before the expiry of that leave

2. An officer, who on recall from leave is ordered to proceed to a station other than th[illegible] station.

Survey Subordinates.

1128. The Surveyor-General may grant such rail and steamer fares as he considers necessary, to and from the place of recruitment, to khalasis and other menials when proceeding on or returning from leave of any kind, including departmental leave, or on enlistment or discharge. He may also grant such travelling expenses as he considers necessary to Surveyors and other subordinates when proceeding on or rejoining from leave to their homes if the latter are situated in provinces other than those in which they are employed.

NOTE.—[Similar authority in regard to their respective subordinates may be exercised by (i) the Director of Land Records, Bengal, in [illegible]
Director of Land Records and Agriculture, Ass[illegible]
Assam in Assam and the three Eastern Districts [illegible]
Survey party, Central Provinces, by the Commis[illegible]
of Surveys may grant to menials, and also to [illegible]
In provinces other than Bengal, travelling expenses to and from the place of recruitment, when returning on the expiry of departmental leave, or on enlistment or discharge.]

Retirement.

1129. The Superintendent of Port Blair and the Nicobars may grant to any subordinate employed there a free passage to India for himself and his family, on dismissal or retirement. He may also grant a free passage to India to the family of any subordinate who may die while employed there.

1130. The Government of Bombay may grant to any subordinate employed at Aden a free passage to India for himself and his family, on dismissal or retirement.

1131. Members of the Police Force in the United Provinces whose homes lie west of the Sutlej, may, on discharge or retirement from the service if their pay was less than Rs. 20, be provided with a railway ticket to enable them to reach their homes, and may also be allowed subsistence allowance of two annas a day for a period not exceeding ten days: Provided that no policeman shall be entitled to these allowances if he has been discharged for disgraceful conduct or by sentence of a Criminal Court for an offence other than a breach of discipline.

1131A. Honorary Commissioned officers and Warrant officers in civil employ enjoy the same rights as similar officers in Military employ in regard to free passage on retirement after service entitling them to a pension or gratuity, *vide* paragraph 61 (*d*) and (*e*), Army Regulations, India, Volume X

Termination of Temporary Employment.

1132. A person employed for a temporary purpose, who has received travelling allowance for joining his appointment, may, on the termination of his employment, be allowed travelling allowance to the place at which he was engaged, provided the claim is preferred within three months of the termination of the temporary service, and the officer under whom the person was employed is satisfied that he intends to make the journey.

allowance should be allowed for jurneys to and from the training headquarters either on joining or leaving such headquarters at the beginning or termination of the period of training, or in cases where the training is received at a school, college or other similar institution, on the occasion of holidays and vacations: Also what travelling and halting allowances should be allowed for journeys during the course of training.

NOTE 1.—[The Local Government may delegate its powers under this Article to Heads of Departments.]

[illegible]

To attend Durbars.

[illegible] in the underment [illegible] Government, to a [illegible] the Military Police [illegible] when invited *to attend a Durbar or a Levée at a place other than that at which he is* stationed or has his residence :—

(*a*) For journeys from his station or place of residence to the station at which the Durbar or the Levée is held, and back—single railway and steamer fares actually incurred each way, and actual expenses of road journeys limited to the maximum amount admissible therefor to an officer of the first class.

(*b*) For halts at the station at which the Durbar or the Levée is held —Rs. 2 a day.

(2) A civil officer in active service who is permitted to attend a Durbar or a Levée away from his headquarters, is entitled to draw travelling and halting allowances as on a journey on tour.

Chapter LV.—Special Rates for Special Localities.

1139. A Local Government may prescribe that the ordinary rates of daily allowance, or mileage, or both, shall be increased either in a definite ratio or in any other suitable manner for any or all persons travelling in any specified district or locality in which travelling is specially expensive, provided that—

(i) No daily allowance shall be increased so as to exceed Rs. 10.

(ii) No mileage shall be increased so as to exceed one rupee.

(iii) The allowances admissible under Articles 1011 to 1015 and under Articles 1067 to 1069 and 1072 (*a*) for journeys by railway shall not be increased.

(iv) The Local Government may, if it thinks fit, except any officer or class of officers from a general rate of increase, and direct that either the ordinary rates, or a lower rate of increase, be granted to such officer or class of officers.

NOTE.—[Local Governments exercising territorial jurisdiction may prescribe special rates under this Article for journeys in special localities within their jurisdiction. Officers subor-

1140. In certain localities special rates of daily or mileage allowances or both, have been prescribed either generally or for particular classes of officers A list of these special rates in the various provinces is given in the Local Manual of the Audit Officer concerned.

Chapter LVI.—Special Rules for High Officers.

NOTE.—[The rules in this Chapter relate to journeys on duty. Rules on the subject of journeys by railway otherwise than on duty are contained in Appendix 30.]

Viceroy, Governors, and Lieutenant-Governors.

1141. The Viceroy and Governor-General controls his own travelling expenses and those of his household, including the members of his personal Staff, with the exception of his Private and Military Secretaries.

1142. Governors, Lieutenant-Governors and the Chief Commissioners, Central Provinces and Assam, control their own travelling expenses and those of their household, with the exception of the officers of their personal Staff. The Military Secretary and Aides-de-Camp to the Governor of Bombay receive their actual travelling expenses while on tour with His Excellency the Governor

1143. The travelling expenses of the Governors of Madras and Bombay and of their households, are paid out of the contract allowance for household charges

1144. A Local Government (other than the Governments of Madras and Bombay) should report to the Government of India, in the Finance Department, any representations made with regard to its travelling expenses by the Accountant-General and any measures taken in consequence of such representations.

Indian Members of the Council of India.

1144A. A gentleman who is habitually resident in India at the time of receiving notice of his intended appointment to the Council of India, shall receive £500 as allowance for equipment and £100 for the voyage to England to be paid on appointment, and £100 to be paid on termination of office for the return voyage to India

Members of Viceroy's Council.

1145. An Ordinary Member of the Viceroy's Council, when travelling on duty by railway, is entitled to a reserved first class carriage for himself, and to third class accommodation for not more than ten personal servants.

When travelling on duty by road or steamer he is entitled to charge to Government his personal *bonâ fide* travelling expenses, appending to his bill a certificate as follows :—

"I certify that I have actually paid the amount of this bill, and that it does not include any charge for the freight of any stores or goods, other than my personal luggage, or any charge for refreshments, hotels or staging bungalows."

NOTE 1.—[Stores taken for consumption on tour are treated as personal luggage.]

NOTE 2.—[Further rules are contained in Note 2 to Article 1000 and Appendix 30.]

1146. *Cancelled.*

Members of a Governor's Executive Council.

1147. Members of the Executive Councils of Governors and Lieutenant-Governors, when travelling by railway, are entitled to a reserved first class carriage, to railway fares actually paid for not more than ten personal servants at lowest class rates, and to the conveyance of all their personal luggage at the public expense, whether taken in the luggage van of the train to which the reserved carriage is attached or sent by any other train.

When travelling by road or steamer they are entitled to charge to Government their personal *bonâ fide* travelling expenses, appending to their bills a certificate as follows :—

"I certify that I have actually paid the amount of this bill, and that it does not include any charge for the freight of any stores or goods, other than my personal luggage, or any charge for refreshments, hotels, or staging bungalows."

NOTE 1.—[Stores taken for consumption on tour are treated as personal luggage.]

NOTE 2.—[Further rules are contained in Note 2 to Article 1000.]

Members of the Imperial and Provincial Legislative Councils.

1148. Additional Members of the Imperial Legislative Council and all Additional Members or Members of the Provincial Legislative Councils, who are required to leave their official head-quarters or usual places of residence for the purpose of attending meetings of any such Councils or transacting business connected with their duties as Members of any such Councils, are entitled to travelling allowances in accordance with the following scale :—

(1) The travelling allowances admissible to an officer of the first class to and from the place at which the Council meets, or the business is to be transacted, and

(2) a daily allowance for each day of residence at the place where the Council is to meet or the business is to be transacted until the close of the session or the completion of the business, at the rate—

(a) in the case of Additional Members of the Imperial Legislative Council, of Rs. 20 a day, and

(b) in the case of Additional Members or Members of the Provincial Legislative Councils, of Rs. 10 a day.

Provided that—

(i) an Additional Member of the Imperial Legislative Council travelling to and from the place at which the Council meets, or the business is to be transacted, by railway in a first class compartment or by steamer in a cabin reserved by him for his personal use will, for such part of the journey as may be so made, be entitled, in lieu of the allowances admissible under clause (1), to a refund of the cost of reserving such a compartment or cabin,

(ii) any person who is at the same time a Member of the Imperial and of a Provincial Council, and who leaves the place of meeting of the Imperial Council, to attend the Provincial Council, will be entitled to travelling allowances, as in clause (1) and proviso (i), for journeys between the places of meeting of the Imperial and Provincial Councils, and if the place of meeting of the Provincial Council is not the official head-quarters or usual place of residence of the Member, to a daily allowance at Rs 20 a day during the period of such attendance,

(iii) an Official Member, who is in receipt of a fixed monthly travelling allowance, will not be entitled to any allowances under this Article unless he leaves the limits of his jurisdiction to attend the Council or to transact business connected with his duties as a *Member of the Council*, in which cases he will be entitled to the same travelling and daily allowances as other Members, subject, however, to the condition that such sum as may represent the amount of his fixed monthly allowance calculated at a proportionate daily rate, shall be deducted from his travelling and daily allowances.

Bishops of Calcutta, Madras and Bombay.

1149. The Bishops of Calcutta, Madras and Bombay, when on tours of visitation, draw a monthly allowance of Rs. 1,000 (which is intended to cover all their expenses and those of their clerks and messengers for journeys by land) for the whole period of visitation, in addition to the actual expenses of journeys by sea: Provided that the monthly allowance may not be drawn by any individual Bishop for more than eighteen months in every three years

of his term of office. The allowance which is admissible only when the Bishop is actually engaged in episcopal visitation or is travelling with that object in view, may not be drawn for any period spent in the visitation of a Sanitarium without the express approval of the Local Government.

1150—1157.—*Cancelled* (*see Appendix 30*).

Fares payable by Officers travelling in a reserved carriage.

1158. The officers mentioned in Articles 1145, 1147, and in Parts II and III of Appendix 30 should pay the usual fares for any person besides themselves travelling in the reserved accommodation provided for them. It is open to the officers to obtain the accommodation they are entitled to by requisition or by purchase of the necessary number of tickets for cash according to their convenience.

Note.—[When the reserved accommodation is obtained by the purchase of a prescribed [illegible] —hall [illegible] travelled with me [illegible] by requisition in the form prescribed in [illegible] or persons travelling with him and get the [illegible] certificate to the effect that fares for such [illegible]

Chapter LVII.—Rules of Procedure.

Countersignature.

1159. A bill for travelling allowance (other than a permanent allowance) of an officer, other than the head of a department, on tour should not be paid unless countersigned by the Controlling officer. The Local Government may declare who shall be the Controlling officer for all or any of the officers of any particular department.

1160. In the following cases bills for travelling allowance may be paid without countersignature :—

(a) Chaplains—provided the bill is accompanied by the order, authorising the Chaplain to make the journey, of (a) the Bishop or Commissary of the Diocese in the case of a Chaplain of the Church of England, and (b) the Presidency Senior Chaplain of the Church of Scotland in the case of a Chaplain of the Church of Scotland.

(b) Deputy Auditors General, the Examiner of Government Press Accounts and the Auditor of Customs House Accounts in India—provided that duplicate bills are at the same time forwarded to the Comptroller and Auditor General for countersignature and transmission to the Comptroller, India Treasuries.

(c) Non-gazetted officers—provided that detailed countersigned bills are subsequently submitted to the Audit Officer for adjustment.

Duties of Controlling and Audit Officers and of Officers who draw travelling Allowance Bills.

1161. (A). It is the duty of the Controlling officer, (or of the Drawing officer when a bill does not require countersignature) to scrutinise the necessity, frequency, and duration of journeys or halts for which travelling allowance (whether permanent or other) is claimed. He may disallow the whole or a portion of the travelling allowance claimable for any journey or halt, if he considers that the journey was unnecessary, or that it was not completed with due expedition, or that the halt was of excessive duration. He should also carefully [illegible] should check [illegible] mileage under [illegible] entered in travelling allowance bills whether countersigned or not are correct.

(b) The Local Government may lay down any subsidiary rules that it thinks fit, for the guidance of a Controlling officer of any department.

1162. A Controlling officer (other than the Head of a Local Government or Administration, including the Commissioner in Sind) may not delegate the duty of countersignature to a subordinate.

1163. Countersignature does not dispense with the necessity for formal audit with reference to rates and general conditions. An Audit Officer will [illegible] that the claim is admissible with reference to Article 1161(a) and to any departmental rules. It is the duty of the Controlling, or the Drawing officer as the case may be, and not of the Audit Officer, to enforce departmental rules.

REFERENCE TABLES.

Note.—Except in the case of the [illegible] mentioned in the first two statements below, the [illegible] same as in the 5th Edition. The Reference [illegible] where the rules in that and the 4th Edition [illegible]

ABBREVIATIONS USED IN THESE TABLES.

N., *Not in the 5th Edition.* Ex., *Exception.* r., *rule or rules.* n., *note or notes.* O., *omitted.*

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations.

Reference to		Reference to		Reference to		Reference to		Reference to	
5th Edn 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn	5th Edn 2nd Re-print.	5th Edn.
1 (c)	1 n.	72 (b)	N	85 n. 2	85 n. 1	161 n	N	198 n. 2	N.
16 n. 4	N.	72 (c)	72 (d)	85 n. 3	85 n. 2	167 n	N.	199 n. 1	199 n.
20A (c)	N	72 (d)	72 (b)	85 n 4	85 n 3	172 A	N	199 n 2	N.
39 r. 3	N	72 (e)	72 (b) n	86 r 2	N.	172 B	N	203 A n. 102	N.
39 r. 4	39 r 3	72 n. 1	N	89 n	N.	173 n	N	224 n.	N
44 A	N	72 n 2	72(d) n	104 (4) r 1 & 2	N	174 n	N	237 (c) n	N
49 n. 1	N	73 n	N	124 (c)	124 (c)	177 n 1	N	260 r 2	N.
49 n 2	49 n	74 (c) n. 1	74 (c) n.	142	142 (a) & (b)	177 n. 2	177 n. 1	263 Ex	N
53 r 2	N	74 (c) n 2	N	144 n 1	N	177 n 3	177 n. 2	264 n 1	264 n.
53 r 3	53 r 2	76 A & 77	77	144 n. 2	144 n 1	178 n	N	264 n. 2	N
55 n.	N	76 B	78 A	144 n. 3	144 n. 2	180 n.	N.	267 r. 2 n.	N.
57 n.	N.	83 n 1	N	160 A n. 1 & 2	N	183 r 1	N.		
68 n. 1 & 2	N					193 n. 1	195 n.		

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations—contd.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn 2nd Reprint	*5th* Edn	5th Edn 2nd Reprint.	*5th* Edn.	5th Edn 2nd Reprint.	*5th* Edn	5th Edn. 2nd Reprint	*5th* Edn.	5th Edn. 2nd Reprint.	*5th* Edn
278 n 1	278 n	423 (2)	423 (2) (*a*) & (*b*)	583 (*a*) n.	N.	642 (*b*) n 4 & 5	N.	697	698
278 n 2	N	446 n	N.	599 n. 1	599 n	642 (*b*) n 6	642 (*b*) n 3	698	699
280 (*a*), (*b*), (*c*) & n	280 (*a*), (*b*) & n.	467 n	N	599 n. 2	N	643 n 1 & 2	N	699	697
280 (*d*), (*e*) & n.	280 (*c*), (*d*) & n.	468 A	N	600 (*a*)	600	650 n 1	650 n.	700	696
288 n. 3	N.	475 n. 1	475 n.	600 (*b*) & n.	N	650 n. 2	N.	749 A and 749 B	1 and 2 in preamble to new Foreign Service rules.
295 (ii)	295(iii)	475 n. 2 & 3	N.	635 r. 1	N.	661 n.	N.	756 n.	N.
295 r. 3	N.	514 (*a*) n 1 to 5	N.	635 n. 1	N	663 n.	N.	764 (iv) (*a*) n.	N.
308 n	N	524 A	N.	635 n. 2	635 n.	664 (*e*) n.	N.	783	785
338 n.	N.	542 C	N.	642 (*a*) (i)	N.	666 n.	N	783 n. 1	N.
353 n.	N.	543 r. 33 A	N.	642 (*a*) (ii)	642 (*a*) (i)	671 n. 1	671 n.	783 n. 2	785 n. 1
353 A	N.	543 r. 33 B	543 r. 33 A	642 (*a*) (iii)	642 (*a*) (ii)	671 n. 2	N.	783 n. 3	785 n. 2
356 Ex. 5 & 6	N.	564 B	N.	642 (*a*) (iv)	642 (*a*) (iii)	693	N.	783 n. 4	N.
368 n.	N.	566 n. to Section 4 (*c*) of Leave Regulations.	N.	642 (*b*) n. 2	N.	693 A	693 (*a*) & (*b*)	811 n.	N.
411 n. 1 & 2	N.			642 (*b*) n. 3	642 (*b*) n. 2	695	700		
422 & n.	422 (i) (ii) & n.					696	695		

Table I.—Showing the variations in the rules of the 5th Edition (2nd Reprint) as compared with the 5th Edition of the Civil Service Regulations—concld.

Reference to		Reference to		Reference to		Reference to		Reference to	
5th Edn. 2nd Re-print.	5th Edn.	5th Edn 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print	5th Edn.	5th Edn 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.
814 n	N.	999 (2)	999 (ii)	1011 n. 1	1011 n.	1094 (a), (a) n, (b), (c) & n 3	N	1105 n	N.
863 n	863 n 2	999 (3)	999 (2)	1011 n 2	N.	1096 n	N.	1116 (5)	N.
914 A	N.	999 A	999 (1)	1014 Ex. (e)	N.	1098 (A) (i) (a) (b)	1098 (a) (i) & (ii)	112 A (i)	1121 A
918 n 1 & 2	N	999 A (a), (b), (c) & (d)	999 (1) (h), (a), (f) & (g)	1059 n. 1	N.	1098 (A) (ii)	N	1121 A (ii) & (iii)	N.
941 (a)	941	999 A (e)	N	1059 n. 2	1059 n.	1098 (A) (iii)	1098 (a) (ii)	1131 A	N
941 (b)	N	1000 n 1	1000 n	1063 Ex. (i) & (j)	N.	1098 (A) (iv)	N.	1133 n. 1 & 2	N.
949 (b)	N.	1000 n 2	N.	1065 r 1 n 2	N	1098 (B) & (C)	1098 (b) & (c)	1133 n. 3 & 4	1133 n. 2 & 3
949 (c)	949 (b)	1002 n. 1	N.	1073 n. 1	N.	1098 n. 1 & 2 & r. 2	N.	1137 A	N.
957 n	957 n.	1002 n. 2	1002 n. 1	1073 n. 2	1073 n.			1137 B	1137 A
990	990 & 991	1002 n. 3	1002 n. 2	1076 Ex. 3	N.			1135 A n. 1, 2 & 3	N
999 (1)	999	1002 n. 4	N.	1085 n.	N.			1135 B	N.
999 (1) (a)	999 (i)								
999 (1) (b)	N.								
999 (1) n.	999 (1) (j)								

Table II.—Showing the variations in the rules of the 5th Edition as compared with the 5th Edition (2nd Reprint) of the Civil Service Regulations.

REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO		REFERENCE TO	
5th Edn	5th Edn 2nd Re-print	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn 2nd Re-print
1 n	1 (c)	79 & 80	O.	280 (a) (b) & n.	280 (a), (b), (c) & n	642 (a) (i)	642 (a) (ii)	698	697
39 r 3	39 r 4	85 n 1	85 n 2	280 (c), (d) & n	280 (d), (e) & n	642 (a) (ii)	642 (a) (iii)	699	[illegible]
49 n	49 n. 2	85 n 2	85 n. 3	295 (iii)	295 (ii)	642 (a) (iii)	642 (a) (iv)	700	695
53 r 2	53 r. 3	85 n. 3	85 n. 4	422 (i) (ii) & n	422 & n.	642 (b) n 2	642 (b) n. 3	1 & 2 in preamble to new Foreign Service rules	749 A & 749 B
70	O.	124 (c) & (d)	O.	423 (2) (a) & (b)	423 (2)	[illegible]	[illegible]	785	783
72 (b)	72 (d)	124 (e)	124 (c)	423 A	O.	642 (b) n 3	642 (b) n 6	785 n 1	783 n 2
72 (b) n.	72 (e)	127 to 132	O	475 n	475 n 1	645	O	785 n. 2	783 n 3
72 (c)	O.	141 Ex	O	478 to 480	O	650 n	650 n. 1	863 n 2	863 n
72 (d)	72 (c)	142 (a) & (b)	142	543 r	543 r	671 n	671 n 1	941	941 (a)
72 (d) n	72 n. 2	144 n. 1	144 n 2	33 A	33 B	693 (a) & (b)	693 A	949 (b)	949 (c)
74 (c) n	74 (c) n 1	144 n 2	144 n 3	592 n.	O.	693 (c)	O.	957 n. 1	957 n
75 & 76	O.	193 n	193 n. 1	599 n	599 n 1	695	696	990 & 991	990
77	76 A & 77	199 n.	199 n. 1	600	600 (a)	696	700		
77 A & 78	O.	264 n. 1	264 n	635 n.	635 n. 2	697	699		
78 A	76 B	270	O.						
		278 n.	278 n. 1						

Table II.—Showing the variations in the rules of the 5th Edition as compared with the 5th Edition (2nd Reprint) of the Civil Service Regulations—contd.

Reference to		Reference to		Reference to		Reference to		Reference to	
5th Edn.	5th Edn. 2nd Re-print	5th Edn.	5th Edn. 2nd Re-print.	5th Edn.	5th Edn 2nd Re-print.	5th Edn.	5th Edn. 2nd Re-print	5th Edn	5th Edn 2nd Re-print.
999	999 (1)	999 (1) (e)	O	999 (2)	999 (3)	1073 n.	1073 n 2	1121 A	1121 A (i)
999 (i)	999 (1) (a)	999 (1) (f) & (g)	999 A (c) & (d)	1000 n.	1000 n 1	1080	O	1133 proviso & n. 1	O.
999 (ii)	999 (2)	999 (1) (h)	999 A (a)	1002 n. 1 & 2	1002 n 2 & 3	1097 n.	O.	1133 n. 2 & 3	1133 n 3 & 4
999 (1)	999 A	999 (1) (i)	App No. 16 A	1011 n.	1011 n 1	1098 (a) (b) & (c)	1098 (A) (B) & (C)	1137 A	1137 B
999 (1) (a)	999 A (b)	999 (1) (j)	999 (1) n	1034 (b)	O	1098 n.	O.	1163 r 1	O
999 (1) (b), (c) & (d)	App No 16 A			1059 n.	1059 n 2	1120	O		

Table III.—Comparing the new with the old Foreign Service rules.

Reference to	
New rule	Old rule
749 A	N.
749 B	N
750, *first & second*	750, *first & second*
751	753 (v)
752	754 (*b*) (i) & n. 754 (*b*) (ii) & n. 787 second part & n
752 n.	N.
753	755 (*b*) 778
754	784
755 (*a*)	786 } first part 787 } first part
755 (*b*)	N
756	753 (iv) (*d*) 766 774 (*c*)
756 n.	N
757	788

Reference to	
New rule	Old rule
758	774 (*a*) & (*b*)
759 & n.	782 A & n.
760	782 B
761 (*a*) & (*b*)	757 A
761 (*c*) & n. 1 & 2	N.
762 (i)	753 (i)
762 (ii)	755 (*c*), second part
762 n.	753 A n.
763	753 (ii) (*a*) 753 (iii) 761 (*b*), first part
763 n	N
763 r 1	761 (*a*) n.
763 r 2.	753 (ii) (*a*) n.
763 r 3	N.
764	753 (iv)
764-IV (*a*), n.	N.

Reference to	
New rule.	Old rule.
765 (*a*)	755 (*a*) 757 (*a*)
765 (*b*)	N
766	755 (*a*) 779 (*a*)
767	754 (*a*) 755 (*a*) (i) & n. 3
767 Ex.	754 (*a*) Ex.
767 n.	754 (*a*) n. 2
768	754 (*b*) (i) & (ii) 755 (*a*) (ii)
769	768 780
770	755 (*a*) (i) & (ii) 768
770 n. 1	757 (*b*) n. 1 768 n. 2 779 (*a*) n. 1
770 n. 2	754 (*a*) n. 1 768 n. 2

Reference to	
New rule.	Old rule
770 n. 3	757 (*b*) n. 2
770 n. 4	755 (*a*) (i) n. 4 755 (*a*) (ii)
770 n. 5.	768 (*c*)
770 n. 6	N.
771	785
771 n. 1	785 Ex.
771 n. 2	785 n. 1
771 n. 3	785 n. 2
772 (*a*)	762
772 (*b*) (i)	758 (*a*) & n.
772 (*b*) (ii)	763 (*a*)
772 (*b*) (iii)	763 (*e*) & n
772 (*b*) (iv)	763 (*g*)
772 (*b*) (v)	N.
773	753A 771 773

Table III.—Comparing the new with the old Foreign Service rules—contd.

Reference to		Reference to		Reference to		Reference to	
New rule.	Old rule	New rule.	Old rule.	New rule.	Old rule	New rule.	Old rule.
774 (*a*)	772 (*c*)	775 (*c*)	770 n. 772 (*b*) n.	779	779 (*a*) 780	782	792
774 (*b*) (1)	772 (*a*)	776	775 776	780 (*a*)	789	783	795
774 (*b*) (2)	772 (*b*)	777	782, second part	780 (*b*) & (*c*)	790 & n.	783 n. 1	N
775	770	778	782, first part & n.	781	757 (*b*) 791	783 n. 2	795 n. 2 (*b*)
775 (*b*)	777					783 n. 3 & 4	N.

Table IV.—Comparing the old with the new Foreign Service rules.

Reference to		Reference to		Reference to		Reference to	
Old rule.	New rule.	Old rule	New rule	Old rule	New rule.	Old rule	New rule.
750 *first & second*	750 *first & second*	754 (a) n 2	767 n	757 (b) n 1 & 2	770 n 1 & 3	763 (g)	772 (b) (iv)
750 *third*	O	754 (b)	768 & 752	757 (b) n. 3	O.	764	O.
751	O.	755 (a) (i)	770 / 767	757 A	761 (a) & (b)	765, first part	750 *second*
752	*Cancelled*	755 (a) (i) n 1 & 2	O.	758 (a) & n	772 (b) (i)	765, second part	O.
753 (i)	762 (i)	755 (a) (i) n 3	767	758(b)	O.	766	756
753 (ii) (a)	763	755 (a) (i) n 4	770 n 4	759	O	767	O
753 (ii) (a) n.	763 r 2	755 (a) (ii)	770 / 768	760	O	768	769 / 770
753 (ii) (b)	O.	755 (a) (ii) n	O	761 (a)	O.	768 n. 1 & 3	O.
753 (iii)	763	755 (b)	753	761 (a) n	763 n 1	768 n 2	770 n 1 & 2
753 (iv)	764	755 (c) first part & note	O.	761 (b), first part	763 (iv)	769	O.
753 (iv) (d)	756	755 (c), second part	762 (ii)	761 (b), second part & r 1	O.	770	775
753 (v)	751	756	O.	761 (b) n.	763 r 2.	770 n.	775 (c)
753 A	773, first part	757 (a)	765 (a) / 770	762	772 (a)	771	773
753 A n.	762 n	757 (b)	781	763 (a)	772 (b) (ii)	772 (a) & (b)	774 (b) (1) & (2)
754 (a)	767			763 (b), (c), (d), (f) & (h)	O	772 (b) n.	775 (c)
754 (a) Ex.	767 Ex.			763 (e) & n.	772 (b) (iii)	772 (c)	774 (a)
754 (a) n. 1	770 n. 2						

Table IV.—Comparing the old with the new Foreign Service rules—contd.

Reference to		Reference to		Reference to		Reference to	
Old rule	New rule.	Old rule.	New rule	Old rule.	New rule.	Old rule.	New rule
772 (c) n.	O.	779 (a) n. 1	770 n. 1	784	754	789	780
773	773	779 (a) n. 2 & (b)	O.	785	771	790	
774 (a) & (b)	758	780	769, last part 779	785 Ex.	771 n. 1	790 Ex.	O.
774 (b) n.	O.	781	O.	785 n. 1	771 n. 2	791	781
774 (c)	756	782, second part	777	785 n 2	785 n 3	792	782
775	776	782, first part & n	778	786	755 (a)	793	O.
776	776	782 A	759	787, first part		794	O
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Greenshields, 9 Moo P. C. 18; *Mancharji* v. *Kongoseoo*, 6 B H. C R 69; *Hakeem* v *Beejoy*, 22 W R 8; *Jugul Kissore* v *Kartic*, 21 C 116; *Bhikhi* v *Udit*, 25 A 366; *Kondiba* v *Nana*, 34 I A 138

o whether registration is sufficient
Court mere registration does not
W N 11, *Monindra* v *Troylockho*,
n by *Chief Justice Sir Arthur Collins*
Court in *Shan Man Mull* v *Madras*
Bombay and Allahabad High Courts
Chenoasapa, 9 B 427, *Chintaman* v
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has been set at rest by the decision of the P

Khedampal, 25 C W. N 49=48 C 1 (P C)

cannot in all cases be imputed from the mere fact of registration of a document Whether registration is or is not notice in itself depends upon the facts and circumstances of each case, upon the decree of care and caution which an ordinarily prudent man would necessarily take for the protection of his own interest by search into the registers kept under the Registration Act *Ibid*, but now see Act XX of 1929 s 4

Knowledge— is obviously impossible to speak s that which the principles of testim it is, and that by the ows. ictly l his re in strictness concerned *Wigmore* § 650

Good faith 1897) a thing shall be deemed done honestly, whether it is dor icts apparently collateral may be proved, if they show good faith or prudence or the knowledge or information on which a person has acted when such fact is in issue These instances occur most frequently in cases of assignments for the benefit of creditors, the good faith of the holder of a bill or note, and of vendors and solvency e the *Free-* nce, tent The illustration (t) is based on the case of *Sheen* v *Bumpstead*, 2 H. & C. 193=32 L J Ex 271 In that case which was an action brought against the defendant for false representation as to the trustworthiness of W, the plaintiff as part of of the representation had

the state of mind of the defendant at the time he made the representation A plaintiff may ive evidence a however, prove ose the plaintiff W was insolvent, ir and obvious remark to the jury that the defendant must have known what was the common after the plaintiff

is not that strong evidence—morally at least—from which the jury may infr that what was the common opinion of trade shared by the defendant and that in making faith" *Norl Ev* 136, *Woodroffe Ev* 193 examples of good faith Illustration (*g*) is based on the case of *Chartier*, 1 Com B 13 In that case *Maule J* observed 'The evidence was material and was properly admitted It intended to show that the defendant was not seeking to evade payments of goods ordered for his benefit but that he had actually paid the person with whom alone he had contracted It showed that the defendant conducted himself like a party who was dealing with C as a principal and not as an ments for the benefit of circumstances surrounding to support it is then a vital part of the proof to rebut the presumption of fraud *Deus* v *Cornish*, 20 Ark 33? Illustration (*h*) is based on the leading case *R* v *Thurborn* 1 Den Cr C R 387 In that case *Parke B* said "The rule of law on this subject seems to be that if a man finds goods that have been actually lost or are reasonably supposed by law to have been lost and appropriates them with intent to take the entire dominion over them really believing when he takes them that the owner cannot be found, it is not *larceny* But if he takes them with the like intent though lost, or reasonably supposed to be lost, but reasonably believing that the owner can be found, it is larceny In d rules questions of ed whether the person l by evidence of his previous acquaintance with the ownership of the particular chattel, the place where it is found would be apparent, in other presumed that the do, at the time of taking conclude that he took it, — The mere taking it up to

eor believed n e deceased owing that he had reasonable ground to fear violence and to show that he acted in self defence *R* v *Hopkins* 10 Cox Cr 229 In *Allison* v *United States*, 160 U S 203 *Chief Justice Fuller* said 'Here the threats were recent and were communicated, and were admissible in evidence as relevant to the question whether defendant had reasonable cause to apprehend an attack fatal to life or fraught with great bodily injury, and hence was justified in acting on a hostile demonstration and one of much less pronounced character than if such threats had not preceded it. They were relevant because indicating cause of apprehension of danger and reason for promptness to repel attack, but they could not prosecution as son threatened, with an actual the absence of inference was that these sistent inference could not *Long C J* in *Thomason* v *Territory* 4 N M 150 a New Mexico case where he said 'If there is even slight evidence to indicate that the act of killing was done under a present reasonable apprehension to himself of great bodily harm, prior threats should not be excluded' Evidence of communicated threats is intended to shed light upon the mental attitude of the prisoner toward the deceased when homicide of the ie good which hat he sertion he believed at a certain

time is worth very little without some kind of confirmation from external S 1
conditions *Derry* v *Peak* 14 App Cas 337 In each case good faith as defined by the Indian Penal Code should be considered with reference to the general circumstances and the capacity and intelligence of the person whose conduct is in question *Bhatoo* v *Mulji* 12 B 377 (393), *Emperor* v *Abdul*, 31 B 293 (298), *Arfan Ali* v *Emperor* 44 C 66, *Davey* v *Corey* (1901) A C 477

In a case where an accused is charged with murder, he can assert that he has committed the crime in self defence In such a case the state of his mind at the time of the killing becomes a material fact An important element in determining his justification is his belief—in an impending attack by the deceased So reasonable fear of such an attack repels the conclusion of malice And the character of the deceased for violence has much to do in determining the reasonableness or unre

Negligence whether proved by habit Negligence is in one aspect the not doing of a particular act but in another and more correct aspect it is the doing of one act in a manner which amounts to negligence in that some other

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engineer and fireman, had some times passed the crossing during the preceding year without those precautions observed It would seem to be axiomatic that a man is likely to do or not to do a thing, or to do it or not to do it in a particular way, as he is in the habit of doing or not doing it But this must be understood of acts which are done or omitted to be done without any particular intent or purpose to injure any one, it ca
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any intention whatever and through mere
give these signals on that occasion we think the enquiry was properly ma
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If negligence can be inferred from repair of machine high way or the
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again, by fencing or covering, or at any rate making safe the particular thing from which it arose That, however, is no evidence of, and I protest against it being put forward as evidence of negligence A place may be left for a hundred years unfenced, when at last some one falls down it, the owner like a sensible and humane man, then puts up a fence; and upon this the argument is that he has been guilty of negligence, and shows that he thought the fence was necessary because he put it up. This is both unfair and unjust It is making the good feeling and right principle of a man evidence against him"

Ill-will, malice, etc The term ill-will as used in the Act, is not the exact equivalent of the terr
the criminal intention
In a case of defama
the libel If for any reason this presumption is rebutted, it becomes necessary
for ... to show actual malice In *Helditch* v *McIlwaine*
I said "It is for the defendant to prove
tl f the defendant does so the burden of
s the plaintiff; but unless the defendant
does so ... tual malice' By the ex
rely the criminal intention
but a more positive mental
hat technical

nsaction is material
Roscoe Ev. 880, see also *R* v *Mason*, 8 Cr A R 121 (1912)
riminal acts leading up to the
one nd of the accused is admissible
Trien commit the crime for which
a person is upon trial are constantly received as evidence against him, as
...other he has
intention
ie has to
ch threats
owards the
ic emotion
itself is evidential as an independent circumstance to show the act So also where an emotion of hostility at a specific time is shown, the existence in the same person ... admissible
What, that I tances
of each case, Court
The ... defama
tory ways,
(1) a ound
for at the
time of uttering the defamation charged, other utterances of the defendant may

be offered, and the question arises whether and on what terms they are admissible The probative value of other utterances as showing malice at the time charged rests on a double argument (A) that the other utterance indicates malice at the time of utterance, and (B) that malice then indicates malice at the time charged *Wigmore* §§ 105, 396 401 In *Barrett* v *Long*, 3 H L C 395 (414) *Parke B* said "We are all of opinion that under such a plea the publication of previous libel on the plaintiff by the defendant is admissible evidence to show that the defendant wrote the libel in question with actual malice against the plaintiff A long practice of libelling the plaintiff may show in the most sat

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him' Charlton v Barret
Peake N P 22 In

v. *Westby* 6 C
slander is only ac
Davies, 7 C &
rejected on the gr
words, and yet th
founded upon tl
Lemaitre, 5 M &
"This ap
damages,
in the m
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prove it
different c
Denman
of mot

was rejected

Good will The term 'good will' is peculiar to the Act, and there is no equivalent for it in the English law, nor is used at all, except in a different sense The answer to a charge of 'express malice' would probably be the absence of express malice or some sort of defence that implied it. This moreover, seems to be the meaning of the last clause of the illustration *Donough Ev.* 123

State of body or bodily feeling etc This section also provides for the admission of evidence regarding the state of body when that is in issue or relevant It would be in issue in all crimes of violence, or 'offences affecting the human body,' within the meaning of the Penal Code It would be relevant in all questions of insanity, legitimacy, life insurance, inheritance, and identity of persons *Donough Cr Ev 127* Illustration (*k*) shows how persons' expressions of feeling towards each other at or about any particular time may be used to show what those feelings were and (*l*) and (*m*) show the same thing in regard to states of body *Cun Ev 131* So whenever the bodily or mental feelings of an individual are material to be proved, the usual expressions of such feelings, made at the time in question, are also *original evidence* If they were the natural language of the affection, whether of body or mind, they furnish satisfactory evidence, and often the only proof, of its existence And the question whether they are real or feigned, is for the jury to determine *Greenl Ev* § 162 (a) cited in *Taylor* § 580 Thus the representations by a sick person of the nature and effects of malady under which he is labouring are receivable as original evidence whether they may be made to the medical attendant, or to any other person, though the former are naturally entitled to greater weight than the latter, in as much as a physician is far more capable than a man unacquainted with the symptoms of diseases, of forming a correct judgment respecting the accuracy of the statement *Aveson* v *Kinnaird*, 6 East 188 *R* v *Blandey* 18 How St Tr 1135, *Grey* v *Young* 4 M C 31; *Gilchrist* v *Bale* 8 Watts, 355 cited in *Taylor* § 580 Illustration (*m*) is based on *Aveson* v *Kinnaird*, 6 East 188 So also answers of patients to enquiries made by medical men and others are evidence of their state of health provided they are confined to contemporaneous symptoms and are not in the nature of a narrative as to how, or by whom such symptoms were caused *Gardner Peerage Case* Le March, 169, *R* v *Nicholas*, 2 C & K 246, *R* v *Gloster* 16 Cox 471, *R* v *Gutridge*, 9 C & P 471 The reason for the admission of such evidence is thus given by *Mellish L J* "Wherever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions there you may prove what he said, because that is the only means by which you can find out what his intentions were" *Sugden* v *St Leonards* L R 1 P D 154 This use of such statement is often spoken of as admissible under the *res gestae* notion or as 'original' evidence, i e not an exception to the Hearsay Rule But this seems clearly unsound There is one sort of evidence of mental condition which is in truth merely indirect or circumstantial, and therefore not subject to the Hearsay Rule, e g where the sharpening of a knife on the morning before a homicide is taken as evidence of a design to kill, or where the repeated infliction of blows indicates malice or where running away is taken as indicating fear But where a distinct assertion, in the form of words, predicating a mental state is offered,—as "I have a pain in my side" or "I have the intention of going out of town,' or "I do this for such and such a reason,'—this language is no less an assertion of the existence of a fact than is an assertion of any other sort of fact; in the neat phrase of *Bowen L J* 'The state of a man's mind is as much a fact as the state of digestion," and therefore such assertions, being taken on the credit of the declarant as testimonial evidence of the fact asserted, are met by the Hearsay Rule To admit them, then is to make an exception to the Hearsay Rule The different kinds of facts that may be the subject of such assertions may be roughly gouped as follows: (1) assertions of pain, or other physical condition; (2) assertions of plan, design, intention, (3) assertions of feeling, emotion, motive, reason (4) sundry assertions by a testator *Greenl Ev* § 162 *a*, *Wigmore* §§ 1714 to 1740 It is usually said that such declarations are receivable though they form the only proof of the given condition (*Tay* § 500), but this has been doubted and it has been considered to be the *manifested condition* and not the sickness itself which is the true *res gestae* to be explained (*Thayer*, 15 *Ir L T*. 141—143) *Phip Ev* 3rd *Ed* p 51. *Mr. Cunningham* thinks that statements in illustrations

as to the circumstances in which he came to be poisoned should be admissible

Such Statements are exceptions to Hearsay Rule It has already been stated that such st ... to the Hearsay Rule. I ... 32) presents itself in a ... on the consideration that, though the person's testimony on the stand may still be both actually and conveniently practicable yet the probability of their receiving from him testimony which shall be in value equal or superior to certain hearsay statements is small, thus, while there is hardly a necessity in the strict sense, the ... Applied ... there is a ... own cont ... possible to obtain by circumstantial evidence (chiefly of conduct) some knowledge of a human being's internal state of pain, emotion motive, design, and the like; but in directness, amount, and value, this source of evidence must usually be decidedly inferior to the person's own contemporary assertions of those conditions It might be argued, however that the person's own statements on the stand would amply satisfy the need for his testimonial evidence The answer is that statements of this sort on the stand where there is ample opportunity for deliberate misr ... or testing it by ... at times when ... of trustworthine ... of Court and ... is a fair necessi ... of evidence eit ... death, insanity ... dent; and this has not been questioned *Wigmore* § 1714; see also section 21 clause (2)

In *Aveson* v *Kinnaird*, 6 East, 195, which appears as illustration (*m*) of section 14 *Lord Ellenborough* in admitting such statements observed "A witness has been received to relate that which has always been received from patients to explain,—her own account of the cause of her being in bed at an unreasonable hour with the appearance of being ill What were the complaints, what the symptoms, what the conduct of the parties themselves at the time, are always received in evidence upon such inquiries, and must be resorted to from the very nature of the thing The declaration was upon the subject of her own health at the, time which is a fact of which her own declaration is evidence, and that too made unwares before she could contrive any answer for her own advantage and that of her husband, and therefore falling within the principle of the case in *Skinner* to which I have alluded' (The case referred to by him was *Thompson* v *Trevanion*, Skin 402) So "the evidence is admitted on the presumption arising from experience, that when a man does an act his contemporary declarations ... there be some reason for misrepresenting ... *Carter*, 8 H N. 42 "Wherever the bodily ... are material to be proved, the usual e... ...inal and competent evidence These expressions are the natural reflexes of what it might be im... ...xplanatory or cor... ...istration of justice ... upon which the ... ast. 'Anything in nature of narration must be excluded" *Per Swayne J* in *Insurance Co* ... *Mosley*, 8 Wall. 397 So "such declarations made with no apparent mot...

misstatement, may be better evidence of the maker's state of mind at the time than the subsequent testimony for the same purpose" *Per Holmes J* in *Elmer* v *Fessenden*, 151 Mass 359

State of body In *Annesley* v *Anglesea*, 17 St Tr. 1139, where the question was whether the claimant was the [illegible] vast amount of evidence was gone [illegible] condition of *Lady Altham* during [illegible], shortly before the claimant's birth in a [illegible] belief to that effect [illegible] cession, a question of legitimacy [illegible] d to be the heir to a dukedom and [illegible] son of *Lady Jane Douglas* and [illegible] the objector [illegible] to the bodily [illegible] points consu[illegible] situation of *I*[illegible] These were [illegible] *Staunton*, Not Tr, where four prisoners were charged with conspiring to cause the death of a woman of weak intellect by a slow process evidence was admitted regarding her bodily state at various intervals down to the date of her death "The object of his evidence" said *Hawkins J* "is to show that those who were about her and saw her from week to [illegible] the condition to which she was being re[illegible] The physical strength of a person may be [illegible] was peculiarly capable or peculiarly incapable of doing the act in question. *Goodtitle* v *Braham*, 4 J R 498

Owner of vicious animals "Whoever" says *Lord Denman* "keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *prima facie* liable in an action on the case at the suit of any person attacked and injured by t[illegible] negligence [illegible] *Jhonson*, 36 L J. C P [illegible] (the knowledge of the [illegible] f the animal is relevant. [illegible] '36 Particular acts of viciousness are also relevant, for the same reason Vide *illustration* (c). So [illegible] l to show the owner's knowledge [illegible] P 3, see also *Thomas* v *Morgan*, [illegible] *Hudson* v. *Robert*, 6 Ex 697,

Receiving stolen property—Proof of knowledge The act of possession is in this class of cases (except rarely) concealed, and the question is as to the [illegible] possession [illegible] other times [illegible] view of the [illegible] er possession be such [illegible] f the stolen character of [illegible] warned the defendant [illegible] it may be assumed that the receipt of st[illegible] likely to result in a warning, chiefly bec[illegible] up and reclaim them, but also in part because a purchase not made in th[illegible] offer [illegible] in the transactions, i e that the same person comes to dispose of the [illegible] *Wigmore* § 32[illegible] ing stolen goods [illegible] edged, within five [illegible] l brought to the

defendant by the same person was admitted " S.
guilty knowledge" See also *R.* v *Davis*, 6 C. &
& Rob 524=1 Cox. Cr 12, illustration (*a*)
C 264 such evidence was held inadmissible.
judgment said · "Here the evidence merely went to show that the prisoner was in possession of other property which had been stolen in December, and not that he had received such property knowing it to be stolen. Now the mere possession of stolen property is evidence, *prima facie*, not of receiving, but of stealing; and to admit such evidence in the
prosecutor, in order to make out that a prison
knowledge, what had been stolen in March,
December previous stolen some other property from another place and belonging to other person" The result of *R.* v *Oddy*, was a legislative change of the law in 1871 by Stat 34 & 35 Vict C 112 By section 19 of that Act "evidence may be given that there was found in the possession of such person property stolen within the preceding period of twelve months for the other purpose of proving that such person knew the property for which he is indicted to be stolen" But illustration (*a*) to the section makes no reservation as to ownership or time, so that it would seem that though the stolen property belonged to other persons than the prosecutor, and without

Jones, 14 Cox Cr 3

Forgery and Counterfeiting The Chief form of offence connected with forged and other counterfeit documents or money are (1) making the false

the inference of knowledge from such particular transactions, it would not make the evidence inadmissible" See also *R.* v *Ball*, R & R 132; *R* v *Ball*, 1 Camp 324, *R* v *Millard*, R & R 245; *R* v *Phillips*, 1 Lew Cr C 105, *R* v *Smith*, 4 C & P 411, *R.* v *Forbes*, 7 C & P 224, *R.* v *Ball*, 7 C & P. 429 In *R.* v *Froster*, Dears Cr. C 456, to prove a guilty uttering on December, 12, an uttering of a similar piece on December 11 was shown, see also *R.* v *Goodwin*, 10 Cox Cr 534 In *R.* v *Whiley*, 2 Leach 985, *Thompson J.* observed "As to the cases put by the prisoner's counsel of uttering bad money,

the knowledge ...
30; *Blake* v *Albion Life Assurance Society*, 4 C. P. D 10..., ... 204. In *Mason's Case*,

10 Cr App 169, which was a case of uttering a forged deed, evidence of possession of two other sets of forged deeds a fortnight and five months later was admitted See also *R.* v *Foster*, 24 L J M C 134 The possession of other forged or count ... different way to show knowledge The mere fact of ... may be relevant to show ... g a knowledge of ... tels wrapped in paper or counterfeit paper is kept ... also found, and thus the prior knowledge applies equally to the article in question *Wigmore* § 311

Illustration (d) Th ... case of *Gibson* v *Hunter* 2 H Bl 286 H drew ... n) or order and indorsed in F's name, ... ued G and in order to show that G knew this particular ... as fictitious person, ... ered the fact of the former instance of such bills with irregularities and suspicious circumstances of such a nature that they must have made G aware of the fictitiousness of F's name, and it was admitted

Illustrations (i) and (... These two are illustrations of intention The case in (i) is that of *R* ... *R* v *Robinson*, 2 East P C 111 ... Nort *Ev* 137 The difference ... with intent to kill, (o) of murder outright ... admit other acts of the de ... to negative innocent intent and thus to establish the crimi ... officer and the like) No fixed ... ther act must bear, it ... ame ... ident

364 In *R* v *Voke* ... intent to kill The defence was accident. The fact of the accused ... way after the firing and concealed himself beside the road ahead and then firing again at the same person, was received to prove intent

Explanation I Illustrations (*a*), (*o*) and (*p*) refer to Explanation I The rejection of general facts rests on the ground that the collateral matter has been too remote, if, indeed, there was any connection with the *factum probandum*. *Nort. Ev* 139 The meaning of this explanation is that the state of mind to be proved must be, not merely a general tendency or disposition towards conduct of a similar description to that in question, but a condition of thought and feeling having distinct and immediate reference to the matter which is under ... The fact that a man is generally dishonest, generally malicious ... not bear with sufficient ... on or as to any particular ... ing his conduct what is ... ves and state of mind with immediate reference to that particular occasion or matter Illustrations (*a*) and (*b*) make th ... goods with guilty knowledge ... obability of his having been dishonest ... is increased ... he is found in possession ... ht on his ... ssession ... it, he was ... man, who ... stolen from ... *Ev* 122 ... in *Holling* ... Does the ... ilar act in a ... has done the same thing in the ... sion? To admit such speculation ... t danger" ... t of these illustrations, it is difficult to see why a m ... letting defective carriages for hire

should be irrelevant in an enquiry as to his negligence in this respect on any particular occasion Surely the evidence of habit would have some probative value The same view has been taken by the Bombay High Court in regard to the second illustration, cl (o) It has been observed that on the issue of whether A actually shot B or not the fact that he had previously shot at him would have *some probative force So too would proof of a general malignity* of disposition by evidence that 'A was in the habit of shooting at people with intent to murder them, yet this evidence is excluded, even as proof of A's intention, either as too remotely connected with the particular intention in issue, or as raising collateral questions which could not be resolved in the case' *per West J* in *Reg* v *Prabhudas*, 11 B H C R 90 at p 92 **S. 1**

"It is presumed that if evidence of 'habit' is not admissible as a 'state of mind' under section 14, it might be admissible as conduct' under s 8 Habit after all is only previous conduct which is provided for in section 8"—*Donough Cr Ev 2nd Ed* p 133

...it of the uniformity ...een to be such a ...A, to a particular ...casion in a given

regularity of action, there can be no doubt that this fixed sequence of acts tends strongly to show the occurrence of a given instance But in the ordinary affairs of life a habit or custom seldom has such an invariable regularity Hence, it is easy to see why in a given instance something that may be loosely called habit ...ient regularity ...ice and in most ...depend largely ...that arise in connection with such evidence, both of them, however, depending on other exclusionary rules (1) The idea of habit is sometimes difficult to distinguish from that of character—for example where negligent habit is charged, and if it is interpreted in the ...
against the use of ...
(2) Assuming the ...
to be made by ...
inference to a habi...
character of a pe...
probabilit... ...nadmis-
sible Pe...
difficulty ...
(Dispositi...

another or more correct aspect, it is the doing of one act in a manner which amounts to negligence in that some other act is omitted which ought to have ... should not be used as ...if careful action *Joy* v ...ifficulties here seem to be ...ever be anything more than casual or occasional If it is, are we not really predicating a careless ...

well founded, and that such evidence is often of probative value and is not attended by the inconveniences of character evidence *Wigmore* § 97

... was only one explanation to the section By ... Amendment Act, 1891 (3 of 1891) these two ... the one original explanation Only slight verbal alterations were made in the original explanation and it was numbered as ' Explanation 1 The Explanation 2, is new This amendment wa... n of the Calcutta High Court in the ... as 14 C 721 (F B) In that case whether in the trial of a person charged ... property, evidence could be given of ... empting to receive stolen property, ... to be stolen The Full Bench decided on the 20th July 1887, that ...

the accused person has been previously ... but the fact that he has a bad character ... given that he has a good character in which case it becomes relevant *Explanation* —This section does not apply to cases in which the bad character of any person is in itself a fact in issue * By Act III of 1891, the said section has been amended in such a way as to render the previous conviction of an accused person irrelevant when it is sought to prove the conviction with the object merely of showing that the accused is a man of bad character and is therefore more likely to have committed the offence with which he is charged The fact that a person has been previously convicted of an offence has of itself little probative force to establish the fact that he has committed another offence and it is not expedient to admit evidence which can only prejudice the accused *Statement of Objects and Reasons of Act III of 1891* The result of this amendment of the law is that the rule as to the relevancy of a previous conviction is to be contained in section 43 of the Act The existence of the judgment convicting the accused is only relevant if the fact of the conviction is a fact in issue or is relevant under some provisions of the Act Explanation 2 has been added to section 14 so as to allow a previous conviction to be proved in order to show a guilty knowledge or intention *Statement of Objects and Reasons of Act III of 1891* As having regard to the character of the offence under s 400 I P Code, previous commissions of dacoity are relevant under s 14 of the Evidence Act so convictions previous to the time specified in the charge or to the framing of the charge ... the time ...

... section 4 (a) of the Bombay Prevention of ... the evidence that the accused was previously convicted of similar offe... *Aloomiya* 25 B ... *Jacob, J* dissenting) ... 139 the appellants were convicted, under section 401 of the Indian Penal Code of belonging to a gang of persons associated for the purpose of committing thefts The question was whether evidence of previous convictions of some of the accused of theft was admissible for the purpose of proving association for that purpose and bad character In rejecting the evidence the Court observed "It is sufficient to say in reference to the case now before us that the character of the accused was not in issue ... is not admissible ... *King Em*... Court obs... ciation for purpose of ... tions whether for offence ... always been admitted, ... it would seem that of su...

* In page 725 of I. C. this explanation is not given after section 54 although in the Act this explanation is given after section 14

more cogent than those for isolated thefts Such evidence must of course be **S.**
weighed A single instance of theft for instance would count for little or nothing Ther
to show habit,
against the we
Empress v. *Nal*
four unreporte
such evidence".

bad character, is inadmissible under section 14 of the Evidence Act *Emperor* v *Haji Sher Mahomed*, 45 B 958 – 75 Ind Cas 67 = 25 Bom L R 214 The reason for admitting such evidence is thus given by *Faucett J*, in 46 B 958 "Such evidence clearly falls under section 14
a disposition on the part of the accu

doubt produce evidence
description to that in
question, but not of the exact description in issue A person may be a habitual surreptitious night thief, but this goes very little way towards showing that he has a disposition towards dacoity
of bad character which is excluded by
See also *Public Prosecutor* v *Boncge*
1001 = 9 Cr L J 567, *Emperor* v *Del*
Emperor v *Pachu Das*, 47 C 671,
is being tried for the offence of belonging to a gang of thieves, evidence that he was previously convicted of dacoity is relevant and admissible But if the conviction took place long before the second prosecution no weight can be attached to such evidence for the purpose of proving that the accused has a habit of committing thefts *Moti Ram* v *Emperor*, 89 Ind Cas 527 = A I R 1925 Bom
ourse that
the guilt
144 But
purpose of
affecting the punishment imposed *Queen Empress* v *Nga Lan*, (U B R 1892—1896) Vol I, 82

Seditious speeches—Intention Where certain speeches form the subject

in respect of the speech
iam v *Emperor*, 32 M 3
14 of the Evidence Act,

question is one of the intention of the accused in publishing these articles Did they intend to excite
enmity to the governmen
of certain government me

or it may be proved
nection with what such
on another or other

conspiracy as to a diary kept by her, that she kept it to show to her husband was admitted to evidence her feelings towards her husband. But in *Walton* v. *Webster*, 7 C & P. 198, letters by a wife, offered to show her happiness with her husband, —

Stat

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said

to be ta

do not prove it, but wherever it is material to prove the state of a person's mind,

you may prove

find out what

Tr. 442, *Wilde J*

in itself a material fact of which such statements are the fair exponents But where those declarations are vouched to prove the fact that he had declared and embodied those intentions in a certain will they have no other title to confidence than the statements of any other person who had seen the will and could speak to its contents In this aspect they become mere hearsay" See also *Keen* v *Keen*, L R 3 P & D 107; *Wigmore* §§ 1718 1722, 1729, 1730, 1735, 1736

ably, defeated We do not mean to say that fraud can be established by any less proof, or by any different kind of proof from what is required to establish any other disputed questions of fact, or that circumstances of mere suspicion which lead to no certain result should be taken as sufficient proof of fraud, or

some bearing in proving fraudulent intention by negativing the probability of good

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transfers are made, (3)

On the whole, while se

may vary in each cas,

here no fixed rule can be laid down *Vide Wigmore* § 333. The fraudulent intent of the transferor may be indicated by other circumstances not of the above sort,—such as the debtor's remaining in possession after the mortgage or sale the pendency of suits at the time of the sale and other circumstances suggesting their own significance and not raising any difficulty of principle *Wigmore* § 33

Illustrative Cases—Admissible Evidence A writing made some time after the committing of an offence under section 124 I P Code is admissible in evidence under s 14 of the Evidence Act *Emperor* v *Phillip*, 30 Bom L R 315 = 108 Ind Cas 30 = 29 Cr L J 320 = A I R 1928 Bom 78 Former judgment more than 25 years old and convicting accused of dacoity is admissible in a case under s 401 I P Code for showing criminal tendency to commit theft and not habit of committing theft *Motiram* v *Emperor*, 69 Ind Cas 729 = A I R 1925 Bom 193, see also *Bonai* v *Emperor*, 38 C 408 = 15 C W N 461, *Emperor* v *Naba Kumar* 1 C W N 146; *Emperor* v *Haji Sher Mahomed* 25 Bom L R 214 = 75 Ind Cas 67 In a trial for an offence under ss 235 and 243 I P Code of being in possession of counterfeit coins and instruments and materials for counterfeiting coin, evidence of the possession by the accused of counterfeit coins and instruments for their manufacture at his house in another district is admissible *Misri Gossain* v *Emperor*, 61 Ind Cas 647 = 22 Cr L J 407 On a charge against the accused of cheating by falsely representing that they were the servants of a wealthy lady and were entrusted to act on ... in the arrangements for loans, to be made to th... she possessed, and thereby ob... in connect... transacti... complain... prove the ... A 273 ... ...ution to show that the acts charged a... ...of a series of similar acts committed by him, or ... ...is concerned at or about the time in question Evidence of such other acts, whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent *Girdhari* v *Emperor* 269 P L R 1914 In cases where the other evidence has established association for purposes of habitually committing theft, evidence of previous convictions whether for offences against property or for bad livelihood is admissible, not as evidence of character but as evidence of habit and of such evidence, convictions for bad livelihood would be more cogent than those for isolated thefts *Bonai* v *Emperor*, 9 Ind Cas 455 = 15 C W N 461 = 38 C 408

Illustrative Cases—Inadmissible Evidence Where the accused is charged under s 409, Penal Code, for embezzling three specific sums *Held*, that evidence of collateral offences in respect of other sums was not admissible *Pritchard* v *Emperor*, A I R 1928 Lah 382 Where in a particular trial under section 420, I. P Code evidence was let in with regard to a previous act of fraud which was alleged to have been committed by the accused person on the witness who spoke to the fact that on a particular occasion he was cheated by the accused in respect of a certain sum *Held*, that the evidence is clearly inadmissible in law and it cannot be brought in with the aid of s 14 or 15 of the Evidence Act *Gokul* v *Emperor*, 29 C W N 483 = 86 Ind Cas 970 = 26 Cr L J 906, see also *R* v *Abdul Wahid* 34 A 94 In a case of murder by administering sweetmeats the facts that the accused offered sweetmeats to boys and poisoned one of them is not evidence under section 14 of the Evidence Act *Kashi Ram* v *Emperor*, 73 Ind Cas 262 = 6 N L J 144 In a prosecution under section 209 of the Penal Code for having knowingly made a false claim in a suit against certain persons, evidence relating to other suits brought by the accused against other persons may be admissible against the accused under sections 14 and 15 of the Evidence Act, for the purpose of showing ill will or animus of the accused, and as systematic cause of fraud or a systematic series of fraudulent claims and for the purpose of rebutting the defence that the particular suit was brought in good faith or any suggestion that it was brought under some m... ...ke or misapprehension But evidence relating to simil... ...other persons is not admissible against the ac... ...instituted by the accused are part of ... ...of a conspiracy between

them Evidence which goes merely to the character or disposition of the accused **S.**
as a person likely to have committed the offence is generally inadmissible against
iot become inad-
e accused of other
N 491=19 Cr.
was charged with
nas in excess of
tion evidence was
produced t
was inadm
Evidence
Cas 781=1912 M
of instances of acts of
acts of misconduct
The defendant can
justify the libel as true in substance and in fact by proving its truth, not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show that those acts were parts of the habitual and
-ojshau,
restrain
having
dence to
the rule
being that a man must be taken to have intended the reasonable and natural consequences of his own act *Munna* v *Jauala* 35 C 31 Where in a prosecution under s 304 I P Code it was
taken part in a similar occurrence just p
rash driving of his motor car certain

Bom L R 324=A I R 1930 Bom 157

15 When there is a question whether an act was accidental or intentional, *(or done with a particular knowledge or intention), the fact that such act formed part of a series of similar occurrences, in each of which the person doing the act was concerned, is relevant.

Facts bearing on question whether act was accidental or intentional

Illustrations

(a) A is accused of burning down his house in order to obtain money for
ach of which he
fires A received
ng to show that

It is A's duty to make entries in a book showing the amounts received by him He makes an entry showing that on a particular occasion he received less than he really did receive

The question is, whether this false entry was accidental or intentional

The facts that other entries made by A in the same book are false, and that the false entry is in each case in favour of A, are relevant.

*These words in s 15 were inserted by the Indian Evidence Act 1872 Amendment Act, 1891 (3 of 1891), s 2

(c) A is accused ... e

The question is,

The facts that, ... delivered counterfeit rupees to C, D and E are relevant, as showing that the delivery to B was not accidental

Scope of the section Section 15 of the Evidence Act is an application of the general rule laid down in section 14 *Emperor* v. *Debendra*, 36 C 573–13 C W N 973 = 9 C L J 610 It lays down that where there is a question whether an act was accidental or intentional *or done with a particular knowledge or intention*, the fact that such act formed part of a series of similar occurrences in each of which the person doing the act was concerned, is relevant It is wrong to say that this section only deals ... lent The bracketed words were added by s 2 ... not be overlooked in construing section 15 ... *Emperor* v. *Panchu Das* 24 C W N 501 at p 525 F B But in the same case *Mookerjee J* took a different view At page 516 he observed "There was no room for any hypothesis that the death of the woman, whoever might have caused it, was either accidental or unintentional The medical evidence makes it incontestable that the act amounted to deliberate murder No question consequently arises whether the act was accidental or intentional or was done with a particular knowledge or intention In so far as the charge of theft was concerned, there was also no question, whether the act was accidental or intentional or was done with a particular knowledge or intention" *Fletcher J* agreed with *Mookerjee J* in that case According to *Sanderson C J* also this section has no application where *there is no question of an act being accidental or intentional* So evidence of other crimes is admissible if it bears upon the question whether the acts alleged to constitute the crime charged in the indictment were designed or accidental *Per Lord Harschell* in *Makin* v. *Att Gen of New South Wales* 75 L J K B 693 = (1906) 2 K B 389, see also *R* v. *Bond*, (1906) 2 K B 389, *R* v. *Heesom*, 14 Cox 40, *R* v. *Stephens*, 16 Cox 387, *R* v. *Armstrong* (1922) 2 K B 555 In *Gunwant* v. *Emperor*, 38 Ind Cas 723 = 13 N L R 35, which was a case under ss 467, 471, and 193 of the Indian Penal Code in respect of a receipt of Rs 4,200 discharging a debt, the complainants were allowed in the lower Court to file certain certified copies intented to prove that four different documents namely (1) a will, (2) a receipt, (3) a deed of lease, and (4) another receipt written by the accused K were suspected to be false documents and were not acted upon by Court As regards the admissibility of these documents the Court observed. "There was no question here whether the writing, attestation, or production of the receipt for Rs 4,200 was accidental or intentional Each was admittedly an intentional ... knowledge of the ... ents were ... ided ... far ... the ... of a ... spect ... hed ... decided is whether ... knowledge or in... ilar acts be let in ... of the kind of ... *Crown*, 12 P R ... had been charged under s. 420 I P. Code, for having received from the two complainants certain sums of money on false pretences that he had been authorised to recruit unskilled ... would be able ... that the ... sole of ... having ... d not ... llowed

to show that in the course of this recruiting business the accused had defrauded other persons from whom he had received sums of money on false pretences of a similar kind S.

In general whenever it is necessary to rebut, even by anticipation, the defence of accident, mistake or other innocent condition of mind, evidence that the defendant has
same specific kind as th
Amrita Lal v. *Emperor*,
systematic act mentioned here should not be confused with design or system. (*Vide* p 236.)

'Section 14 provides that facts showing the existence of any state of mind, such as intention or knowledge, are relevant when the existence of any such state of mind is in issue or relevant and section 15 provides specifically for allowing evidence of similar occurrence in each of which the person doing the act was concerned, whenever there is a question whether the act is done with a particular knowledge or intention' *Per Fawcett J* in *Emperor* v *Harjivan valji*, A I R 1926 Bom 231 = 50 B 174 – 28 Bom L R 115 This section

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obtaining money on false pretences In that case *Lord Coleridge, C. J* said
...en the fact that the prisoner has done the
remaining question is, whether at the time
he quality of his act, or acted under a
ved must be admissible' This amendment seems to have been overlooked by *Jacob J* in *Emperor* v *Ulhmiya Hussain*, 28 B 129 = 5 Bom L R 805, where he states that this section invites consideration of the question of intention only as opposed to accident *Woodroffe's Ev* 8th Ed p 208 This case probably goes further than any other case, and the amendment which has been proposed of section 15 seems to provide sufficiently for the class of cases in which the peculiar nature of the offence makes this question the crucial test' In *Reg* v *Ollis* 69 L J Q B 918 *Bruce J* stated the law to be as follows "A line of cases has established the rule that when it becomes material to establish that an act charged in the indictment and proved to have been done, was intentional and not accidental, evidence is admissible of similar acts done by the same

...rson (*Rex* v *Gray*, 4 F & F
313), of false pretences
J Q B 83), of coining
re, 1 Bos & P N R 92
credit by fraud (*Rex*
as necessary to negative

prisoner at the time of the offence charged against him, and, therefore negat... accident or mistake on his part in the last occasion'

Of course, such evidence is not admissible merely for the purpose of showing that the character of the accused was such that he was a person likel to commit the acts of cheating with which he is charged That is a totally different question and the distinction between the two classes of cases is well brought out by *Channel J* in *Rex v Fisher*, 26 L T R 122: "The principle" said the learned Judge 'was perfectly clear and if attended to the difficulty disappeared That principle was that the prosecution must not prove facts ... was of bad character and there- ... But if proof of the facts went to ... ence charged it was admissible ... the accused, that it showed that he ..., in a charge of embezzlement ... mistake, evidence could be given to show other instances of the same kind, because such evidence tended to show that he was not making a mistake on the occasion charged Whenever it could be shown that the question involved was whether there was a mistake or whether there was a system evidence might be given although it proved other offence that the prisoner's actions were systematic and fraudulent

In *Reg v Rhodes* 68 L J Q B 83=(1899) 1 Q B 77 the prisoner was indicted for obtaining eggs by false pretences and it was proved that he had falsely represented by advertisement in newspapers that he was carrying on a *bona fide* Dairyman's business Evidence was admitted that subsequent to the transaction in question he had obtained eggs from other persons by means of similar advertisements and the Court for the consideration of Crown Cases Reserved held that such evidence had been properly admitted In delivering the judgment of the Court, *Lord Russel L C* observed "It seems to me quite clear that if the transactions with *Elston* and *Chambers* had taken place before that with *Boys* and at a period not too remote the evidence of *Elston* and *Chambers* would have been admissible against the prisoner Is that evidence admissible although the transactions were subsequent to the offence charged? That depends as it seems to me on the question whether or not the case put forward for the prosecution was that the prisoner was not carrying on a real business but that the business in which he was engaged was from first to last a bogus or show business If the prosecution merely alleged isolated transactions of a fraudulent character against the prisoner with no connection between them I should certainly say that evidence of transactions which took place after the offence charged was not admissible more especially if such transactions took place two months after the offence But here as I have said, the charge to be made out was that of carrying on a bogus business and on the whole, I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by ...

In the same case H... can only be shown ... do not see how ... in any other way If the t... en prior to the offence charged ... lear that they would have be... , if they were immediately after the act complained of. If they formed part of the same system of fraud I think it can make no difference The only difficulty in the case is, I think, the long interval of time that elapsed between the act charged and the other acts Very often the only *nexus* between such transactions is their proximity in point of time That however, is not the case here, and had there been no other connecting link, I should certainly have thought that the transaction two months after was at any rate too remote But when it appears that the ... in and that it ... the charge was ... the evidence becomes admissible

So to come under this section it must be established that the act forms ... of the ... the ... ance

some common ' ' ' ' ' ' ' nces S.
had its own nces
Per Mookerjee , . So
"whether they were evidence or not depends upon whether they were evidence of similar transactions" *Per Reading C J* in *Rex* v *Baird*, 84 L J K B 1785 To admit evidence under this head, however, the other acts tendered must be of the same specific kind as that in question and not of a different
proximate in point of time
. 9 C W N 676 at p 692; see
. ' v *Rhodes*, (1899) 1 B 77
Section 15 of the Evidence Act covers both previous and subsequent similar occurrences *Raghunath* v *Emperor*, 22 C W N 494=46 Ind Cas 696=19 Cr. L J 776

In a case of cheating, it is open to the prosecution to show that the acts charged against the accused were parts of a series of similar acts committed by him or in which he was concerned, at or about the time in question *Girdhari* v *Emperor*, 26 P W R 1910 Cr; see also *Emperor* v *Debendra* 36 C 573=13 C W. N 973=9 C L J 610, but see *Gokul* v *Emperor* 29 C W N 483=29 Cr L J 906=86 Ind Cas 970 In the case of *Blake* v *Albion Life Assurance Co*, 4 L R C P D 97 at p 106 *Lord Lindley* observed "Nothing could, at first sight, seem mor
appearance of fraud;
that the transaction
precluded from doing

answer to the objection that evidence of frauds on other persons cannot be admitted is that this transaction is one of a class, that there are features in common, the features in common being the false pretence and a knowledge of
it that
.5 L J
cases
in my
opinion, that the case which the prosecution seeks to prove is that the prisoner has in his mind a scheme or plan, say for obtaining money by fraud, and the other acts, of which evidence is sought to be given, when proved will show the existence of the plan, and, therefore the guilty mind of prisoner"

Evidence of the commission by the accused of previous or subsequent offences—General Principle of In *Makin* v *Att Gen of New South Wales*, 75 L J K B 693, 703, 710 712=(1906) 2 K B 389, 409, 414 417, *Lord Chancellor, Lord Herschell*, said 'It is undoubtedly not competent for the prosecution to adduce evidence tending to show that the accused had been guilty of criminal acts other than those covered by the indictment, *for the purpose* of leading to the conclusion that the accused is a per on likely from his criminal conduct or character to have committed the offence for which he is being tried On the other hand, the mere fact that the evidence adduced tends to show the commission of
issue before th
whether the ac
were designed or accidental, or to rebut a defence which would be otherwise open to the accused" In *Rex* v *Bond*, 75 L J K B 693=(1906) 2 K B 389, *Mr. Justice Darling* and *Mr Justice Bray* called attention to the fact that *Lord Herschell's* last words quoted above must have been intended to apply only to a defence which is really in issue, and that the words of the *Lord Chancellor* should be read with that limitation *Per Bankes J* in *Rex* v *Fallon* (1913) 3 K B 168=82 L J K B 1070 In *Rex* v *Bond*, *supra*, *Mr*

secondly, where the prosecution seeks to rebut a suggestion on the part of the prisoner of accident or mistake, and thirdly, where the prosecution seeks to prove knowledge by the prisoner of some fact In their judgments in that case it was pointed out by several of
of the Court that a single prior
not be admissible as evidence of s
recent case of *Director of Public Prosecutions* v *Ball*, (No 2) 80 L J K
692, *sub nom* *Rex* v *Ball*, (1911, A C 47) the *Lord Chancellor*, in speaking Further
of the grounds upon ster) had
evidence was then t object was
previously carnally k
to establish that they had a guilty passion towards each other and that therefore the proper inference from their occupying the same bed room and the same bed was an inference of guilt, or—which is the same thing in another way—that the
to fail' The
idence suggests
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admissible to

Evidence of death by poisoning The question is whether the administration of poison to A, by Z, his wife, in September 1848 was accidental or intentional The facts that B, C, and D (A's three sons) had the same poison
... D ... 1848, March 1849, and April 1849, and that though Z
rder D
A ing the
evidence *Pollock C B* observed I am of opinion that evidence is receivable that the death of the three sons proceeded from the same cause, namely, arsenic The tendency of such evidence is to prove, and to confirm the proof already given, that the death of the husband whether felonious or not, was occasioned by arsenic In this view of the case I think it wholly immaterial whether the deaths of the sons took place before or after the death of the husband The domestic
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in this case *Heso*
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14 Cox 40,
Sess Pap 1451, *R* v *Klosowski*, 137 Cent Crim Ct Sess Pap 411 See also *R* v *Roden*, 12 Cox 630 (a trial for murder of a child by suffocation in bed) In *R* v *Cotton*, 12 Cox 400 (poisoning a child) evidence was admitted of the
the same poison The prisoner and his
his mother by poison The prisoner's former
his present wife was then their servant The
er his second marriage and died in December
ultural purposes, and there was evidence of
administration by the prisoners of articles of food in which arsenic might be contained, ... However evidence
that three h nce aen
tally poison he was
not suppos mptoms
evidently ar to prove
that the administration of the poison to the mother was wilful, evidence was
first wife, and to
F 346,
n which
aracter
ll Gen
y and agreed with
nd F 1102 and that
R v *Winslow*, could not therefore be treated as of much importance

S. 1

Cr 2111 On an indictment for murder by poison of S, evidence was admitted of ... ices, and fro ... il; and it be ... t of the pri ... was also nd ... J and L by ... *leesom* 14 Cox 40, see also *R* v *Flannagan*, 15 Cox 403, where *Brett J* took a similar view 2 Russ Cr Ev 2112 In *R* v *Armstrong* (1922) 2 K B 555 = 91 L J K B 504, where the accused was charged with the murder of his wife by administering arse... person with arsenic ... ted to rebut the def... kept by the accuse... 1191 = 12 Cr L J

Causing death by other means On the trial for the murder of an infant, it was proved that the prisoners had alleged that they had received only one child to nurse before, and had give... take the child, with whose murd... their own for the payment of £ 3 ... other infants had been received ... upon payment of sums inadequate ... also that the bodies of several infa... to that of the infant in question in ... occupied by the prisoners On ... vant to the issue and was rightly a... (1894) A C 57, 2 Russ Cr 2112 Appellant was charged with the murder of B M a woman with whom he lived and with whom he had gone through a form of marriage She was found drowned in her bath Evidence was admitted that

defendant, by his cross-examination of prosecutor, had endeavoured to show that the gun might have gone off the first time by accident

... vi... ...ies ... he ...ies ...ons ...is ... he ... charged the ...ig does not ... of innocent ... ground for ... representa- ... test The ...mmon sense ...er which the ... the circum- ... are equally ... is the repeti... ... he prohibi...

been made innocently, we may assume that any given one might have been innocent, but cannot concede this when we notice the recurrence.

'When the very act of making the representations is to be provel and a system or design is to be argued from, the evidence is to be restricted by the r or ous rule applicable to that purpose, i e, there must be shown a connection of features

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therefore objected to In admitting this evidence, *Holt L C J* said "It is an evidence of his cheating since that time and that one of the information (t e not charged) but it is an evidence also to prove that his pretended fasting before was a mere deceit for he then pretended to have fasted ten weeks before he came hither, and afterwards pretends to continue fasting in the same manner, if that be proved to be a fraud, it is strongly to be inferred that this pretended fasting was so too' In *R* v *Roberts* 1 Camp 399 the charge was criminal conspir by representing themselves as wealthy people by the accused to other tradesmen was admit Q B 77 where prisoner was indicted for obtaining eggs by fraudulently pretending by repeated advertisement that he was carrying on a substantial business, it was held that evidence was rightly admitted that persons other than the prosecutor had subsequently been deceived by similar advertisements, issued by the prisoner In admitting such evidence *Lord Russell C J* said 'On the whole I think the evidence was admissible on the ground that it showed part of a scheme to defraud persons by the pretence of carrying on an honest and *bona fide* busines Th

were the advertisement

L J ch.

L v *Russell* n

ben ipany acted

fraudulently in obtaining a premium from A through their agent B who had represented to A that if he would insure B would procure him a loan from the company The fact that premium had previously been obtained by the same agent and by and benefit of the company, fraudulent character of D 94=40 L J C P 663, *Tay* § 340 *Phip Ev* 142 Upon a trial of an indictment for obtaining money by false pretences by means of worthless cheques evidence of other and similar frauds by the prisoner given in support of an indictment for a similar fraud upon another person in respect of which the prisoner was acquitted, is relevant and admissible as illustrating a course of conduct showing an intention to defraud *Reg* v *Ollis* 69 L J Q B 918=(1900) 2 Q B

Upon a t of fraud evidence

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Rex v

Wyatt, 73 L J K B 15=(1904) 1 K B 188, see also *R* v *Walford*, 71 J P 215, *R* v *Mean*, 69 J P 27 So evidence of the same kind of practice is admissible when only separated by a short interval of time as tending to negative accident or mistake, and to show system *Rex* v *Walford*, 71 J P 215 Upon the trial of an indictment charging the prisoner with having obtained goods and credit by false pretences, and also with having obtained credit by fraud other than false pretences evidence cannot be admitted that on two previous occasions the prisoner had obtained goods from other persons on credit by false pretences in as much as it does not tend to show that he is guilty of the offences charged in the indictment *Rex* v *Fisher*, 79 L J K B 187=(1910) 1 K B 149 On a trial of an indictment for endeavouring to obtain an advance from a

pawn-broker upon a ring by the false pretence that it was a diamond ring **S. 1** evidence was admitted that two days before the transaction in question the prisoner had obtained an advance from a pawn broker upon a chain which he represented to be a gold chain, but which was not so, and had endeavoured to obtain from other paw
be a diamond ring, but
Francis, 43 L J M
411=30 L J M C 11,
pretences He was employed by his master to take order but not to receive moneys, and he was proved to have obtained the specific sum from B by representing that he was authorised by his master to receive it Evidence of his having, within a week afterwards, obtained another sum from another person by a similar false pretence, such obtaining not being mentioned in the indictment in any way, is not admissible for the purpose of proving the intent when he committed the acts charged in the indictment *Reg* v *Holt*, 30 L J M C 11 In *R* v *Stinson*, 12 Cox C C
an order to be given
of quality, for a book s
orders of the same sort was received to show the intent

In *R* v *Saunders*, 1 Q B D 19, which was a case of false pretences by advertising to give work and requesting money by mail to pay for the preliminary instructions, the fact that a number of other persons have been induced afterwards by him in the same way to forward money on such advertisements was received to show intent In *R* v *Smith*, 20 Cox C C. 804, the charge was
The accused
Evidence of his
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evidence to show his intention By the first transaction the prisoner obtained a

sactions and we are of opinion that neither of those cases was of a similar character, and that the evidence of those two transactions was not admissible '

Setting fire to b
Gray, 4 F & F 1102
in a note to this case
this case in *R* v *Stan*
doubts its authority The

fire had originated near the kitchen, where the accused stayed as servant
prosecutor's shop

evidence is not without precedent and authority, moreover, ... *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been sawn almost in two by some unknown person. This was proved to show that some one entertained a design against the life of *Sir Theodosius* for he was accustomed to stand on the tree while engaged in fishing, and the natural presumption was that whoever cut the tree did so with the design of precipitating the deceased into the water. Those facts were given in evidence on the trial of *Donellan for murdering Sir Theodosius afterwards* and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death. Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial. See also the observation of *Telang J* in *R* v *Jagiram*, 16 B 414, where he expresses the view that such evidence is admissible. Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown; thus the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it. On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having ... had been on ... a gun in ... It was ... rick on the previous day it ... mitting the evidence said ... of another felony that circumstance ... evidence is otherwise receivable. In many cases it is an important question whether a thing was done accidentally or wilfully. It is only by the conduct of the prisoner that ... But on ... act of the ... d ... ally ... could be ... v ... turn the ... fact was admitted that on the same day articles were found on fire at four ... in different parts of the house.

Embezzlement. Illustration (*b*) is founded on *R* v *Richardson* 2 F & F 343. On an indictment for embezzlement where the entries of sums were correct but the castings up incorrect, a series of similar errors in casting up ... both ... ferred were ... accidental ... 378, ... 514. In ... only with a view ... crime ... another ... prisoner but only by way ... guilty did the act of which he was accused but innocently and without ... ed in him for the ... not with a ... it was done ... & ... 79, ... n ... ope ... embezzlement ... y perhaps that the entry was a mistake; but the probability of such mistakes would be

greately lessened by proof that other false entries of the same kind had been made at or about the same time by the same person" S.

Extortion and black-mail In *R* v *Cooper*, 3 Cox Cr 547, the prisoner was charged for feloniously accusing H C S of an assault with intent to commit an unnatural offence, with the intent to extort money *Cresswell J held* that evidence of declarations of the prisoner on a former occasion, on coming off guard, that he had obtained money from a gentleman by threatening to take him to the guard house, and accuse him of an unnatural crime, was admissible The evidence was not offered by way of proving simply that the prisoner had been guilty of the same crime before The question was whether on this occasion he did an act with the design of effecting a certain object One step in the proof was to shew that he would be likely to know that a certain result would follow, and if it could be proved (result would be produced, it w contemplated it 2 Russ C argument as here applied, seemed somewhat forced, such knowledge being a matter of common understanding and not needing to be proved It is clear, however, that the intent argument is entirely applicable; *i e* the doing of similar acts at other times tends to negative the supposition that the demand on the occasion charged was made in good faith (for example with a genuine desire to obtain compensation for supposed injuries) This use of such evidence is generally sanctioned *Vide Barnard's Trial* 19 How St Tr 8?5, *R* v *Winkworth* 4 C & P 444, *R* v *Egerton* R & R 375, *R* v *Boyle & Merchant* (1914) 3 K B 339, but see *R* v *McDonnell*, 5 Cox Cr 153, *Wigmore* § 352, 2 Russ Cr 1168

Rape ... -priety of admitting ... be some limitation ... There ... nly purpose is to ... assault on another ... general desire to satisfy the test that is involved in this crime and no particular woman is essential for this *Wigmore* § 357 But mere liberties taken by the defendant with the ... *R* v *Lloyd* 7 C & P 318 ... ommit rape the evidence of ... ht and having intercourse ... *Rodley's Case* 9 Cr App ... ten years th... which the pr... of subsequer... sible *Wiles J* said I shall allow all the matters to be proved in order to show the real nature of the case It has repeatedly appeared to me in cases of this sort that a man by a threat of violence deters the child from complaining and thus acquires a species of influence over her by terror, which enables him to repeat the offence on subsequent occasions, and this seems to me to give a continuity to the transaction which makes such an evidence properly admissible"

Abortion In *R* v *Dale*, where an instrument or appliance is used which might be properly employed for innocent treatment of woman *Charles J* ruled ... ipted to cause ... guilty intent ... er a drug with

... uments upon ... s admitted on another woman three months later, to procure a miscarriage ... It should only ... facts "Such evidence should be admitted with great caution ... be admitted where the prisoner has suggested that the administration of the drug or the use of the instrument was legitimate or accidental on his part, and not where the defence is a denial of the act itself And proof of only one other similar case, without any special connection with the case charged in the

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evidence is not without precedent and authority, moreover, for on the trial of *Donellan* for the murder of *Sir Theodosius Broughton* by administering him some poison, evidence was given that a certain tree which hung over a deep and dangerous brook near a spot where *Sir Theodosius* was accustomed to fish had been sawn almost in two by
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the trial of *Donellan* for murdering *Sir Theodosius* afterwards, and were received though quite unconnected with the prisoner, in order to show that some one entertained a design on his life and that the probability was that he had not come to a natural death Of course the accused's doing the act complained of must be proved by other evidence direct or circumstantial See also the observation of *Telang J* in *R* v *Tajiram*, 16 B 414, where he expresses the view that such evidence is admissible Here the principle recognised is that the recurrence of a similar fire may tend decidedly to negative innocent intent even though the author of the other fires is not shown, thus, the prosecution having negatived innocent intent in the present fire by whomsoever set, the accused may be shown to have kindled it On an indictment for setting fire to a rick of straw it appeared that the rick had been set on fire by the prisoner having fired a gun very near it It was proposed to prove that the rick had been on fire ... gun in
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that circumstance does not render it inadmissible, if the evidence is otherwise admissible. In many cases it is an important question whether a thing was done both ... is a civil case in which the issue arises and the foregoing principles ... But on applicable In almost everyone of the foregoing classes of cases there are instances of the application of the principles in civil litigation The salient feature is the nature of the issue and the kind of evidence offered, not the penal or the civil form of the proceeding *Wigmore* § 371

Copyright infringement In Copyright infringement cases the defence often is that the passage in question is taken from a common source but the hypothesis of other sources is not available as an explanation where the same errors—either of fact or of ... plaintiff's books Accordingly the r
evidencing to a high degr
by B from A *Spiers* v *I*
is unsatisfactory on the question whether the defendant did use the p
work ... k that are contained
in the ... hich the ordinary and
famili ... used the plaintiff's

extensive copying of other passages not otherwise shown to have been copied. This argument is always open, and its use has constantly been sanctioned, there can merely be a question of its weight in a given instance *Longman* v *Winchester*, 16 Ves Jr 269, *Hauman* v *Tegg*, 2 Russ 385, *Lewis* v *Fullarton* 2 Beav 6, *Wigmore* § 373

ILLUSTRATIVE CASES

Illustrative cases—Admissible evidence Accused were prosecuted for misappropriation by defalcation of accounts made in 1925 and 1926, evidence was adduced by the prosecution of similar acts done by the accused before 19.. *Held* that the evidence was admissible under section 15 to rebut the probable pl

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Aika reported this matter to the municipality The accused was charged under s 77 (2) of the Bombay District Municipal Act for introducing the said goods within the Octroi limits without paying dues Held that the evidence that the accused had been connected with similar cases as the one under charge was admissible to show his knowledge and intention Emperor v Hayiram Talpi A I R 1926 Bom 231 – 50 B 171 – 28 Bom L R 115 The accused on the 7th June 1909 administered dhatura poison to A and B both of whom died from the effects thereof and on the following day administered the same poison to C and D The former got ill and recovered but the latter died Held that the events which occurred or were said to have occurred on the 7th and 8th of June were relevant to the case of charge of murder of D as forming incidents in series of similar transactions occurring about the same time and tending to show system and intention and to negative the idea of accident Lala v Emperor 9 Ind Cas 731 = 32 P L R 1911 see also Kasiram v Emperor 73 Ind Cas 262 = 6 N L J 141 Where in a trial upon a charge under section 399 of the Penal Code the accused pleaded that their presence at a particular spot, armed and in compa

plea, a

which

which in themselves

that one or more me

the accused were parts of a series of similar acts committed by him or in which he was concerned at or about the time in question Evidence of such other acts whether previous or subsequent to the frauds charged against the accused is relevant for the purpose of showing whether or not the intention of the accused was honest or fraudulent Evidence merely to prove that the accused person's character is such that he is likely to commit the act with which he is charged is not admissible Girdhari v Emperor 26 P W R 1910 Cr – 6 Ind Cas 964 In a charge against the accused of cheating by falsely representing that he was the Dewan of an estate and could procure employment for the complainant and thereby obtaining a

dishonest

9 C L J

C 402

Illustrative Cases—Inadmissible evidence Where the accused was charged under s 409 Penal Code for embezzling three specific sums Held that evidence of collateral offences in respect of other sums was not admissible Pritchard v Emperor, A I R 1928 Lah 382

substance and in fact by proving its truth not the truth of other acts and occasions having nothing to do with the act in question, unless it is intended to show

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but had falsely charged and got convicted some other persons as murderers *Gangaram* v *Imperator*, 62 Ind Cas 54[r]=22 Bom L R 1274=22 Cr L J 529 Two persons A and B were tried on 21st July 1919 for the offence of murdering D a woman of the town, on the 10th December 1914 of conspiring to rob her, of theft of property from her house and for abetment of murder and theft At the trial the prosecution wanted to adduce evidence (1) of the association of the two accused, (2) of their association in cases spoken of by other women of the town in connection with the charges of theft which they made against them and generally of a series of incidents from 1914 to 1918 that they used to go about together under different names A taking B with him as his *durwan* and introducing himself as a Babu to rich prostitutes of the town and this being followed by their subsequent disappearance and discovery of loss of money and ornaments *Held* that the evidence was not admissible *Emperor* v *Panchu Das*, 24 C W N 501 (F B) In a case under s 420 of the I P Code the question of the guilt or innocence of the accused depends upon proof of actual facts and not upon the state of the accused's mind Therefore evidence as to any previous act of fraud (committed by the accused) is not admissible under any provision of the law *Gokul* v *Emperor* 29 C W N 483-26 Cr L J 906=86 Ind Cas 970 (But see *Emperor* v *Debendra* 36 C 573=13 C W N 923=9 C L J 610, and other English cases) In a trial of an accused person for giving false evidence in respect of an alleged forged document "to judge of the intention and knowledge of the scribe and attesting witness by the opinion of other Judges on other documents written and attested by these persons in suits and proceedings to which they were not parties is a use of section 15 of the Evidence Act which was never intended by the Legislature *Gunwant* v *Emperor*, 38 Ind Cas 723=13 N L R 35

16 When there is a question whether a particular act was done, the existence of any course of business, according to which it naturally would have been done, is a relevant fact.

Existence of course of business when relevant

Illustrations

(a) The question is, whether a particular letter was despatched

The facts that it was the ordinary course of business for all letters put in a certain place to be carried to the post, and that that particular letter was put in that place are relevant

(b) The question is, whether a particular letter reached A The facts that it was posted in due course, and was not returned through the Dead Letter Office, are relevant

Principle Of the probative value of a person's habit or custom as showing the doing on a specific occasion of the act which is the subject of the habit or custom, there can be no doubt Every day's experience and reasoning make it clear enough *Wigmore* § 92 Customs may, like any other facts or circumstances, be shown where their existence will increase or diminish the probabilities of an act having been done or not done, which act is the subject of contest. *Per Flanlam J* in *Walker* v *Barron* 6 Minn 508, 518, (*Am*) In another American case *Sargent C J* said, 'It would seem to be axiomatic that a man is likely to do or not to do a thing or to do it or not to do it, in a particular way, according as he is in the habit of doing or not doing it' *State* v *Rail Road*, 52 N H 528, 532 *In Mathias* v *O Neal*, 94 Mo 527=6 S. W. 25, (*Am*) evidence of a book keeper's custom of handing over collateral notes, to the teller, as indicating that it was done in this instance was admitted The reason of such admission is thus given by *Sherwood J* It is really immaterial, under the authorities cited, whether he was able to do more than to verify his entries and prove his invariable custom These things being proven the pre[illegible] therefrom that the usual course of business [illegible] instance Every one is presumed to govern [illegible] and consequently that he acquits himself of h[illegible] ev[illegible] it is established that one act is usual [illegible] of another, the latter

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being proved, the former will be presumed, for this is in accord with the experience of common life It is simply the process of ascertaining one fact

deference of
1e notion of
rregularity of
action, there can be no doubt that this fixed sequence of acts tends to show the occurrence of a given instance But in the ordinary affairs of life a habit or

circumstances of each case *Wigmore* § 92

Scope of the section In commercial transactions the *presumption is that* the usual course of business was followed by the parties thereto *Henry* v *Bensita*, 37 Fla 609 "Where the maxim of *omnia praesumuntur rite et solemniter esse acta* (all acts are presumed to have been done rightly and regularly)

a taken place on Tuesday
sday, is strong evidence
C & B 973 So to prove
any general course of

business or office, whether
have been done there b
will be followed in a partic
public offices, e g the Post Office *Phip Ev* 102 There is no presumption that

is based on this case
particular letter In
must go further Som
the table in the countin
poster, and he had said

of a
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Loan Assn, 47 Pac Rep 13 (Wash) it was said "The evidence that a letter left at the *Tremont House* and addressed to B actually reached him is of the same

by post, it is *prima facie* proof, until the contrary be proved that the party to whom it is addressed received it in due course See also *Sandersons* v *Judge*, 2 H Bl 509, *Woodcock*
Shipley v *Todhunter*, 7 C & P 680 (686), *Ab*
Lowen, 1 Camp 175,
Plumer's case, R &
L Cas 351, *Household*
Fire v *Grant*, 48 L J
J K B 177, *Huston*
v *Levering*, 6 Wheat 102
that it was delivered to a cler
letter, took all letters deliv

Camp 193, *Trotter* v *Mc Lean*, 13 Ch D 571; *Phip Ev.* 3rd Ed 97, *Skilbeck* v *Garbett*, 7 Q B 846, *Ward* v. *Londesborough*, 12 C B 252; *Percy Super Club* v *Whyte*, 106 L T Jo 308 But without any proof that it was properly addressed, stamped and posted, there is no presumption of its receipt *Best* v *German Ins Co* 68 Mo (Aps) 520 (U S) So where a person refuses a registered letter or notice he cannot afterwards plead ignorance of its content *Latif* .. v *Piari Mohan*, 16 W R 223, *Jogendra* v *Dwarka Nath*, 15 C 681 *Girish Chandra* v *Keshore Mohan* 23 C W N 319; *Louis Dreyfus* v *Human Das*, 50 Ind Cas 191

A telegram properly addressed is delivered to a telegraph company The presumption is that it was received by the addressee *Oregan Steam Co* v *Otis* 100 N Y 446, *Gerding* v *Harlem* 21 N Y S 630 To prove that a certain indorsement had been made on a (lost) licence entered at the custom house it is relevant to show that the course of the office was, not to permit the entry without such licence *Butler* v *Allnut*, 1 Stark 222, *Pupson* 3rd Ed 97, *Taylor* § 183 A; *Van Omeron* v *Dowick*, 3 Camp 44, *Waddington* v *Roberts* L R 3 B 579

In an action against the acceptor of several bills of exchange which were made in November, 1850, and became due on February 5th and March 12 1851 the defence is that they were accepted by the defendant while an infant It is proved that the defendant came of age on March 11th, 1851 The presumption is that all the bills were accepted before he attained his majority *Roberts* v *Bethel*, 12 C B 779 The reason of this presumption is thus expressed by *Jervis C J* "There is nothing on the face of the bill to show when it was accepted Why then is it that this evidence is sufficient? It is because it must be presumed that the bill has been accepted during its currency, and consequently before the commencement of the action, because it is the usual course of business to present bills for acceptance before the time for the payment of them has run out and within a usual time after the drawing of them I decide this case upon this broad ground, that we are to presume, unless the contrary is shown that a bill of exchange has been accepted not on the day of its date, but within a reasonable time afterwards It is not to be presumed that the acceptance took place after the maturity of the bill That view disposes of the case as to all these bills—as to five of them because they became due before the defendant attained the age of twenty one as to the sixth, because a reasonable time for its acceptance had elapsed before the defendant's majority" "And *Maule J* added "Although it is not usual to accept a bill on the day on which it is drawn, it is usual to do so at some early opportunity after that day Therefore, where the drawer and acceptor are both living in the same town the presumption is that the bill is accepted shortly—within a few days—after it is drawn, it being manifestly the interest of the drawer to have a negotiable instrument made perfect as early as conveniently may be The date of the bill, therefore though not evidence of the very date of the acceptance is reasonable evidence of the acceptance having taken place within a short time after that day regard being had to the distance the bill will have to travel from the one party to the other Upon the same principle upon which that presumption rests it may be presumed in this case that the bills were accepted before they arrived at maturity" It is alleged in a bill for relief that a certain agreement was in writing The presumption is that it was signed *Best* v *Hobson*, 1 Sm & Stu 553

Course of business meaning of—The expression "course of business" must mean the ordinary course of a professional avocation or mercantile transactions or trade *Ningana* v *Bharmappa*, 23 B 63 (66) The usage in a private house, however methodical, cannot carry the same weight as the ordinary routine of office *Ibid*

Regularity in Public Office It has already been stated that the fixed method and systematic operation of the Government postal service have long been conceded to be evidence of the due delivery to the addressee of letters notices etc duly placed for that purpose in the custody of the authorities The only requisites to raise a presumption of due delivery are that the letters are duly stamped addressed and posted *Walter* v *Haynes*, Ry & M. 149, *Skilbeck* v *Garbett*, 7 Q B 846, *Percy Super Club* v *Whyte*, 106 L T Jo 308 This presumption is so universally conceded that the strength of the evidence of this kind has been even raised to a presumption (*vide* illustration (*f*) to section 114, *Medapatti's Case*,

S. 1

10 L J Ch 39) Of course it is always open to show circumstances which would rebut that pre ... a requirement ... nt, has given ri ... he strength of this presumption is so great that provisions have been made in certain Statutes for the ...

... which ... expor ... ouch, 2 Camp 44 Taylor § 180 An envelope produced bears the post mark and date of a certain off ... letter was mailed and sent at this time ... 15 Conn 206 (Am), see also Fletche ... Collin 7 M & W 515, R v Johnson, 7 ... hangels v Thompson 2 Camp 623 R v Plumer R & R 264, Butler v Mountgarret, 6 Ir L R N S 77 Taylor, § 179

Course of business in private firms The habit of a private house doing systematically a similar service being equally relevant the principle has been applied to an exp ... s transmission of telegra ... g v Scott 112 Cal 369 (... plication of the ... se of business to ... of a notice or ... usiness followed ... urther evidence whereas in the case of private business the system alleged to have been followed must be proved like all other facts The course of business of an individual firm may under the circumstances not appear sufficiently fixed to be of that probative ... a) was ... placing ... posting ... 61, the ... house to send circulars on every change in the firm was admitted In the course of his judgment Lord Abinger said That does not show that a particular person received a circular except upon the presumption that a jury may make upon the general habit In Woodcock v Houldsworth, 16 M & W 124 Parke B said He has ... certainty or ... 1 H I C ... Babcock 3 ... accustomed ... case of injury at a high ... evidence was admitted ... highway Hall v Bro ... preceding month was admitted to show a specific sale In admitting such evidence the Court observed Where there is a question whether a particular act was done, the existence of any course of business according to which it ... Shaw, 28 H N 73 ... a receipt for rice was ... was admitted ... Ishe ...

In Lucas v Novosilieski 1 ... offered ... of the def ... workmen ... Birch 3 Camp 10 which was ... ed over to his employer ... over the receipts daily was ... have been consigned to ...

S In *Vaughan* v *R Co* 63 N C 11 (1m) where the question wa whether goods have been receive l by a railway company evidence of its customer to weigh and mark goods was received a showing that they woul l have been found marked In *Hine* v *Promeroy* 21 Vict 211, 214 (1m) the que tion was whether an attorney had directed a process server to take N and M as receiptor Evidence of h uniform cour e of busines to give no instructions as to receiptors wa admitted as corroborative In *Howard* v *Sherwood*, L R C P 148, the question was whether the d fen lant s servant who ha l warrant d a horse sold to the plaintiff had authority to lo o Io how probable non-exi tence of such authority, evidence was offere l of a usage among hor e dealers not to warrant und r the circumstances

Refusal of a registered letter The use of a po t mark in evidence involve at least three distinct princi les In the first place, the question arises, may it be inferre l from the pre ence of what purports to be the official mark that the mark wa genuinely affixe l by an officer of the Post Office concerned? This is a question of authentication and may be answered in the affirmative, though there ha l been some fluctua ion of judicial opinion on the subject. In the second place the question ari es whether if the post mark be taken as genuine it is evidence that the cover bearing it was stamped on the date the impression bears The answer is in the affirmative In the third place, the post mark i evidence that the place or office mentioned therein was actually the place where it was affixe l Th mere fact of a notice bearing a certain date is no proof that it must have been po te l on th same date An article po ted and delivered may be inferred to have been delivered in due course of post *Gobin la* v *Dwarka* 20 C L J 455 = 19 C W N 489

Telegrams—Times of delivery The documents kept by the Po t Office showing the terms of receipt and delivery of telegrams are not admi tible in evidence as public records in as much as they are kept only a short time are not accessible t the public are not the result of public enquiry and do not deal with a general public right but are merely kept for the purpose of regulat re the pas an l the work of the post office servants *Heyne* v *Fichel*, 110 L T 264 = 30 T L R 190

ILLUSTRATIVE CASES

Admissible evidence—Illustrative cases A notice was sent by the plaintiff firm to the lefendant firm by registere l letter which was posted to the correct address of the latter, but was returne l with the word refused' endorsed upon it by the Post Office *Held* that under section 16 of the Evidence Act the presumption was that the letter h d re ched the *Kothi* of the defendant firm *Louis Dreyfus* & *Co* v *Chimand* is 50 Ind Cas 195 = 2 S L R 14? see also *Jogendra* v *Dwarka Nath* 15 C 681 *Balram* v *Bali Pannabai* 11 Ind Cas 351 — 13 Bom L R 328 The que tion is whether a letter was sent on a given day The po t mark upon it is deemed to be a relevant fact. *R* v *Canning* 19 St 370 *Gobinda* v *Dwarka*, 20 C L J 455 = 15 C W N 489 = 26 Ind Cas 967 In a suit by one banking firm against another firm for the recovery of the balance of an account between them it was held with reference to the keeping of the firm s account books and their perio lical transaction to the principals that it was reasonable to presume that that which was the ordinary course was pursued in that case *Dwarka* v *Baboo* 6 M I A 88 (90)

Inadmissible evidence—Illustrative cases An endor ement on the cover of a registere l letter that the cover had been tendered to the addressee on a certain day and had been refused by him, is at best a record of the statement by the peon and would be admissible either under section 32(2) or section 33 of the Indian Evidence Act, if the requirements of those sections are fulfilled If it be not admissible under sections 32(2) or section 33, in th c the events rec ted therein by the peon must be proved by calling him a *Gorinda* v *Dwarka* 26 Ind Cas 962 = 20 C L J 455 = 19 C N To prove the posting of a letter written by A to B —evidence by on ks that he habitually copie l all letters written by A then return seal, and that afterwards, wl en A gave back, the witne s or anot l them, *held* in the absence of e d to show that A had retur letter to the clerk this is no ting *Toosey* v *Wills* Ft 97 So also wh erk, proved that the letter

the S.
ands
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ceive it (*Re London etc*
e also *Ram Dass* v *Official*
posted to H at Bristol,
" is insufficient *Walter* v.
Haynes, Ry & M 149

ADMISSIONS.

17. An admission is a statement, oral or documentary, which suggests any inference as to any fact in issue or relevant fact, and which is made by any of the persons, and under the circumstances, hereinafter mentioned.

Admission defined

Admissions, meaning of An admission is defined by *Stephen* to be "a statement, oral or written suggesting an inference as to any fact in issue or relevant or deemed to be relevant to any such fact, made by or on behalf of any party to any proceeding" Step Dig Ev Art 15 "An admission" says

relevant fact made by a party to an action, or by a person deemed to be entitled to make such statement on his behalf An admission is a relevant fact as against such party" *Solicitors' Journal* Vol XX p 894 The definition given in the section eliminates the implied statement as to the existence of a probative or *res gestae* fact arising from the acts of a party, "admission by conduct" so called In English law the term admission, means any statement made out of the witness box by a party to the proceedings, whether *civil* or *criminal*, or by some person whose statements are binding on the party against his own interest. *Wills' Ev 2nd Ed* 149 "In our law" says *Mr Taylor* "the term admission is usually
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admission been tendered in evidence to establish the charge or any misapplication of the money by the noble defendant, it would clearly have been rejected The law was thus stated by *Lord Chancellor Erskine* "This first step in the proof" (namely, the r

in now on trial may be affected
it by the pay-master would in itself
convict him of a crime" *Lord*
, *Taylor* § 721 citing *verbatim from*

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made by an accused person is an admission only, or amounts to a confession, a reference must always be made to the terms of the statement. Every statement, oral or documentary which suggests any inference as to any fact in issue or relevant fact, made by an accused person is an admission under ss 17 and of the Evidence Act, which is provable against the person making it, unl

6 In *Vaughan* v *R Co* 63 N C 11 (fm) where the question was whether goods have been received by a railway company evidence of its customer to weigh and mark goods was received as showing that they would have been found marked In *Hone* v *Promeroy*, 24 Vict 211, 214 (fm) the question was whether an attorney had directed a process server to take N and M as receiptors Evidence of his uniform course of business to give no instructions as to receiptors was admitted as corroborative In *Howard* v *Sherwood*, L R C P 148, the question was whether the defendant's servant who had warranted a horse sold to the plaintiff had authority to do so To show probable non existence of such authority evidence was offered of a usage among horse dealers not to warrant under the circumstances

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that the plaintiff ha l said to the defendant "You always promised to marry one, and you don t keep your word' held that this was "material evidence *Stein* (1877) 2 C P D 265 (270), I

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Admissions are statements, i e assertions in words and it is their inconsistency with the party's other assertions that discredits the latter Hence conduct cannot

has been suggested that an an infirmative fact diminish present evidence, should he take the stand as a witness and to his position in the case if he does not So far as the suggestion emphasizes the truth that there is, in principle, no distinction between statements of a party and the other facts introduced by him to the tribunal, it seems sound and helpful An admission however presents no necessary implication of inconsistency or other injury to the cause of the declarant Undoubtedly former statements are frequently used to show inconsistency between the declarant s present position and one which he occupied at an earlier time Such statements are not strictly speaking admissions A former admission may be used to prove the truth of the fact stated Such a statement may be used as a mere verbal act to show inconsistency But such is not the only use which may be made of it It may be used as true or as contradictory Either party, in proving his own case may, instead of introducing evidence to a certain effect show that his adversary has unequivocally

Chamberlayne's Ev § 1250 (N)

There are two kinds of admissions according is first formal admission, which may be an l may be made by a party in his pleading, by stipulation or by statement in open Court Secondly there is a statement of a fact at some previous time inconsistent with a fact to be established at the time of trial a statement which, when of evidence direct or circumstantial, an inference or inferences as to the trut

§ 64 As to the formal admissions little nee l be said They simply fix the relation between the parties as to the facts They help to define the issues concerning which evidence is to be heard but they are not in themselves evidence As to the second kind of admissions, those which may be called evidential

lusiveness, that tantial evidence, case they are likely in themselves to carry conviction *McKelvey's Ev* § 66

Direct Admissions Direct and express admissions are practically the same They are direct statements of main facts in issue As regards this kind of admissions there is nothing to be said, except that to be available, the statements which constitute the admissions must be proved in the ordinary way The form in which the admission is made is immaterial so that it amounts to a statement of fact, and is not a statement of opinion or promise *Driscol* v *City of Taunton*, 160 Mass 486 (*Am*) The proof of a direct admission is usually by the introduction of testimony, oral or written, as to the language constituting the admission The statement constituting the admission may be oral or written Its form is immaterial So, also, are the place and circumstances attending its making It may have been heard by witness over a telephone *Wolfe* v *Railway Co* 97 Mo 473=10 Am St Rept 331 (*Am*)

7 t a lmissions are in the natur of c reum indirect admission may be found in the

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evidence that X any more sheep

the direct admission is the statement which by omission becomes evidence of some fact When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence According to Bo "implied admissions are those which result from some act or failure to act of the party *Bouvier's Law Dict* They may also arise from acquiescence An implied admission is proved by introducing testimony as to such conduct as shows as acknowledgment of the truth of the fact in question There are various cases of implied admissions strictly speaking In most instances when actions or conduct are introduced as bearing upon the truth of a fact it is as circumstantial proof of the fact itself and not as proof of an admission The term "implied admission is often really the *element of admission is frequen* A inissions by conduct are not inclu a lm s sion is a statement oral or documentary An admission by conduct has been dealt with in section 8 Such admissions are admissible not as an exception to the Hearsay rule They are usually original circumstantial evidence of the fact to which they relate *Best Ev* 1 8 citing *West Chester v McClure*, 67 Pa St 311 (*Am*) Presumpti has been seen in th nature of admission actions and repres evidence of fact" which treats as admissions by a party, statements made in his presence and denied by him provided the circumstances were such as to make a denial necessary *Ibid*

es admiss ons may one made on the r is offered in evide Court for the purp n the course of judicial proceedings in a case of record or in connection with judic classed as extra judicial *Chamberlayne's Ev* § 1233

party says rue may be 664 see e says Mr consists of nfess on or admits to be taken hose who ons n y or linary n oath is administered to a witness in order to impose an additional obligation on his conscience and so to add weight to his testimony, and he is cross examined to

ascerta ... ans of knowledge as well as his intention to speak the truth **S.**
But w ... onfesses a crime, there is little
occasi ... human conduct are sufficient
warrants
are generall
declaration
nothing m
made against the person s interest The simple and broad rule for receiving them is, in the language of *Chief Baron Pollock* that if a party has chosen to talk about a particular matter his statement is evidence against himself (*Darby* v *Ouseley* 1 H & N 1) and the theory of their use seems to be that they are to a party what prior inconsistent statements are to a witness viz, a means of discrediting ... other times made a
smaller or ... the stand that he saw
the plaintiff ... r statement of his that
he saw fift

hat
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to get a prior statement of the party against the statement now advanced by him in his pleadings or through his witnesses, and thus discredit the present claim by its inconsistency with the former one *Greenl Ev* § 169, see also *Phip Ev* p 221

' *Mr Gilson* while allowing that admissions are evidence of the truth of the fact admitted, considers them not to be exceptions to the Hearsay rule, because *the inference of truth involved is independant of the personal credibility of the* declarant, but regards them rather as relevant facts, evidentiary of the facts

Ev 221

' But even from this point of view, they have two kinds of probative value
"(a) One is the ordinary value of
value depending on his capacity to
bias or interest or lack of it, and so on
satisfied, but that is a rule of law

robative value as those of any

hey have additionally the same
Just as a witness testimony is discredited when it appears that on another occasion he has made a statement inconsistent with that testimony so also the party opponent is discredited when it appears that on some other occasion he has made a statement inconsistent with his present claim against him The witness speaks in *Court through his* ... upon which the

his part includes the whole
testimony relied on by him T
party opponent may be used against him as an admission, provided it exhibits

Indirect Admissions Indirect admissions are in the nature of circumstantial evidence An illustration of indirect admission may be found in the following A sues X for damage done by X's cattle on A's crop and for the purpose of showing an admission on the part of X that his cattle had caused the damage A offers the testimony of a witness to the effect that X had told witness that he had offered A a certain amount of money to cover the damage From

damages although not equivalent to a direct admission that the cattle caused damage, is nevertheless very nearly so An illustration of an admission somewhat further removed in character from a direct admission is found in a case where A sued X for the loss of his sheep charging that X's dog had killed them and as a proof of the fact of the ... evidence that X had killed his ... any more sheep *Anderson* v *H*... the direct admission is the statement which by omission becomes evidence of some fact When we go still further from the direct admission, we finally reach the field of admissions by conduct, or in what are frequently spoken of as implied admissions, and which are simply circumstantial evidence According to *Bouvier* "implied admissions are those which result from some act, or failure to act of the party *Bouvier's Law Dict* They may also arise from acquiescence An implied admission is proved by introducing testimony as to such conduct as shows an acknowledgment of the truth of the fact in question There are various cases of implied admissions strictly speaking In most instances when actions or conduct are introduced as bearing upon the truth of a fact, it is as circumstantial proof of the fact itself, and not as proof of an admission The term "implied admission" is often ... really the element of admission is frequen... Admissions by conduct are not include... sion is a statement oral or docu... has been dealt with in section 8 Such admi... Hearsay rule They are usually ... which they relate *Best Ev* 158 ci...

... man's ... cas... ne rule which treats as admissions by a party, statements made in his presence and not denied by him, provided the circumstances were such as to make a denial necessary *Ibid*

... poses admissions may ... be made on the r... offered in evidence An extra judicial adm... for the purposes of the case on trial in ... the course of judicial proceedings in a c... ugh of record or in connection with ... erly classed as extra judicial *Chamberlayne's Ev* § 1255

Principle on which admissions are received "Whatever a party says is evidence against himself ... what a party himself admits to be true may be presumed to be so" *Per Parke B* in *Slatterie* v *Pooley*, 6 M & W 664, see also *R* v *Turner*, (1910) 1 K B 346 "Another class of evidence" says Mr ... consists of ... confession or ... admits to ... be taken ...

administered to a witness in order to impose an additional obligation ... conscience, and so to add weight to his testimony, and he is cross examined to

...bative value, but not being ...ility explains the proposi- ...equivalent to affirmative ...pt to stress this distinction ...asis of any instruction on

... statements of ... been stated that ... on principle not ... tements used as admissions do happen to state facts against interest, admissions are generally treated as obnoxious to the Hearsay rule, and are only allowed as exceptions to it (*Vide Taylor Ev* § 723) In such cases, as the statements are against the interest of the persons making it, their trustworthiness is supposed to be guaranteed That this is a mere local error of theory and in no sense represents a rule anywhere obtaining may

...

been enforced for the use of a party's admissions (*Vide Woolway* v *Rowe*, 1 A & E. ... ion of that ... e they are ... which is not ... it satisfies

...

must contravene, to the knowledge ... interest In case of an admission, ... obative weight, it would not, however, be essential to admissibility To secure that, it is sufficient that the statement should be the voluntary act of the party and cover a probative or *res gestae* fact. (*c*) The declaration against interest is secondary ... the declarant is shown to be dead, absent from ... some other sufficient cause. The admission, o... and is competent though the declarant be prese... (*d*) An admission may be made at any time The declaration against interests is incompetent if made *post litem motam*. (*e*) The admissibility of a declaration against interest is governed by the rules of sound reason That of admission is determined largely by procedure. *Chamberlayne's Ev.* § 1235.

Admissions whether subject to rules of testimonial qualifications such as personal knowledge, infancy, Opinion Rule etc.—"A primary use and ... claim by ... l whether ... timony of ... that gives ... a party's ... v although ... r 277; R. ... r. Taylor "whether oral or in writing, contain matters stated as mere hearsay, it may be questionable whether such matters can be received in evidence. If rendered against the party making the statement, they are clearly entitled to very little weight, and unless connected with a further admission, that he believes them to be true, they would seem, like hearsay declarations against interest, to be inadmissible *Lord Trimblestown* v. *Kemmis* 9 Cl & F. in 780, 784" *Taylor* § 737 *Mr. Justice Chamber*, in the case of an

answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible for' he added, 'it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some parts of it be only stated from the hearsay and belief *Greenl, Ev* § 203, *Taylor Ev* § 737 But *Stephens J* in *Kitchen* v *Robbins*, 29 Ga 713 766 (*Am*) expressed contrary view where he said 'Are no admissions good against a party unless founded on his personal knowledge? The admissions would not be made except on evidence which satisfies the party who is making them against his own interest that they are true, and that is evidence to the [illegible] do not come in on the ground that the party making [illegible] wledge but upon the ground that a party [illegible] ll unless they are true The fact that he makes them against his [illegible] reasonably explained only on the supposition that he is constrained to do so by the force of evidence The source from which a knowledge of fact is derived, is a circumstance for the jury to consider in estimating the value of the evidence but that is all" *See also Wigmore* § 1053, *Bishop of Meath* v *Marquis of Winchester*, 3 Bing N C 183 (203) *Bulley* v *Bulley* L R Ch App 739 (747) But such considerations do not apply when a party wants to use testimonially his own admission in his own favour under clauses 1 to 3 of section 21 In such cases personal knowledge seems to be necessary In *R* v *Walker* 1 Cox 97 where the question was whether, A was an infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay See *P* v *Symonds* 4 Cox 277 *Re Peston* 53 L T 706 As to statements by an agent containing hearsay or opinions *vide The Actaeon* 1 Speaks E & A 780, *The Solway* 10 P D 137 cited in *Phip Ev* 196 216

On the same principle the admission of an infant party would be receivable *O Neill* v *Read* 7 Ir L R 434 See also *Dharamaji Vaman* v *Gurrar Shrinivas* 10 B H C R 311 Theoretically, the admissions of a lunatic party would stand upon the same footing, although the weight to be given them might be nil *Wigmore* § 1053 The opinion rule also does not limit the use of a party's admission *Doe* v *Stell*, 3 Camp 115 But a bare statement that a party is informed without addition of his belief in the information will not amount to an admission *Trimblestown* v *Kemmis* 9 C & P 780, *Roe* v *Ferrars* 2 B & P 584, *Phip Ev* 196

[illegible] —Admission is usually applied [illegible] cases which do not involve [illegible] ally used in Criminal Court as [illegible] in a criminal case may make admissions, just as a pa[illegible] [illegible] ying things inconsistent with the present points of proof Admissions in the sense of inconsistencies are not peculiar to civil cases *Greenl Ev 170* Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all *Per Rankin C J* in *Ambar Ali* v *Emperor* A I R 1929 Cal 539 'A confession says *Prof Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some fact essential to the charge" *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig* [illegible] [illegible] ements and a 'species of admissions [illegible] 3 (259) =A I R 1927 Cal 17 [illegible] of admissions, it has not bee[illegible] [illegible] Bahu *Lal* 6 A 509 (539) But [illegible] on in the Evidence Act *R* v [illegible] *Jagrup* 7 A 646, *Empress* v *Pandhari* [illegible] 589, *Empress* v *Dabee Pershad* 6 C [illegible] fession is only an

7. answer in Chancery, read against the party in a subsequent suit at law, thought that portion of it not admissible 'for" he added, 'it appears to me, that where one party reads a part of the answer of the other party in evidence, he makes the whole admissible only so far as to waive any objection to the competency of the testimony of the party making the answer, and that he does not thereby admit as evidence all the facts which may happen to have been stated by way of hearsay only in the course of the answer to a bill filed for a discovery But where the answer is offered as the admission of the party against whom it is read, it seems reasonable that the whole admission should be read to the jury, for the purpose of showing under what impressions that admission was made though some, parts of it be only stated from the hearsay and belief *Greenl, Ev* § 203, *Taylor Ev* § 737 But *Stephens J* in *Kitchen* v *Robbins*, 29 Ga 713 766 (*Am*) expressed contrary view where he said 'Are no admissions good *against a party unless founded on his personal* knowledge? The admissions would not be r ... which satisfies the party who is making them against his ... evidence to the jury that they are true ... them is speaking from his personal knowledge, ... will not make admissions against himself unless they are true. ... makes them against his interest can be reasonably explained only on the supposition that he is constrained to do so by the force of evidence The source from which a knowledge of fact is derived, is a circumstance for the jury to consider, in estimating the value of the e... but that is all' *See also Wigmore* § 1053, *Bishop of Meath* v *Mar* ... N C 183 (203) *Bulley* v *Bulley* L R Ch App ... not apply when a party wants to use ... under clauses 1 to 3 of section 21 In such cases person... necessary In *R* v *Walker* 1 Cox 99 where the question was whether, ... infant at the time of making a certain contract, an admission by A that R was so was received against him although founded on hearsay See *R* v *Symonds*, 4 Cox 277 *Re Peston* 53 L T 706 As to statements by an agent containing hearsay or opinions, *vide The Actaeon* 1 Speaks E & A 780, *The Solway*, 10 P D 137 cited in *Phip Ev* 196, 216

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Admission and confession distinguished—Admission is usually applied to a civil transaction and to those matters in criminal cases which do not involve a criminal intent While the term confession is usually used in Criminal Court as denoting an acknowledgment of guilt The accused in a criminal case may make admissions, just as a party in a civil case, i e by saying things inconsistent with the present points of proof Admissions in the sense of inconsistencies are not peculiar to civil cases *Greenl Ev* 170 Admission in a civil suit that a document is genuine cannot in a forgery case be regarded as confession at all, *Per Rankin C J* in *Ambar Ali* v *Emperor* A I R 1929 Cal 539 "A confession" says *Prof Wigmore* "is one species of admissions namely, an admission consisting of a direct assertion, by the accused in a criminal case, of the main fact charged against him or of some f... essential to the charge" *Wigmore* § 1050, *Taylor Ev* § 724, *Steph Dig Art* ... species of 'statements' and a 'species of admissions'" ... I 253 (259) =A I R 1927 Cal 17 The ... gory of admissions, it has not been defined in the ... *R* v *Babu Lal*, 6 A 509 (539) But there is a distinction between an admission ... nfession in the Evidence Act *R* v *Macdonald* 10 B L R App 21 *Empress* v *Jagrup* 7 A 646, *Empress* v *Pandharinath*, 6 B 34, *Empress* v *Meher Ali*, 15 C 589, *Empress* v *Dabee Pershed*, 6 C 530 *Empress* v *Nilmadhab*, 15 C 595 A confession is only an

v *Ram Chunder*, 2 C. 341 (350) P C ; *Sree Dharam* v *Narain*, 41 M L J 525. So also an admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all *Motakhor Mulla* v *Mulji Haridas*, 19 C W N 713=39 B 399; *Sanatan Ali* v *Chand Bibee*, 9 W R 100, *Sheik Surfaraz* v *Seikh Dhunno*, 16 W. R. 257, *Jaloonath* v *Burda Kant*, 22 W R 220, *Niamutoolah Khalum* v *Hummu Ali*, 22 W R 519, *Paltu Behvree* v *Wilson*, 9 W. R 190, *Baikanthanath* v *Chandra Mohan*, 1 B L R (A C) 133; *Ishan* v *Haran* 11 W R. 525; *Tanree* v *Dearks* 15 W R 421, *Shaikh Shurfuraz* v *Shaikh Dhunoo* 16 W. R 257

"The chief difficulty in the application of the rule lies in determining when statements are so connected together as to form a whole within the meaning of the rule The matter does not depend on the statements being contained in one single document but on the nature and degree of connection between them; and it may be said that the rule embraces these two propositions: () When a party's admission is so qualified or explained by some other statement made by him at the same time that the latter is in fairness necessary to present the true intention and meaning of the former, then the party is entitled, if his admission is given in evidence against him to have the qualifying statement put in evidence as a part of the admission ( ) when the admission of a party refers expressly or by implication to some antecedent statement either of himself or his opponent or of any third person then the statement so incorporated or referred to forms a part of the whole admission within the meaning of the rule" *Wills Ev 2nd Ed* 159 This rule will not generally justify a party in insisting that separate letters or documents, or even distinct and separate parts of entries in one entire collection of documents, as letter-books court rolls, etc, shall all be put in evidence by the party producing and reading any one of them unless they are on the face of them connected with the one alrady in evidence, and they seem to be the rule whether the documents be of a public or private nature Where any such separate entries or distinct parts are favourable to the opposite party, he must put them in evidence as part of his own case Thus, though the defendant is entitled to have the whole of a particular entry in an account book read, he cannot insist upon reading distinct entries in different parts of the book unconnected with the one read *Catt* v *Howard*, 3 Stark 6; *Remmie* v *Hall*, *Mannings*, N P Q Index 376; *Roscœ* N P 180 Where the plaintiff called for the production of the defendant's letter book, and read letter of the defendant from it, the defendant was not therefore permitted to read from it on his own behalf, other letters not referred to in the letters read by the plaintiff *Sturge* v *Buchanan*, 16 Ad & E 598, *Roscœ* N P 180 So also the answers of a party given in the course of conversation should not be proved against him without also giving in evidence the questions which drew forth these answers *Pennel* v *Myer* 2 Moo. & Rob 95, *Wills' Ev 2nd Ed* 160 But *this rule is not applicable* where the party gives in evidence a statement made bp his opponent in the course of conversation on some previous occasion *Prince* v *Samo*, 7 A & E 634, *Will's Ev 2nd Ed* Distinct matters, however, though relevant to the case cannot be introduced *Davies* v *Morgan* 1 Cr & J 587

This general principle, however, raises two sorts of questions, first whether the party offering the admissions must, as a preliminary condition put in the whole, or other parts, of the conversation, document, etc, secondly, whether the party whose statement it is may afterwards, by way of explanation, put in the remainder, or other parts, or other statements It does not seem to be generally required that the party offering the admission must put in at the same time any more than that which he desire to use—whether a speech or conversation (*Eaton's Trial*, 23 How St Tr 1030, *R* v *Connell* 5 State Tr N S I, 196) or a writing (*Cornish's Trial*, 11 How St Tr 423, *Sizer* v *Burt*, 4 Den, 426); and so far as the portion of it allowed to be given is concerned, the substance is sufficient, without precise words, whether of an oral statement or a lost writing (*R* v *Edmonds*, 1 State Tr N S 785, 820, *Hardy's Trial*, 24 How St Tr 681) For the party against whom the admission is offered, he may, by way of explanation, put in only so much as is necessary for his purpose *i e*, to qualify or explain the portion put in against him *Price* v *Samon* 7 A & E 627 *Greenl Ev* § 201 But the Court may believe a part and disregard the rest The rule only requires that what is in favour of the party making the admission should be favourably and liberally considered and weighed with other evidence Of

17. *Abbott C J* in *Queen's Case*, 2 B & B 287 ; *Thomson* v *Austen*, 2 Dowl & R 361 ; *Fletcher* v *Froggatt*, 2 C & P 566 , *Cobbet* v *Grey*, 4 Ex R 729 So tis a well settled rule of law that the whole of a declaration or statement contains

Bholanath v *Emperor* 26 A L J 1331=A I R 1929 All 1 In the United States the r is thus laid down by *Mr Justice Field* in *Mutual Benefit Life Ins Co* v *Newton*, 22

which a party relies is to be taken as an en

with the qualifications which limit, modify

This rule, together with its reason, is thus stated by *Mr Best* "Where part of a document or statement is used as self harming evidence against a party, he has a right to have the whole of it laid before the jury who may then consider and attach what weight they see fit to any self serving statements it contains" *Best* § 520 , see also *Bermon* v *Woodbridge*, 2 Doug 788, *per Lord Mansfield* . *Smith* v *Blondey*, Ry & M 259 , *Cray* v *Halls*, cited in Ry & M 259 , *White* v *Wyer*, 11 Mass 6 10 , see also *Sooltan* v *Chand Bibee*, 9 W R 130 , *Rajah Nilmoney* v *Ramanugarh* 7 W R 29 , *Sheikh Shurfuraz* v *Shaikh Dhunoo*, 16 W R 257 , *Lallah Probhoo* v *Sheonath* W R 1864 Act X 27 , *Ishan* v *Haran* 11 W R 525 , *Bala Jwala Das* v *Pirant Das*, 34 C W N

Ind Cas 746 P C "Where, taking the

the party completely avoided,

agent before delivering it jotted down upon it with his master's authority a note of counter-claim which the defendant had against the plaintiffs, and the plaintiffs sought to give the account alone in evidence as an admission of the amount of their claim it was held by *Lord Mansfield C J*, that the whole document must be taken together, since the defendant's statement was made "all in one breath and he never admitted the account as distinct and independent from the counter-claim *Randle* v *Blackburn* 5 Taunt 245 So also if part of a letter is offered as evidence, other explanatory parts may be offered , if a party is sought to be charged or affected by a letter received in evidence, his reply thereto is admissible , and where one party uses as evidence a number of a series of the letters written by the other party, the letter may introduce the entire series *Burr Jones* § 294 It is a well established principle of law that if a plaintiff wishes to rest his case solely on the admission of the defendant, he must accept the admission as a whole It is not open to him to pick out some part of it as may be favourable to him and neglect the rest *Syed Ismail* v *Hamidi Begum*, 2 Pat L T 658 If a Court takes into consideration an admission in a deed to bind a party the whole of the statement therein should be consindered Admissions must be taken

ugh a party cannot by admission make

ight to be used as an admission against him,

taken even if they operate in his favour

, 41 M L J 525=(1921) M.W N 639 An admission must be deemed to be exhaustive It must be read as it stands and it is not permissible to take one part of an admission and reject another part. *Bat Bahadur* v *Raghubir*, 49 A 707=25 A L J 572=100 Ind Cas 1037=A I R. 1927 All 385 Ordinarily a Court is bound to take the whole of an admission together, but a Court is not bound to give equal weight to all portions of it, *Radha* v *Chunder Monee*, 9 W R 290 , see also *Govind Pershad* v *Chatturbhuj*, 60 Ind Cas 138 , *Shib Nath* v *Annada Prasad* 11 C L J 382 , *Konwaer Doorga nath*

v *Ram Chunder*, 2 C 341 (350) P C, *Sree Dhiram v Narain*, 41 M L J 525. So also an admission in pleading cannot be dissected, and if it is made subject to a condition, it must either be accepted subject to that condition or not accepted at all *Mutathoy Mulla v Mulji Haridas*, 19 C W N 713=39 B 399; *Sanatan Ali v Chini Bibee* 9 W R 100, *Sheik Surfaraz v Seikh Dhunno*, 16 W R 257, *Jadoonath v Burdu Kant*, 22 W R 220, *Niamutoolah Khalim v Hanmu Ali* 22 W R 519, *Paltu Behara v Watson*, 9 W R 190, *Baikantha-nath v Chandra Mohan*, 1 B L R (A C) 133, *Ishan v Haran* 11 W R 52, *Tarree v Daarks* 15 W R 421, *Shaikh Shurfuraz v Shaikh Dhunoo* 16 W R 257

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S. 17. course, the one offering admissions of this character is not bound by the statements which are favourable to the declarant He may rebut such statements or show them to be erroneous *Burr Jones Ev* § 293

Probative force In treating of the probative force of admissions, it is necessary constantly to distinguish between those which are judicial and those which are extra judicial The judicial admission is pre eminently a matter of procedure, under the direct control of the adn
and the force and effect of an admission of this
are determined by procedural rules on the other
judicial admission is determined by logic It is not assigned or established by a rule of procedure Substantive Law goes no further in this connection than to determine that the existence of statement will be received as evidence of the fact asserted in it, either in an action at law or in a suit in equity It will not, in this connection be deemed material whether the extra judicial admissions were made before or after the suit is brought. They are rated entirely at their logical value *Chamberlayne's Evidence* § 1236

Judicial and extra judicial contrasted in probative force Logic may have its appropriate effect in case of the judicial admission when used as *probatio* rather than as *levamen probationis* When used as proof, the more deliberate and, as it is said, solemn nature of the circumstances under which the judicial admission is made may confer upon it a probative force not characteristic of the average extra judicial admission The former having been made in solemn form, in a court of justice constituting the foundation, or a part of the procedure in causes pending, in which the rights of the parties are stated, and by which the courts are called upon to pass judgment, and upon which they must solemnly decree the rights of the parties, are for those reasons entitled to greater consideration and weight than when casually or incautiously made, at a time and place, and under circumstances not calculated or intended to affect the rights or interests of others and, perhaps unmindful of all the facts and circumstances of the case *Chamberlayne's Ev* § 1236

Value and weight of extra judical admissions With all verbal admissions it may be observed that they ought to ... *Lang* 3 A & E 702, *Curtis* v *Hunt*, 1 C ...
as it does in the mere reception of ora ...
tion and mistake; the party himself eit ...
clearly expressed his own meaning or ...
It frequently happens, also, that the wit ...
of the expressions really used, gives an effect to the statement completely at variance with what the party actually did say *Greenl Ev* § 200, *Taylor* § 861, *Earle* v *Pickeen*, 5 C & P 542 (n), *Rex* v *Simons*, 6 C & P 540, *Williams* v *Williams*, 1 Hogg Consist 304, *Hope* v *Evans*, 1 Sm & M Ch 195 "In a somewhat extended experience of jury trials, we have been compelled to the conclusion that the most unreliable of all evidence is that of the oral admissions of the party, and especially where they purport to have been made during the pendency of the action or after the parties were in a state of controversy It is not uncommon for different witnesses of the same conversation to give precisely opposite accounts of it, and in some instances it will appear that the witnesses depose to the statements of one party as coming from the other, and it is not very uncommon to find witnesses of the best intentions repeating the declarations of the party in his own favour as the fullest admissions of the utter falsity of his claim When we reflect upon the inaccuracy of many witnesses in their original comprehension of a conversation, their extreme liability to mingle subsequent facts and occurrences with the original transactions and the impossibility of recollecting the precise terms used by the party or of translating them by exact equivalents, we must conclude there is no substantial reliance upon this class of testimony The fact, too, that in the final trial of open question of fact, both ... haracter, in the majority of ... ly to distrust its reliability." *Greenleaf's Evidence*, 12th Ed ... 1 A 74 (79) Oral admissions ... testifying to the admission is careless in his mode of testifying, that he does not accurately remember the statements; that he is willing to misconstrue them, or that the declarant was

misinformed, or did not clearly express his own meaning. *A fortiori*, where the admission is that of one deceased, the caution should deepen into suspicion, for reasons that are obvious and without corroboration is of little value *Burr Jones Ev* § 295 In *Kenney* v *Murray*, 170 Mo 674 (*Am*), the Court said: "Evidence of such declarations, it is true, is admissible, but it never amounts to direct S.

be contradicted are in

Hence it is obvious:

upon the circumstances under which they were made as shown by the testimony, as well as upon the degree of accuracy and truthfulness with which they are related, *Burr Jones* § 295 But where the admission is deliberately made and precisely identified, the evidence it affords is often of the most satisfactory nature *Rigg* v *Curgenven*, 2 Wills, 395, *Greenl Ev* § 200, *Taylor* § 861 In such a case it is neither weak evidence, nor does it require corroboration. *Commonwealth* v. *Galligan*, 113 Mass 202 On the other hand, when admissions are so proved, they may have great inherent force as evidence. *Dicher* v *Fitchburg*, 22 Wis. 675

So what ... ed to be true and ... *im* v. *Mahomed*, 65 I ... Ind Cas. 876, *Vir Singh* v *Harnam*, 1 Lah. 137=56 Ind Cas 191 A statement in a document should *prima facie* be accepted as true as against the explanation unless it can be shown by independent evidence to be false *Irshad* v *Mt Kariman*, 22 C W. N 530=28 C L J 173=20 Bom L R 790 P. C Unless admissions are contractual or unless they constitute an estoppel they are not conclusive, but are open to rebuttal or explanation, or they

were mistaken or were untrue, and is not estopped or concluded by them unless ... lter his condition In such a case ... as against that person (and those ... it as to third parties he is not ... *ord Denman* approved and adopt- ... *an, in re Simpson*, 2 Ch D 72 at p 89 and *Trinidad Ashphalte Company* v *Coryat*, (1896) A C 587 in effect illustrate the same principle *Rani* v *Chaudhuri*, 11 C W N 321 P C, *Girish* v *Issai*, 1 ...
Burr Jones § ...
each particul ... party may confess ... ow mistake (*Bright* ... that the response ... a jocular manner; ... of the facts *Burr*

Jones § 296; *Sibu* v *Netai*, 9 I ... representation of fact is of ... admission is a female *Talok* *Bindoo* 20 W R 112, *Lodh S* ... admission can be withdrawn ... *Muhammad* v *Husain* 26 C 8 ... *Pershad* v *Thakur Dei*, 23 In Cas 26=A I R 1928 Lab 72

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y were m d . Lalla Prosad ... witness admits that a statement previously made by him relative to a certain fact is a false statement, he ought to be asked in re examination by the prosecution or at any rate by the Court why he made a statement which was false The mere fact that the

sumption Junnu Lal v Mt ..., 75 Ind Ca 1027 = 1924 Lah they are found untrue B.

... Emperor, 7 Lah L J 209 = 6 Lah 437 = 90 Ind Cas 145 = A I R 1925 Lah 418 The admission of a wife in a divorce proceeding unsupported by corroborative proof should be received with utmost circumspection and caution L v L 108 Ind Cas 416 (F B), Over v Over, 91 Ind Cas 20 = 49 B 368 If a person admits a right, it is necessary implication that he also admits the legal consequences of that right Guru Charan v Surendra Kri... 22 Ind Cas 690 = 19 C W N 263 Where a guardian is appointed to a minor for purposes of litigation in order to look after his interest any admission made by the minor against his own interest is waste paper Patiali v Dharmraji, 32 Ind Cas 368 A statement made by a person in his own favour is inadmissible in evidence on his behalf Nagina Singh v Sunder 24 P W R 1916 = 33 Ind Cas 487 Title by law cannot pass by admission when the statute requires a deed Mathura v Ramkuar, 23 C W N 370 = 43 C 790 = 23 C L J 26 = 35 Ind Ca 305, see also Jadunath v Pujlal 4 C L J 22 16 C L J 436; 22 C L J 380, Ladia v Dina 6 L W 147 = (1917) M W N 583 = 41 Ind Cas 505, Balkishen v Narain, 13 N L R 121, Ajudhia v Jagannath, 20 O C 18 = 38 Ind Cas 605 A purchaser cannot be prejudiced by admission subsequently made to the debtor whose property has been sold

does not bind the parties Beni v Dudha Nath 27 C 156 P C = 26 I A ... 4 C W N 274, Dwar v Fati 26 C 250 = 3 C W N 222

Admissions are always evidence against the party who makes them but

marriage is a question merely of adjective ... Act Its probative value must depend on the ... Fatima v Mt Jiandi, A I R 1927 Sindh 2(?) ... account book is not sufficient to charge a person with liability still with regard to admissions i e entries, against the producer's own pecuniary interest the law dispenses with all proof save that the book has been kept by or under the authority of the producer Mathal... v ... 96 Ind Cas 429 = A I R 1926 Mad 955

sibility' *Best Ev* § 528. So it is, in general, immaterial to whom the admission was made. Thus, an admission made to a stranger is as receivable as one made to an opponent; though it is said that an admission, in order to support an account stated, must have been made to the creditor or his agent, and an acknowledgment of debt made to a third person, neither agent nor privy to the creditor, will not defeat the Statute of limitations, since it is not evidence of a promise of which he could not take advantage (P . . . . .

v . . . . *ten*, 17 W R 990; *Whart* § *1128*); as are admissions made to himself in mere soliloquy (*R* v *Simmons*, 6 C. & P 540)' *Phip Ev* . . . *nd Ed* p. *191*.

. . . general, im- . . . *Ev 7th Ed* . . . of evidence, between direct admissions and those which are incidental or made in some other connection or involved in the admission of some other fact *Greenl Ev* § 141. Frequently letters of a party are competent purely as admissions, and because some inference may be drawn from them unfavourable to the claim or defence of the writer *Burr Jones Ev* § *269*, *Sital Prosad* v *Monohur*, 23 W. R 325. When letters of a party are in the nature of admissions, they are competent although written long before or after the commencement of the litigation, even though written to persons not parties to the litigation, on proof of their genuineness *Burr Jones Ev* § *269*. When letters are otherwise competent as admissions, they need not be signed or actually written by the party, provided they are sent by his direction *Bartlett* v *Mayo*, 33 Me 518. Except for the purpose of readier reference, there would be no need to deal with other written admissions. The law is practically the same with regard to them as to letters, and is, that . . . roperly be used in . . . matter may relate . . . memoranda written or authorized by a party may be offered as admissions against him like his oral statements. If self disserving in their character, it is immaterial in what form the document may appear *Burr Jones* § *270*. This rule has been applied to receipts (*Harrison* v *Remington Paper Co*, 140 Fed 385, (*Am*), *Gadhan* . . . 27], bills of ladin . . . *acomber* v *Paul* . . . Ill 585, (*Am*)], . . . person making the admission (*Edward* v *City of Watertown*, 59 Hun, 620), maps (*Bridgman* v *Jennings* 1 Ld *Raym* 734 *Hurronath* v *Preonath* 7 W R 249, *Craven* . . . T R 48, *Doe* v . . . rsh (Ky) 238], cer . . . *Van Voy*, 31 N J . . . Ald 606, *Graves*, . . . s in the books o . . . an action against its president (*. . ney* v *Chadsey* 7 R I 224) *Burr Jones Ev* § 270 . . . admissions, evidence against . . . 41) and, of course, equally . . . make them, against the party . . . *eynolds* 121 Cal 74 (Am).

of the defendant that the particulars contained in the entry were true *Narain Coomar* v *Ramkrishna*, 5 C 864=6 C L R 286. Similarly partnership books

S. 17.

' of the several partners and to be
tri
al

troversies between the members of the firm
each member Daji Ibaji v Govind 10 Bom
be with knowledge and consent, although the presumption may be rebutted by proof that the partner or ... against whom the entries are offered, have not had access to the boc
incorrect Burn Jones
the defendant under ss
Goundan 17 M 134
in affidavits or in answers to interrogatories in the same or former proce
are also competent Phip Ev 4th Ed p 21, Fleet v Perrins L R 3 Q B 536, Harish v Prosunno 22 W R 303; Legal Remembrancer v Motilal Ghose 41 C 173, Bhugwant v Lall Jha, Marsh 48 Evidence given in Extradition proceedings by an accused person on his own behalf is an admission and is prima facie admissible No particular formality is required to let it in as an
, 11? Ind Cas 50=29 Cr L J 962=1929 Sind 15
judicial admissions those contained in pleadings
by reason not only of these presumedly solemn
contents, but with regard to the time at which they were made, their use in the action of which they form the basis, their use dehors that action the change in
lment, in brief by the circumstances
making them includ

speak only from information and belie
in their pleadings, these pleadings may be offered in evid
parties as admissions of the facts so alleged Girish Chander v Shama Charn 15 W R 437 Austen v Feist 2 Gr App 91 (Am) A statement in the plaint unchallenged and made by the putnidar after his interest had been transferred is in no way binding upon the transferee Jalhnomull v Saroda Prosad 7 C L J 604 The plaintiff may also rely upon the defendant's admission in the Pleadings or Affidavits or Answers to Interrogatories Tarinee v Dwarka Nath 15 W R 451, Re Cohen (1924) 2 Ch 515 But admissions contained in a statement filed in plaintiff's name are not proof that they have been made by her Asmutloo v Alla Hafiz, 25 W R 125
to as evidence in plaintiff's favour
Radha Churn v Chunder Monee 9 W
W R 519 But it does not bind his co defendant Lochman v
395=A W N 1884, 136, Azizullah Khan v Ahmad, 7 A 353=A W N 1885, 54 So also admissions may be made in verified petitions Girish v Shama 15 W R 437, Mohun v Chutto, 21 W R 24, Gour v Mohesh 14 W R 481
An admission in a Akhoy, 19 C L J
1 An admission in Bibee v Achmat
14 B L R App J 186; Re Hoyle
(1893) 1 Ch 84

Conditions of Admissibility—Statement must be one of fact The extra judicial statement of ... of admissibility
as would apply to the
of all essential that
be one of fact i e affir
While inference is
admission may be a psychological one, e g, belief *Ibid*

Admission on Matter of Law Parties cannot, by their admissions of law ... the court to adopt their view

from certain facts, his 'opinion' as it is frequently called are not ... for an admission except in cases where the declarant might, if present as a witness, have testified to the same inference or conclusion *Chamberlayne's Ev*

§ 1293 An admission on . . . S.
v *Sunder*, A I R 192 . I . . . .
Nag 313; *R* v *Furse*, 8 I . . .
13 Cox 178; *R* v *Lan*. . . .
I. R 1928 Lah 770 = 113 Ind Cas 93; A I R. 1927 Lah 284; A I R 1926 Oudh 311, 92 Ind Cas 732 An erroneous admission by a counsel on a point of law is of no effect and does not preclude the party from claiming his legal rights in the App llat . . . 27 C L J 147 = 15 Ind Cas 953; . . . 309 = I A Sup 17; *Beni Parshad* . . . *Johnston*, 12 Heisk (59 Ten) 155, . . . *h* v *Asraf* Ali, 7 C L J 152; *Ramsaran* v *Khakhan*, 11 C W N 310 So also an erroneous admission of the pleader of a party on a point of law cannot bind the party. *Dewr Bux* v *Fatik* 3 C W N 222, see also *Krishna* v *Rajmal*, 24 B 360, *Narayan* v *Venkata*, 28 B 408

Statements made under constraint or duress In regard to admissions made under circumstances of constraint, a distinction is taken between civil and criminal cases, and it has been considered, that on the trial of civil actions, admissions are receivable in evidence, provided the compulsion under which they are given is legal and the party was not imposed upon or under duress Thus, in the trial of *Collector* v *Lord Keith*, 1 Esp 212, the testimony of the defendant, . . . t . . in which he admitted the

. . .

vindicate his conduct. In that case *Le Blanc J*, remarked that the manner in . . . atter of observation to the jury, . . . a issue, he was bound to receive . . . *las* v *Ramlabanya*, 106 P R . . . s extends also to answers volun- . . . improperly asked, and to which the witness might successfully have objected So the voluntary answers of a bankrupt before the commissioners are evidence in a subsequent action against the party himself, . . . he whole examination was . . . obtained by imposition . . . led by *Lord Ellenborough* . . . When such admissions . . . *Stockfield* v *De Castel*, 4 Camp 11, *Robson* v *Alexander*, 1 M & P 448

Erroneous admission An erroneous admission may be withdrawn *Sita Ram* v *Pir Baksh*, A I. R 1931 Lah 6, see also A I R 1923 All 575, A I R 1928 Lah 726; 77 Ind Cas 875, 65 Ind Cas 368

Statement must be certain An admission must be certain, and consistent, definite and clearly proved It must, in addition, be couched in language reasonably capable, without forced or strained construction, to bear the interpretation placed on it While conjectural and suppositious statements are excluded absolute precision is not demanded in case of a declaration offered as an admission A statement is not inadmissible because of a possibility of ambiguity *Chamberlayne's Ev* 1295 A vague admission is not enough 83 Ind. Cas 904 = 21 A L J 869

Statement must be voluntary It is further required not only that the statement should be one of fact but that it should have been voluntarily made by the declarant. A distinction should, upon principle, be drawn between the admission obtained by the use of *duress*, where the will is overpowered or controlled and . . .

. . .

the bare custody of an officer is not sufficient to exclude a statement otherwise

voluntary Nor is it ground for rejecting the statement as not voluntary that it was given by the declarant as a witness in response to compulsory proce[ss] whether in Court, before arbitrators, commissioners in bankruptcy, or in ot[her] judicial proceeding As the only important matter is the fact that the declara[tion] was made by a party, the circumstances under which he made it are apt to be regarded as unimportant provided he knew what he was doing and desired to do it *Chamberlayne's Ev* § 1294

Admission— by party to proceeding or his agent;

18. Statements made by a party to the proceeding, or by an agent to any such party, whom the Court regards, under the circumstances of the case as expressly or impliedly authorized by him to make them, are admissions

by suitor in representative character,

Statements made by parties to suits suing or sued in a representative character, are not admissions unless they were made while the party making them held that character

Statements made by—

by party interested in subject matter;

(1) persons who have any proprietary or pecuniary interest in the subject-matter of the proceeding, and who make the statement in their character of persons so interested, or

by person from whom interest derived

(2) persons from whom the parties to the suit have derived their interest in the subject-matter of the suit,

are admissions, if they are made during the continuance of the interest of the persons making the statements

Princi[illegible]

[illegible]sibility attaches primarily if not exclusive[illegible] [illegible]logical reasoning as a condition of ad[illegible] fact stated, in case of a probative fact, to [illegible] *gestae* fact, to its constituent quality in rela[illegible] rather than to the relation existing bet[illegible] which it directly alleges A statement competent as an admission may in many cases, be one in an independently relevant rather than an assert[ive] capacity Thus the offer of one accused of crime to plead guilty under c[erta]in conditions while receivable against the declarant, is plainly not within the operation of the Hearsay rule Admission of this type are perhaps more

pre-eminently those of cor
however, being made by th
partly as belonging to
person making them and
they are offered in evi
persons not parties to the su
admissibility of statements
against the interest of the part

utterance, when made thus represents the party's own belief (*Vide* s *20*). By adoption, the party may assent to a statement already uttered by another person, which thus becomes effectively the party's own admission. By privity of interest and by agency the party's rights may in the substantive law be affected by the acts of another person and thus the other person's admissions may equally be available evidentially. *Wigmore* § *1070*. In order that an admission may be
who made it had one interest
of section 18 of the Evidence Act
711; see also *Ma Sheue* v *Maun*
r, 5 W R 268

A general Procedural Requirement From the historical point of view, it seems clear that the practical development of the subject of admissions was materially affected by the existence of procedural rules now practically obsolete. These forbade a party to call his antagonist as a witness and thus confined a proponent, as to facts within the latter's knowledge, to such statements as he may have made with regard to them. But an earlier and more potent formative influence, whether the admissions were judicial or extra-judicial, has been that
emands good faith
the Courts should
It is prescribed for
if he does not like
his story. It punishes a party who attempts to deceive the Court by false
The same principle
en to talk about a
Darbey v *Ouseley*,
is held to explain
any statements he may have made in the matter. *Chamberlayne's Ev* § 1234

Scope of the section This section deals with admissions in general. The

R 434 "No
to a suit. The
th admissions
made by nominal parties, e g, consignees suing in the name of consignor. When the Court considers the admission of such a party fraudulent, it should be rejected at once. See notes to *Bannerman* v *Radenius*, 2 Sm L C 363" *Nort Ev* 143. Admissions under this section are only evidence against the persons

S. 18. making them. Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in which either both were *jointly* interested or one was *derivatively* interested through the other; and a mere community of interest will not be sufficient. Thus, where two persons were in partnership and an action

made by the

only of co part

Rawstorne v *Gandell*, 15 M & W 304 *Phillips* v *Elaget*, 11 M & W 84 So,

of the contractors, nothing

bind the personal represen

23; *Fordham* v *Wallis* 10

& R 75), nor can the admissions of the executor bind the survivor *Slater* v *Lawson*, 4 B & Ad 396, *Hathaway* v *Haskel*, 9 Pick 24 Neither will the admissions of one tenant in common is receivable against his co tenant, though both are parties on the same side of the suit *Dan* v *Brown*, 4 Cowen 483 (492), *Taylor* § 751

Where a party sues in a representative capacity—i e as trustee executor, administra

and only a

statements

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ad litem begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all *Wigmore* § 107, citing *Pindell* v *Rubenstein*, 115 Atl 859; *Stevens* v *Continental*, 97 N W 862; *Chapman* v *R Co*, 12 Utah 8 (*Am*)

Where procedure still

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admissible evidence

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real party in legal interest, and his statements cannot be received as admissions of the corporation *Wigmore* § 107 But a contrary view was early taken in England for parish inhabitants *R* v *Hardwicke*, 11 East 578, 585

Sub clause (2) is the converse of sub-clause (1) There the statement was that of the representative; here it is of the party through whom he derives his right to sue Thus, if an executor were to sue for a debt, the declaration of his testator that the debt was paid would be evidence against him *Pocock* v *Billings*, 1 R & M 227; *Smith* v *Smith*, 3 Bing N. C 29 In the same way the declaration of the ancestor respecting his title to the land held by him is evidence against the heir (*Doe* v *Pettet*, 5 B & A 229), and the declarations of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as *heriot* *Ivat* v *Finch*, 1 Taunt, 141, *Nort Ev* 148

Statements made by a party to the [illegible] been stated

affect by his admissions the substantial rights of one for whom he is acting in

other words, in all these relations, substantive interest rather than form of record S. is regarded as the determing factor One who is to receive the fruits of successful litigation procedure holds responsible for his statements in connection with its subjects matter. *Chamberlayne's Ev* § 1311 In the Court of Chancery, in England, evidences are not received of admissions or declarations of the parties, which are

For example, the admis-

ule. In an action by A against X for prosecuting a suit contrary to an agreement, to prove the prosecution of the suit by X, A offered admissions by X of the obtaining of the judgment and issue of execution. They were objected to, on the ground that they were not the best evidence, and that a certified copy of the judgment should be produced

In *Smith* v

case of the admis

grounds. The a l

belongs to parol evidence from other sources A party's own statements and admissions are, in all cases, admissible in evidence against him, though such statements and admissions may involve what must necessarily be contained in some writing, deed or record Thus the statements of a party that certain land

y deed

as the

admits

against himself may reasonably be taken to be true" A statement made by defendant in another suit may be used as an admission within the meaning of this section *Hirsh* v *Prosunno*, 22 W R 303; *Mohun* v *Chutloo*, 21 W R. 34; *Lala* v *Digambar*, 22 W R 304 N; *Forbes* v *Mahomed*, 11 W R. 28 P C,

its simplest form when the admissions are made by one who is a party to the record and who is also a real party

if he made the statement When the statement proven is between the parties to the transaction it has always been the rule that one party could prove the

of the action Such admissions, *prima facie*, conclusive against the party who

S. 18. making them Under section 32, *infra*, the admissions there enumerated are evidence against all the world

In order to render the admission of one person receivable in evidence against another, it must relate to some matter in
ed or one was *derivatively* interested throug
of interest will not be sufficient Thus,
and an action was brought against them as partners of a vessel, and admission made by the one, as to a matter which was not a subject of co-partnership but

admission as executor or the like would not be receivable against them as
in his personal capacity A guardian so far as his powers place him in a representative capacity is subject to the same rules, but the function of a guardian *ad litem* begins to end with the litigation, and consequently his extra judicial admissions are not receivable at all *Wigmore* § 107, citing *Pendell* v *Rubens tem*, 115 Atl 859; *Stevens* v *Continental*, 97 N W 862; *Chapman* v *R. Co*, 12 Utah 8 (*Am*)

Where procedure still permits a
the real and beneficial party in

not that the declarations of the real
Smith v *Lyon*, 3 Camp 455, which
of the owner on a charter contract *Ellenborough L C J* said "Although
action is in the name of the master it is brought for the benefit of the owner, I am therefore of opinion that anything said by the latter is admissible evidence for the defendant." A share holder of a company is not the real party in legal interest, and his statements cannot be received as admissions of the corpor
rly taken in England for
85
There the statement was
that of the representative, here it is of the party through whom he derives his right to sue Thus, if an executor were to sue for a debt, the declaration of
inst him *Pocock*
29 In the same
land held by him
the declarations
of the former owner of goods that he had sold them have been admitted against the lord of the manor who claimed them as *heriot* *Ivat* v *Finch*, 1 Taunt, 141, *Nort Ev* 148

has no beneficial interest in the issue of the litigation will not be per in affect by his admissions the substantial rights of one for whom he is acting

the previous assignment. *Henderson* v. *Wild*, 2 Camp. 651". *Greenl Ev* § 172. S.
"In modern prac
has no interest in
prejudice of
Bumstead, 99
party is even l
L. C. & D Ry
Payne v. *Rogers*, Doug 107.

A nominal party may be affected by the admission of a real party, who though not named in the record, has a substantial interest in the result. *Falcon* v *Famous Players*, (1926) 2 K B 171; *Bell* v. *Ansly*, 16 East 113.

Tacit
Seipsi law
to do in
8 Scott. N. R 830 'The agency may be constituted by an express limited authority to make such contract or a larger authority to make all falling within the class or description to which it belongs, or a general authority to make any;
a relation existed between the parties
r instance, that of partners, by which
y law the agent of the other for all
rticular partnership whether general
or special, or usually belonging to it, or the relation of husband and wife, in
considers the husband to make his

agency may be created

is *quoad hoc*, precisely the same as a real authority given by the defendant to the agent This representation may be made directly to the plaintiff, or made publicly, so that it may be inferred to have reached him and may be made by

of the case, as expressly or impliedly authorised by him to make them' leave it open to the Courts to deal with each case that arises upon its own merits *Field* p. 44

The principal constitutes the agent his representative, in the transaction of certain business, whatever therefore, the agent does, in the lawful prosecution of that business, is the act of the principal whom he represents *Greenl Ev* §

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S. 18.

as his mere intsrument. So whatever
contract for his principal or at the time,
any act, within the scope of his authority,
and in the course of a particular contract or transaction in which he is then engaged, is in legal effect, said by his principal, and admissible in evidence not merely because it is a dec
that being made at the time
is treated as the declaratio
the *res gestae*, a part of the
if in fact made by himself
own authority, and not accompanying the making of a contract or the doing of an act, in behalf of the
transaction to which they re
part of the *res gestae* and
general rule of law, exclud
statement by an agent of wha
not a part of the transaction,

The declarations by agents are original evidence and not hearsay, and being regarded as verbal acts, they are receivable in evidence without calling the agent himself to prove them *Doe v Hawkins*, 2 Q B 212; *Tay* § 602 They are the ultimate facts to be proved and not an admission of some other fact, and the only question is whether the declarations were made and relied upon It often happens, however, that the declarations of an agent are admissible as part of the *res gestae* and that they form no part of any contract and contain no element of estoppel in which cases they are of course, open to explanation or may be shown to be incorrect, like admissions in general. *Burr Jones* § 3.. The admission of an agent that he purchased as agent is evidence that the purchase was made by him in that capacity and not on his own account *Goreebollah* v *M R G D Boyd* 2 W R 10, see also *Mohesh Lal* v *Basunt*, 6 C 340 (352), *Govindji* v *Chhotu*, 2 Bom L R. 651; *Parameswara* v *Vijathan*, 20 Ind Cas 637

Admission by agent—When receivable. The admission of an agent cannot always be assimilated to the admission of the principal The party's own admission, whenever made, may be given in evidence against him, but the admission or declaration of his agent bind him only when it is made during the

§ 1078 The b
in *Fairlie* v
in 1788 had set
some time before the true principle was defined and accepted *Ibid*, foot (1) As the case of *Fairlie* v *Hastings*, 10 Ves 123 (1804) is of some importance as well as of interest the judgment of *Sir William Grant, Master of the Rolls* is given *in extenso* "The subject of this cause is a loan of money by the late plaintiff, *Maharajah Nabokissen* to the defendant *Warren Hastings* As it is not by bill in equity that money lent is to be recovered, it is incumbent upon the Court for

sum by instalments; that a bond
remain with a *Cauntoo Baboo*, an agen
should be advanced, and then should

. : : ever received the bond, *Cauntoo Baboo* in S.

read, and could not read any part
evidence of declaration by *Gobin*
is whether these declarations c u
the bill. Upon that question my opinion is, that these declarations do not come within the principle upon which they are supposed to be admissible. As a general proposition, what one man says, not upon oath, cannot be evidence against another man The exception must arise out of some peculiarity of
agent may, un-
his agreement,
be what constitutes the agreement of the principal, or the representations or statements may be the foundation of or the inducement to, the agreement Therefore, if writing is not necessary by law, evidence must be admitted to prove that the agent did
with regard to acts done, the words
uently tend to determine their quality
must be affected by the words But except in one or the other of those ways, I do not know how what is said by an agent can be evidence against his principal The mere assertion of a fact cannot amount to proof of it, though it may have some relation to the business in which the person making that assertion was employed as agent For instance, if it was a material fact that there was the bond of the defendant in the hands of *Cauntoo Baboo*, that fact would not be proved by the assertion that *Gobindee Baboo* supposing him an agent, had said there was for that is no fact, that is, no part of any agreement which *Gobindee Baboo*, is making, or of any statement he is making, is inducement to an agreement It is mere narration, communication to the witness in the course of conversation, and therefore
ice of the fact" The bill was dismissed
put by *Mr Justice Gibbs* in *Loughborn*
' When it is proved that A is agent to B, whatever A does
agent of B, is admissible
which he makes for B, and
the agent's account of what

also *Kahl* v.
C 335
coal merchant for a penalty for selling short measures a witness was proceeding to state what was said to him by one *Peely* who managed the defendant's business, as to a sale about to take place *Lord Ellenborough* admitted the evidence saying '*Peely*
iness, what he
t, or on another
said respecting
a sale of coals, then about to take place and respecting the deposition of the
s in the *course of*
affect his master"
Railway Company
master to a Police
y s servants, were
received as admissions against the company, the station master being the proper agent to make such statements *Ibid* In that case *Cockburn C J* said "I

Archibold J said 'Being in charge of the station at the time a felony was committed, it was his duty to put the police in motion That being so, I think he was acting within the scope of his duty, that he had power to bind the

S. 18. company, and therefore that t …
scarcely a case of "cause of em…
master may be responsible in …
him, if done in the course of employment But in contract, and as regard
admis … *Cockle Cas* 177 In
Peto … expression "course of
emplo … the scope of authority
of an … the course of employ-
ment. But to be within the scope of authority, the statement must apparently be made in the course of employment. *Cockle Cas* 178

Where an agent, acting within the scope of his authority, wrote to his
princi… money on their account, and they
replied … was held that the agent's state-
ment … he money *Coates* v. *Bainbridge*, 5 Bing 58, *Powell*, 438 So the declarations of an agent bind the principal only so far as the agent had authority to make them *Faussett* v *Fausset*, 7 Ecc & Mar Cas 93 95, *Hogg* v *Garrett* 12 Ir Eq R 550 If goods were deposited with a pawnbroker in the ordinary course of business, a declaration of the shop-man that his master had received the goods would probably be admissible against his master, because it might be assumed that the shopman was authorised to answer
… in them, but it
… immediate business
… al hundred pounds
… *Garth* v *Howard*
… C R 127 In the
former case *Tindal J* said. "It is dangerous to open the door to declaration by agents beyond what the cases have already done The declaration itself is evidence not given upon oath; it is made in his absence, when he has no
… or any

… trains at a certain station in the course of which the night inspector … on

after the transaction *G O Ry Co* v *Wills*, 34 L J C P. 195=15 … S 748 In rejecting the evidence *Earle C J* said "I am of opinion that this
… admissions

as a co…
princip…
form p…
business and in the ordinary … (*Prof*
to past or present events
…urse, if the transaction or business is
… subsequent admissions regarding
it will be rejected as will … are not
properly within the scope … *210* So
when the agent's right to … ised, the
principal can no longer be … un by his
… *Fairlie* v *Hastings*,
…orn v *Allroll*, 4 Taunt.
… M & W 58, 509,
… *Stockton* v *Demuth*,
…*mesuar* v *Vigatten*,
agent can be received,
… *hari Mohan*, 3 B. L

. . . nd Cas 709. So S.
be an agent is
. . . Ala 633 (Am) and
not by the declarations themselves even when accompanied by acts purporting to be acts of agency *Montgomery* v. *Leith*, 162 Ala 246 (Am) Unless and until the agency is so proved and the declarations, acts or admissions of the agent come within the rule laid down, the evidence is not admissible Such proof need not be invariably introduced in the first instance, the order of proof being within the discretion of the Court *Burr Jones* § 255; see also *Chamberlayne's Ev.* §§ 1338, 1339, *Emperor* v. *Ritbaram*, 19 Cr. L J. 789. Declarations and acts are competent to prove agency if there is proof of former similar acts or declarations recognized or approved by the principal. *Burr Jones* § 255. Agency may also be proved by proving that the agent has acquired credit by acting in that capacity and that he has been recognized by the principal in other instances of a similar character to that in question In *Watkins* v *Venee*, 2 Stark, 368, a guarantee signed by a son for his father was admitted
upon three or four
. . . *Touse*, 1 Camp.
Whitefield v *Brand*,
. . . to the general agent,
special power to do a particular act need not be shown *Ram Buksh* v *Kishori Mohan*, 3 B L R A C J 273

Agency may be either general or special, and it may be express as when it
. . .
. . .

and be an equivalent to an original authority; *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur* (A subsequent ratification has a retrospective effect and is equivalent to prior command) So, where A and B were jointly interested in a quantity of oil, which A contracted to sell without B's authority, and B at first . . . agreement on hearing of it, but afterwards assen . . . made the contract binding upon him *Shom* . . . The point to be regarded in this clause is no . . . n agency, as to which the Court must be satisfied, but that there was authority given sufficient to cover the particular statements relied on as admissions Though the maxim is *qui facit per alium facit per se*, the identity ceases where the agent exceeds the scope of his authority, and his admissions in such a case will not bind his principal *Nort Ev* 144

. . . infant because an

ner agreement to make a new contract for the future occupation of it, will be
. . . wife should have this extensive power
. . . e of conducting the business of the
. . . 2, Tay § 605
. . . impliedly constitutes a third person
his agent for the purpose of

impliedly authorised to make t
Fateh v *Baldeo*, 5 O W N 155=A I R 1928 Oudh 233

S. 18.

19 Pick (*Mass U S*) But the opinion or conclusion of an agent ... legal effect of acts and transactions is not binding on his principal unless the ... n his behalf and ... are not admis- ... admitted but is ... rized to make a ... principal *Burr* ... upon the personal ... ation, inferences ... ts of acknowledg ... Limitation Act (IX of 1908)

Evidence is Primary Admissions by an agent have the same quality of primary proof which characterizes other admissions The declaration is equally competent though the declarant be in Court and available as a witness The evidence furnished by the fact of an admission is primary So also, the statement continues competent after the death of the principal, if made by the agent before that event It is entirely unaffected by the death of the agent *Chamberlayne's Ev* § 1343

Agents ... transactions, which ... ns of the latter will on ... nt make them (a) in ... l transaction, or (b) in pursuance of an authority to make statements or reports as to matters affecting his principal s business or interests; or (c) in the due execution of a general authority to carry on the business of his principal or a particular department of it with full discretion and powers of management *Wills' Ev* 163. So a letter written by the secretary of a company by order of the acting directors, stating the number of shares held by M was admitted on behalf of his executors in proceedings against them *Meux s Executors Case* 2 D M & G 522, see also *Natural Exchange Com* ... 9 Moo 103 But a statement made by the chairm ... Act, 1862, at a general mee ... against the company In ... *Roscoe* N P 70 in rejecting the admission of the chairman *Fry J* said ... could possibly be admitted ... his agency If that were so the statement would be admissible ... for it was made ...

So also the secretary of a projected company has not by ... any power to bind the members of the provisional committee by admis- *Burnside* v *Dayrell*, 3 Exch 225 In *Bruff* v *Gt N Ray Co*, 1 F & F ... *Willes J* rejected an admission of the secretary of a company as to the receipt of a letter And an admission by the board meeting of a company registered consisting of a less number of directors than was required by the deed of settlement was rejected in *Ridley* v *Plymouth Banking Co* 2 Exch 711 Admissions by servants of a ... not allowed ... bind the company, in ...

dants in action ... to who was responsible ... ened, when made at the time of ... tent, is against the company,

on the ground that his employment did not carry with it authority to make declarations or admissions at a sul [illegible] performed his duty; and that [illegible] which the injuries arose and was [illegible] then engaged, but that it was a mere narration of past occurrence. But as has already been pointed out, that there is a class of cases in which [illegible]

[illegible] business, [illegible] are made [illegible] *Kirkstall* [illegible] *lis*, 18 C. [illegible] v. *London Tramway Co*, 27 L T 192; *Mayhew* v *Nelson* 6 C & P 58; *Loughboro* [illegible] 389. But in [illegible] the agent's [illegible] *Warden* [illegible] So in every case the question invariably [illegible] by the agent in the scope of his authority or, as it is sometimes put, in the time of his duty? If so, it is admissible against the corporation. The declarations [illegible] by him. *Burr Jones Ev.* § 357.

[illegible] contracts, give receipts, compromise [illegible] business. *Kishan* v *Har*, 38 I. A. [illegible] N 321 He can maintain suit on [illegible] and can receive payments and [illegible]

Ramkrishna, 15 Bom L [illegible] v. *Ram*, 35 A 380; *Sarkar* [illegible]

S. 18. the transaction was really for the benefit of the family, he can not rely upon an acknowledgment of the liability, made by one of them as an acknowledgment duly made on behalf of all co ot

, save under special circumstances, bind the other adult co-parceners

suami v *Krishner*

is also not open

make an acknowle

those who claim through the person acknowledging *Ram Kishan* v *Hardi Lam* 71 Ind. Cas 737 = 1923 Lah 135

it field in the

ample, if A

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be received

against the employer? Because

made in performance of any wo

been asked by a brakeman whet

point, and had then mentioned receiving certain instructions from the despatcher, this statement might be regarded as made in the course of performing his appointed work. *Wigmore* § 1078.

Admission by agents in criminal cases. The rules of admissibility are in general the same for the trial of civil and of criminal causes. Not only in practice, but in principle and in spirit there is no occasion for a distinction

16 Cox 460,

upon the division of opinions whether under the circumstances of the the testimony of *captain Coit* to the facts stated in the record, was admissible. That testimony was to the following effect That he, *Captain Coit* was at *St. Thomas* while the *General Winder* was at that island, in September 1824 and was frequently on board the vessel at that time, that *Captain* to

of the authority of the master, the nature of the fitments, and the

accomplishment of the voyage, being thus laid, the testimony of *Captain Coit* was offered as confirmatory of the proof, and properly admissible against the defendant. It was objected to, and now stands upon the objection before us The argument is, that the testimony is not admissible, because, in criminal cases, the

force of the argument. In general, the rules of evidence in civil and criminal cases are the same Whatever the agent does, within the scope of his authority, binds his principal, and is deemed his act. It must be shown that the agent has the authority, and that the act is within its scope; but these being conceded or

be con-
poison.
sitive or
circumstantial, but this is matter for the consideration of the jury and not of the legal competency. So, in the cases of conspiracy and riot, when once the conspiracy or combination is established, the act of one conspirator, in the prosecution of the enterprise, is considered the act of all, and is evidence against all Each is deemed to consent to or command what is done by any other in furtherance of
master was just as
the purview of the

The evidence here offered was not the mere declarations of the master upon other occasions totally disconnected with the objects of the voyage These declarations were connected with acts in furtherance of the objects of the voyage, and within the general scope of his authority as conductor of the enterprises He
y for the
Captain
ons were
all made with reference to that object, and as persuasive to the undertaking

he is; and
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An adı
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defendant him
sible for a lett
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Where a pers
agent, then it

S. 18. as where the agent is dead, ... is the best evidence of the ... which can be produced ... decided that a receipt give ... Lord Mel ... lle's attorney ...

proved in the other, each particular fact is to be proved ... evidence" Mr Plumer on the opposite side: "I desire it may be distinctly ... that the rules of evidence are the same in ... evidence

between the agent and ... or said by the other; ... *Chancellor Erskine* in adm... the proof must advance ... cases, for a fact must ... to be followed by a crimin...

... is admissible ...

the statement of his servant, the ... strictly proved It is not sufficient to say that because a man ... another to the thanna the former is a servant of the latter *Rubaram* v *Emperor,* 46 Ind. Cas 709 = 4 P L W. 120 = 19 Cr L J 789

Admission by wife The admission of the wife will bind the husband, only where she has authority to make them *Emerson* v. *Blomden,* 1 Esp 142, *Anderson* v *Sanderson,* 2 Stark, 204 ... 4 Camp. 92 ... This authority does not result, by opera... wife; but is a question of fact, to be ...

inference of ... with great ... *Greenl. Ev* § 185, *Gregory* v *Parker,* 1 Campb 485, ... M 422, *Riley* v. *Snydam,* 4 Barb 222, *Palethrop* v *Furnish,* 2 Esp 511 ... Where a wife is authorised to manage business of her husband, during his absence, her admission is evidence against her husband. *Clifford* v *Burton,* ... 109 The law on this subject is that laid down by *Alderson* B ... a wife can not bind her husband by her ... be

may be his agent to make admissions with respect to matters connected with the trade" A wife's admission has been rejected to prove a slander by her husband *Tait* v *Beggs*, (1905) 2 Ir R 525 An admission of a daughter is not binding on the father. *Buch* v *Lulee*, 2 Agra 20.

Admissions by Pleaders, Attorneys and Counsels A vakil in this country has not ordinarily any greater power to bind his client than that which is possessed by an attorney in England *Woodroffe Ev* 237, *Prem Sukh* v *Pirthee*

... has authority to act as agent in ... as it is to be implied from the mere ... been enlarged in the particular case, extends only to the management of the cause. Yet, conversely, all his admissions during the management, including utterances in the pleadings do affect the client *Wigmore* § 1063 "The attorney is not the agent of the client for the purpose of making admissions, except in the cause and for the purpose of the cause All that appeared here was that one of the plaintiff's witnesses

by a ... ly because they ... *Ev* Art 17 An a ... on the ... *ala*, 10 ... W R. ... as 18 ... is not evidence in the cause *Young* v *Wright*, 1 Camp 139, *Petch* v *Lyon*, 9 Q B 147 (154) The reason for this distinction is found in the nature and extent of ... d for the management of the ... also *Parkins* v *Hawkshaw* ... *ilson* v *Turner*, Taunt, 398 If the admission is made ... appears that the attorney was ... *Cliff*, 4 Camp 133, *Ellis* v ... *Bishesuar*, 5 Pat 777 = 1927 Pat 61 But in *Wagstaff* v *Wilson*, 4 B & Ad 339 a letter threatening legal proceedings, but written before action begun, was excluded See also, *Doe* v *Richards*, 2 C & K 216 So in the absence of any retainer at that time in the ... ke the admissions ... ss 185; *Burghart* ... 34 *Greenl Ev* § ... If an attorney ... herein binds the ... *liams* 2 B & Ad 845, 855; *Standage* v *Greighton*, 5 C & P 406, *Taylor* v *Foster*, 2 C & P 195, *Griffiths* v *Williams* 1 T R 710, *Trusolie* v *Burton*, 9 Moore 64, *Lord Owen & Co* v *Wood*, 120 Ia 303 (*Am*)

... wards be withdrawn" *Taylor* § 783 citing *Haney* v *Croydon Union*, per Ct. of ... here there was no ... counsel is the ... N 82, *Mr. Justice* ... to conduct his

to make binding
... ie ca e" See al o
... 10 W R 372,
Venkata ... Chambara, 21 M 274,
v Minis ... 13 A 272; Mathews
Bhasya ... B 122; Venkata v
v E I Ry Co, 52 C 386, see also Sen v Chuni Lal, 51 C 385, Askaran
authority is less extensive than that of a solicitor Richardson v Pelo, 1 M. & G
896, R v Greenwich ... Gaya, 1923 (Pat) 307
... l is not binding on the
... to bind his client by
486, but see Bansi Lal v. Emperor, 30 Bom L. R 646 = A I R 1928 Bom 241
... the absence of express authority. R v Downer, 14 Cox

If a plaintiff relies upon any statement by the defendant or his plea ... made in a previous litigation between the parties, that statement mu t regularly proved On proof of such statement the question arises as to t weight to be attached to it Mani Lal v Uma Charan, 19 C L J 541

A judgment deliberately recording the admission of a pleader must presumed to be correct, unless contradicted by an affidavit, or the Judge s ow admission that the record was wrong Hur Dyal v Hura Lall, 16 W R 107

Oral testimony on behalf of a litigant in a litigation with A cannot b admitted as evidence against him in a litigation with B on the footing of a admiss on by counsel The case lodged by ... not strictly a ... Lords ... in it, although ... atement any subsequen... arded ... British Insulate... Co v Jo 252 = 156 L T Jo 440 ... = (1923) W N 344 (Eng) = 68 Sol 160 = 93 L J Ch 467 = 131 L T 683 Per Russel J affirmed an appeal in (1924) 2 Ch

Partners and joint contractors ... virtue of a ...

... ner concerning partnership affairs
... See also Cal C C P 1872 § ... by this Act is evidence against the
Mo 133 = 220 S W ... 1870 ...

... member,
By the
... Er
... Taunt 101; Pethering v Truner, ... v Marsh, 2 B & Ald 673; Wood v Bradlik, Fox v Clipton, 6 Bing 792, Nicholls v Dowding, 1 Stark. R. 81; Lucas v De li Cour, 1 M & S 249; Whitcomb v Whiting, 1 S L C 644 = 2 Doug. 652, Kali v Gope, 2 C W N 166, ...

Partners and joint contr... making admissions against ... or joint cont... 588 (591) ... to the admis... admissible o... 281 (Am); ... who are pr... one of them, ... within his ... within the su... partners "... have been ob... made during ...

action, are admissible against both; and entries in the partnership books made by a partner during the continuance of partnership are admissible against both Admissions of one partner are admissible against all to prove the execu-

e admissible Although one
admissions may be received,
uestion of credibility." *Burr*
received against another on
ord, but on the ground that they are

business and within the sco
Kowsulliah v. Mukta, 11 C. 688 (691), *Steph Dig Ev* art 17; *Re Whitely*, (1891) 1 Ch 598; *Calho v. Jhoro*, 39 C. 995 While the firm thus created exists, it speaks and acts only by the several members; and of course when the existence ceases by dissolution of the firm the act of an individual member ceases to have the effect.
as by the
agreed. *Bel.*
v. *Braddick*,

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the statement made during the existence of the partnership, it is undoubtedly binding on and evidence against the other members of the firm *Burr Jones* § 248. In *Wood* v. *Braddick*, 1 Taunt, 104 (1808) which was an action brought to recover from the defendant the sale proceeds of certain linens, which the bankrupts, in the year 1796, had consigned for sale to America, as the plaintiffs alleged, to the defendant jointly with one *Cox*, who was then his *partner*, but, as the defendant contended, to *Cox* only, the plaintiff produced a letter from *Cox*, dated 24th June, 1804, stating a balance of £919 to be then due to the bankrupts upon this consignment It was in proof that on the 30th of July 1803, *Braddick* and *Cox* dissolved their partnership, as from the 17th of November, 1800 *Cockell* and *Lens Serjts*, objected that this letter, being written after the dissolution of the partnership, was not admissible evidence to charge *Braddick* In rejecting the contention *Mansfield C J* said "Clearly the admission of one partner, made after the partnership has ceased, is not evidence to charge the other in any transaction which has occurred
rights created
lear that one
t principle is it
joint contract
one person in
regard to past
s last exception
Myl 191, 199,

200, wher
payment,
against tl
Whiting,
Deane V

S. 18. others, admissions made by the signatory at a time other than the execution of the contract were held inadmissible *Taft* v *Church*, 162 Mass 527 (*Am*) And where one partner after having given a note in his own name said it was for the partnership h
Smith, 21 Wind (
partnership, that
for the rest, in con
that relationship
for himself in simi
goods, either of t
into the same business, at the same place, on his own account. The legal presumption is, when a person purchases a thing, he purchases it for himself In such case, the vendor, in order to charge another person as a partner, must show the purchase was made for the firm or that it went to their use. So where a member of a partnership bought a mule, *ostensibly for himself*, and when it was sent home he said it was for the firm, his declaration so made after the purchase was not of itself competent to bind them It is a general rule of the law of evidence that the
against all the rest,
evidence is admis

received when the rule of interest in the cause excluded the witness" But

all the partners, and kept more or less
lso generally be received as *prima facie* evidence *inter se* *Gething* v *Keighley*, 9 Ch D 547, 551; *Lindley on Partnership* p 566 *Day*
De G M & G
the books of
against them a
tion If one
ground for an
to exclude an allegation of a mistake or erroneous omission or insertion The only question is whether the books are *prima facie* evidence between *partners and their estates In my opinion they are*" But it is not conclusive evidence agan
if he can by clear evidence show that there is an
I R. in *Gething* v *Keighley*
9 Ch D 549, c
App 587, *Hutchison* v *Smith*
5 Ir
Day

with
So an
But representation or m
respect to some partnershi
2 B & A 795, *Thwaites*
R 81, *per Lord Ellenborough*
of several parties in fraud
s fact by the innocent parties,
cted by the Court *Rawstorne* v
One member of a firm can borrow
notes and such promissory notes
sa, 40 M 727, *Karmali* v *Karim*
39 B 261.

Limitation—Saving of, by acknowledgment of one partner An acknowledgment or a payment by a parter without special authority is binding upon another partner. Under section 21 of the Limitation Act a partner *ipso facto* has no authority to acknowledge or to make a part payment, but if he has general authority to contract debts or make payments he has implied authority to keep the debt alive and it is unnecessary to make out a special authority.

Chegamull v Govinda Swami, A I R 1923 Mad 972 So in the absence of S.

v. Veera- 18=(1918) Ind Cas. 1 Ind. Cas. 552=35 M. 112; see also K. R. Firm v Sathyavada, 21 Ind. Cas 635=37 M. 146=25 M. L J 501

In Premji v Dossa, 10 B 358, Scott J said at p 362. "It must be shown that the partne plied to do so to be presumed bad High Court in Gadu Bibi v Parsotam, 10 A. 418 and Candy J of Bombay High Court in Dulsukhram v W R 145; Lalta v Babu, 32 A

) and though the nership (Watson v circumstances be treated as continuing where, for instance, the retirement of a partner is kept secret and payments of interests are made in the name of the firm In re Tucker (1894) 3 Ch 429=63 L J Ch 737), see also Abdulali v Ranchadlal, 38 Ind Cas 872=19 Bom L R 86 (95), Karamali v Boralanji, 26 Ind Cas 915=39 B 261=19 C W N 837

of payments by s of Limition as to of that particular form of liability is of first importance, and the solution lies in stripping the proposition to the bare statement of the authority, express or implied, with which the declarant was invested at the time of the declration The discussion is limited to admissions made after dissolution Prior to it, and whether the admission be regarded as a new contract or an extension of an old one, there need be no question of the partner's ability to charge his co partners with the act which bars the Statute But after dissolution the agency and its cessation, or rather the exact time of the determination of the agency regulates the period when such admissions or payments which operate as admissions become, as to the other partners, ineffectual Burr Jones § 249

partnership does not Similarly a partner of o authority to give an 36 Ind Cas 225=

8 L B R 363

Parties suing or party is receivable as interest, i e, a relation to be affected by the ac evidence as that other person may have furnished by way of admission This privity may be Where the p administrator, and only adm statements ma

S. 18. admissions as executor or the like would be receivable against him as a party in his personal capacity *Wigmore* § 1076 The admissions which are thus receivable in evidence, are those of a person having at the time some interest in the matter afterwards in controversy in the suit to which he is a party The admissions, therefore, of a guardian, or of an executor or administrator, made before he was completely ...

... *prochein amy*, made before ... against the ward or infant ... of heirs, devisees and ... (*Webb* v *Smith*, R & M. 106; *Fraser* v *Marsh*, 2 Stark 41; *Cowling* v *Ely* 2 Stark 366), though it may bind the person himself when he is afterwards a party, *suo jure*, in another action A solemn admission, however, made in good faith, in a pending suit for the purpose of that trial only is governed by other considerations

Generally the competency o... which they are made But it is an ... that if the admission is made by ... tive capacity only, it must be made ... capacity *Freeman* v *Brewster*, 93 ... dispute in England In one case, *Chief Justice Tindal* is reported to have received an admission of a person, who was serving as an assignee now called the trustee of bankrupt, though it ... *Morgan*, 2 B & Rob 257 But *Lord* ... the same point *Fenwick* v *Thornto*... the admission by an Official Assignee made before his appointment See also *Methers* v *Brown*, 32 L J Ex 140, *Plant* v *M'Ewen*, 4 Cox 544; *Taylor* § 755 So statements of an executor or administrator ... his appointment, cannot be received ex... *Church* v *Howard*, 79 N Y 415, *Lamor*... *Butler*, 48 N H 161, *Hilton* v *Snyder* ... v *Edmonds*, 25 L J Ch 125, 140 141 ... startling proposition' says *Taylor* 'that the assets of a testator, and the consequent rights of legatees may be affected by some inconsiderate statement which the executor, before the death of the testator, may have been induced to make' *Taylor* § 755 But statement of such persons is competent, if made while representing the person beneficially interested, and in the transaction of business or in performance of the trust in such manner as to be part of *res gestae* *Church* v *Howard*, 79 N Y 415 (Am), *Fox* v. *Walters*, 12 A & E 43, *Concha* v *Concha*, 11 App Cas 541 543 So an affidavit of guardian of an infa... infant in anoth...

... 'If he was a ... , while actually ...

... *Vaughan Williams* J in *Re* ... *Trustee* v *Hunting*, (1897) 1 Q B 607, 611, affirmed (1897) 2 Q B 19 ... *Land etc Co*, 28 Colo 320, the Court ref... fraudulent admiss...

... 544, *Fox* v *Walters*, 12 A & E 43, ...

v. *Russell*, 53 Hun 17=4 N Y Supp 781 [illegible] *Church* v *H* [illegible] 70 N Y [illegible]

operate as a waiver *Kailas* v *Sheikh Chheuu*, 12 C 516, *Woodroffe*, 232.

§ 1076(2); (see al[illegible] guardian of the person of an infant as to the property right of the latter are not [illegible] for other purposes [illegible] as 825, see also [illegible], 10 C L R 377, [illegible] *ammal* 24 I A [illegible] rt of Wards, made [illegible] bind or prejudice [illegible] Cas 825=29 C L J. 577; *Ram Autar* v *Rajah Mahammad*, 24 C 853=1 C W N 117, 21 W R 253 An acknowledgment of debt [illegible] period of limitation *Ram Charan* v [illegible] J. 375; *Sobhanadari* v *Sriramulu* [illegible] 456, *Annahaganda* v *Sanjadiqyapa*, [illegible] 292; *Chhata* v *Bilo*, 26 C 51, [illegible] guardian of a Hindu minor has no power to keep debt alive against the minor *Ramaswamy* v *Kashinath*, 103 Ind Cas 529=A I R 1928 Mad 226

[illegible] t in receiving [illegible] to the party is [illegible] same person [illegible] that view that [illegible] llows that the [illegible] become receiv- [illegible] other words, the admissions of one co plaintiff or co defendant are not receivable against another merely by virtue of his position as a co party in the litigation This is necessarily involved in the notion of an admission, for it is impossible to discredit A's claims as a party by contrasting them with what some other party B has elsewhere claimed, there is no discrediting in such a process of contrast, because it is not the same person's statements that are contrasted Moreover ordinary fairness would forbid such a license, for it would in practice permit a litigant to discredit an opponent's claim merely by joining any person as the opponent's co-party and then employing that person's statements as admissions It is plain, therefore, both on principle and in policy, that the statements of a [illegible]

[illegible] who happen to be joined as parties to the [illegible]" See also *In re Whiteley* L. R. (1891) 1 Ch 558, *Azizull*[illegible] *Lachman* v *Tansukh* 6 A 395; *Amrita*[illegible] W R 214=2 I A 113, *Chandeswar*[illegible] *lah* v *Himmut Ali*, 22 W R 519 [illegible] by one defendant can not be read in evidence either for or against his co-defen[illegible] [illegible] be read in [illegible] *hens* v. [illegible] *Johns*- [illegible] being, [illegible] ve been

S. 18. afforded for cross examination (*Jones* v *Turbeville*, 2 Ves 11, *Morse* v *Royal*, 12 Ves 355, 361, 363), and moreover, if such a course were allowed, the plaintiff might make one of his friends a defendant, and thus gain a most unfair advantage *Wych* v *Meal*, 3 P Wms 311" *Taylor* § 754

But the situation has often been obscured by the circumstance that the co party's admissions are received against himself, and that they are sometimes received also against the other co party because of a privity of obligation or of title But it is not by virtue of the person's relation to the litigation that this can be done, it must be because of some privity of title or of obligation, which would indeed have admitted the statements even had the declarant not been made a co-party *Wigmore* § 1076 In *R* v *Hardwicke*, 11 East 578 *Ellenborough L C J* said "Evidence of an ... defendants in trespass will no... But if they be established to... declaration of the one, ... evidence against all ... object" The payment ... the principal debtor cannot create a new period of limitation for the surety's debt *Gopal Dan* v *Gopal Bin*, 28 B 248.

In *Ambar Ali* v *Lutfee Ali*, 45 C 159=25 C L J 619=21 C W N 500, at page 999 Mr *Justice Mookerjee* said "There can be no room for controversy that the admission is good evidence against the maker of conveyance, but the question arises whether it is admissible against the other defendants These defendants it will be observed, are jointly interested in the land now in dispute, along with fourth and fifth defendants, in fact, they claim under a common lease from the landlord, and have on the basis thereof, taken a common defence to defeat the suit of the plaintiffs But these defendants were not joint owners of the property covered by the conveyance of 1894, and were strangers to that transaction They consequently press the view that an admission made by the owners of that property cannot be received in evidence against them, merely because, since the date of the alleged admission, they have jointly acquired the property now in suit. In our opinion this contention is well founded and section 18 of the Evidence Act is of no assistance to the plaintiffs The principle which regulates the reception in evidence of an admissio... another defendant, was formulated in ... *Sundari* 11 C 585, *Chatho Singh* v ... *muddi*, 44 C 130=20 C W N 1217 ... are jointly interested in the subject mat... these persons is receivable not only ... defendants, whether they be all join... relates to the subject matter in d... character of a person jointly intereste... is tendered The requirement of the ... in legal interest between the joint owners is of fundamental ... *Blakeney* v *Blakeney*, 6 Sim 52; ... *shop*, 11 Beav 134. ... joint owner-ship ... as in *Blakeney* ... person cannot ... interest in the ...

... consequently it is not by virtue of the ... relation to the litigation that ... the oth... ...

... of the admission against the co-defendant

the words of section 18 were perfectly clear and in as much as he made the statement when he had parted with his interest in favour of his co-defendant in the present suit, the admission made by him could not be treated as evidence of admission against the co-defendant *Brojballan* v *Ubon Bagh* 30 C W N S.

that the brothers were not joint at the date of the sale and that the properties were exclusively owned by U put in a deposition given by another brother K in the suit in which the money decree against U was passed in the course of which K stated that the family was not joint and the properties belonged exclusively to U *Held*, that the deposition of K in the previous suit was not

including defendant No 6 constituted a joint family and that a certain property was joint family property The defendant No 6 in the course of his deposition as a witness on behalf of the representatives of Upendra Nath Ghose in suit No 127 of 1911 stated that on the death of the plaintiffs' father Upendra separated from his brother and that there was no joint family The defendant No 6 therefore was not claiming any interest in the property in question and in the 'admission' made by him in the previous suit he did not fulfil the character of a declarant jointly interested with the party, in respect of the property con-
urther more, it is
ay that at the time
No 6 there was
thers" *Nogendra*
v. *Laurence Jute Mills*, 25 C W N 89 (94)=61 Ind Cas 544 An admission of one defendant in a written statement in a suit will not be evidence against the
by examining that defendant who
Ind Cas 924, see also *Appavu*
4 M L T 117=25 M L J 729,
s 2, *Hiat Bakhsh* v *Lachmuna*,
a confession of judgment by one of
nce against the other defendant
129, *Amrito Lal* v *Rajanee Kant*,
2 I A. 113=23 W R 214=15 B L R 10, *Narindar Singh*, v *C M King*, A I R 1928 Lah 769, *Saidu* v *Meher*, 101 Ind Cas 589, *Jones* v *Turberville* 2 Ves Jur 11, *Hay* v *Gordon*, 10 B L R 301=18 W R 480 P C, *Gopal* v *Gopal*, 28 B 248, *Morse* v *Royall*, 12 Ves 362, *Daniel* v *Potter*, 1 M & M 503, *Chandraeshwar* v *Chuni Ahir*, 9 C L R 359 A co-party cannot, indeed, as a rule use the statements of his associate on the record as against the opposing interest He may, however, employ them in his own favour as against the declarant *Chamberlayne's Ev* § 1316

interest, and may be easily applied Many other cases arise which cannot be brought under any certain rule but must depend largely upon the facts as to identity of interest, as they are brought out at the trial In either case the authority should clearly appear before the statement of one should be considered binding as against another Bare statements by an agent unaccompanied by
o doing of his principal's business,
ess it were shown that the principal
In most cases the statements of an
l with acts in such a way as to be
part of the *res gestae*. *McKelvey Ev*
§ 125; *Greenl. Ev* § 109

S. 18. Admissions of persons having joint interest. T[illegible]

[illegible] persons seized jointly are seized of the whole, each being seized of the whole, the admission of either is the admission of the other and may [illegible] *Nagendra* v *Lawrence Jute Co*, 25 C [illegible] C 159=21 C W N 996=25 C L J [illegible] 8 An admission made by some of several defendants in their character of persons jointly interested with the other defendants in the matter in respect of which the admission is made is binding on the other defendants *Bhika Mol* v. *Ganga Ram*, 69 Ind Cas 35; *Meajan Matbar* v *Alimuddi Mea* 31 In[illegible]

[illegible] and his fellows, whether they be all jointly suing or sued provided the admissions relate to the subject matter in dispute and were made by the declarant in his character of a person jointly interested with the party against whom the evid[illegible] *Meajan* v *Alimuddin*, 34 [illegible] v *Mukta*, 11 C 588 [illegible] in evidence against anot[illegible] were jointly interested, [illegible] mere community of interest will not be sufficient *Taylor Ev* § 750 An apparent joint interest is obviously insufficient to make the admission of one party receivable against his companions, where the reality of that interest is the point in controversy A foundation must be laid, by sho[illegible] that a joint i[illegible] not be est[illegible] but this [illegible] against th[illegible]

[illegible] for a sum of money, the other brother is not bound by such admission *Mama* v *Madho*, 21 Ind Cas 165

In ad[illegible] who [illegible] releva[illegible] be made [illegible] *tial interes*[illegible] one entitl[illegible] *D' Alton*, [illegible] interest is [illegible]

party in in[illegible] example, [illegible]

[illegible] the admissions of party in interest Thus the interest of *cestui qui trust* of a bond, in a suit by the trustee, is an original interest, and not a mere incidental interest in the result of the suit, so also, the interest of persons in a policy effected in another's name, for their benefit It is also a requisite that the statements should have been made during the continuance of the interest. Declarations, made after the declarant has ceased to have any interest in the matter are not admissions, but mere hearsay *Burr Jones* § 238 The admission of one executor does not conclude another. *Chunder Kant* v *Ramnarain*, 3 W.

R 63 The admissions of the executor of a donor may be treated as the admission of the donor. *Dwarkanath* v *Chundeechurn*, 1 W R 339. The admission of a *ryot* of the rate of rent at which he holds a tenure cannot be treated as evidence against another *ryot* to prove the rate at which he holds the tenure *Nurochurry* v. *Naraince*, W R (F. B) 23 = 1 Ind Jur O S 9. **S.**

Privies in Obligation. So far as one person is privy in obligation with another, *i e.*, is liable to be affected in his obligation under the ... by the acts of ... admissions of ... Not ... here ... who ... interests ... of one or two other classes of liability *Wigmore* § 1077.

Joint Promisors Co promisors like principal and sureties are also privies in obligation, and on principle the admission of one should be admissible in evidence against the other provided the other conditions are satisfied The rule is that, in the absence of fraud, if the parties have a joint interest in the matter in suit, whether as plaintiffs or defendants, an admission made by one is, in general evidence against all Such was ... laid down ... opriety and ... questioned ... *al*, 2 Bing. ... , *Brandram* ... and to each ... Thus also ... within period of limitation by one of several ...

... the act of one member of a class is liable to be taken as the act of all So acknowledgment of a *ljudgi* ...

Ashanullah v *Dakhini*, 27 ...

... Cas ... nt by ... st be ... 21 of ... eived ... cisions

18. of English Courts are by no means uniform in this respect Thus in an action against joint makers of a note, if one suffers judgment by default, his signature must still be proved against the other. *Gray* v *Palmer*, 1 Esp 135, *Shirref* v *Wilks*, 1 East 48

Principal and surety. Principals and sureties are privies in obligation i e one is liable to be affected in his obligation under the substantive law by the acts of the other *Wigmore* § 1077 So where the effect of a contract is that a surety shall be responsible for the acts and admissions of the principal, such admissions are competent evidence against the surety *Burr Jones Ev* § 238 So the entries of the principal were evidence against the surety because they were made by the collector (principal) in pursuance of the stipulation contained in the conditions of the bond *Whitnash* v *George* 8 B & C 561; *Goss* v *Watlington* 4 B & B 132 (137); see also *Jordon School District* v *Gaets*, 23 D L R 739 (*Canada*), *Sanders* v *Keller*, 18 Ida 592 But ordinarily where a principal is not a party to the suit his declarations are not admissible, unless they are made while the employment in which the principal was engaged continued, and in such manner as to be part of the *res gestae* *Burr Jones* § 238 The principle in thus laid down by *Greenleaf* "The admissions which are thus receivable in evidence mu t as we have seen be those of a person having at the time some inte ... in the suit to which he is a party ... looks chiefly to the real parties in in ... same weight, as though they were parties to the record Thus ... of the *cestui que trust* of a bond; those of the persons interested in a policy effected in another's name, for their benefit; those of the shipowners, in an ... of the identifying creditor, in an action ... deputy sheriff in an action against the high ... ty, are all receivable against the party making them And in general, the admissions of any party represented by another, are receivable in evidence against his representatives" *Greenl Ev* ... incidental or contingent interest in ... for the introduction of hearsay ... n interest *Burr Jones* § 238

so as to become part of the *res gesta* otherwise not The surety is cons... party, and not for whatever he might ... to proof of his conduct by original evidence, where it can be had, exclu... all declarations of the principal, made subsequent to the act to which they relate, and out, of course of his official ... § 187 So in an action against a surety the l... of any admissions ... the surety *Rambhaj* v *Sreedevi*, 25 M L ... D 668, *Lush J* sa... ents w...

had rece... receivab... *Chesney*, one bec... a clerk, ... confessions of embezzlement made by the principal after his dismissal, ... admissible in evidence (*Smith* v. *Whittingham*, 6 C & P. 78. *Goss* v *Watlington*

S.

37), though, *Whitnash* : *McGahey* v. case of *Ex* it even a decree against the principal to the amount of debt, but see *Drummond* v. *Prestman*, 12 Wheat 515

the money that the wife's admissions of the receipt by her of the carriage and horses were admissible *Francis* v *Lewis*, 10 Johns 35, *Greenl Ev* § 187 So when A guaranteed the performance of any contract that B might make with C, the admissions and declarations of B were held admissible against A, to prove the contract *Meale* v *McDowell*, 5 Bing 195; *Greenl Ev* § 187.

But where the surety, being sued for the default of the principal, gives him notice of the pendency of the suit, and requests him to defend it, if judgment

they operate against the surety *Greenl Ev* § 188

Privies in Title The admissions of one who is privy in title stand upon the same footing as those of one who is privy in obligation (*Vide supra* p 343) Having precisely the same motive to make correct statement and being identical with the party (either contemporaneously or antecedently) in respect to his ownership of the right in issue, his admissions may, both in fairness and on principle, be 1080
The grounds u with
the party maki *Rowe*,
1 A & E 1 *J* m
Gibblehouse v and
admissible evidence of any fact admitted by them to be true, and may be given in evidence to prove it, notwithstanding the confessions might be such as to show
non ex
when
making
party extends not only to the admissions of them against himself, but against all who claim or derive their title from him, in other words, between whom and himself there is a privity There are four species of privity privity in blood, as between heir and ancestor privity in representation as between testator and executor,
common
privity of

confessions . . It is asked, why not swear him? The answer is, the other

S. 18. party likes his declarations better. He may, from the same motive, vary his statement, and the party offering this evidence is alone to judge '

Admiss... land is so identified in ... title, that his admissio... vested with title, are rece... t the self interest involved in the ownership of tit' truthfulness of statement against interest m 19 Ill 383, *Taylor,* § 787 It is imperative pri... of ... sta... aff... *Kel* anc...

sue ... we think they are receivable on the ground of identity of interest. The fact of his being alive at the time of the trial, when, perhaps, his memory of facts was impaired, and when his interest was not the same, does not in our opinion, affect the admissibility of those declarations which he formerly made on the subject of his own rights" *Woolway* v. *Roe,* 1 Ad & E 114 So the declarations of former owners or occupiers, made while in possession, have been admitted as evidence of the nature and extent of their title against those claiming in privity of estate *Taylor* § 758, *Doe* v *Austin,* 9 Bing 41; *Davies* v *Pierce,* 2 T ... 367, *Jackson* v *Bord,* 1 Johns 230, 234, W...

... ect ... claran... R 2(... scheme between the grantor and grantee, e g ... that the declarant, if at the time owner ... possession, and conversely, that his being in ... does not make his declaration competent as an admission ... v *Lawton,* 109 Cal 662 (*Am*) ... books of survey, ... on this ground, wh... under whose direc... they are offered ... So, as to receipts fc...

... successor, in an ejectment for the same property, in right of his vicarage *Doe* v *Cole,* 6 C. & P 359 The receipts, also, of a vicar's lessee, it seems, are admissible against the vicar, in proof of modus, by reason of privity between them *Jones* v *Carrington,* 1 C & P 329, 330 *n*); *Maddison* v *Nuttal,* 5 Price 485 An answer in Chancery is also admissible in evidence against any person actually claiming under the party who put it in, and it has been held *prima facie* evidence against persons generally reputed to claim under him, at least so far as to call upon them to ... *Earl of Sussex* v *Temple,* 1 Ld ... er *Roberts,* 16 East 334, 339. The ac... contain ed in a mortgage deed is ... sentatives in interest of the original ... A 191= 11 A L J 221, *Brajesw*... *Hul* 5, 10 A L J 390 *Bakhshi* v *Laladhar,* 35 A 353, *Birbal* v. *Behari,* 76 Ind Cas. 815

The admission of a zamindar that the holding of certain tenants is *Mokurrurec* at a given rent is binding on any zamindar who succeeds him without being an auction purchaser at a sale for arrears of revenue. *Walson* v *Nobin*, 10 W R. 72. S.

Sales for arrears of Revenu

bind v. *Rakhal*, 12 C

Hossain v *Girdharee Lal*, Bom L R P C 78; *Poreshnath* v *Ananta Nath*, 9 I A 147, *Watson* v *Nobin*, 10 W. R 72 The auction purchaser at a revenue sale acquired all the rights, which the original seller at the date of perpetual settlement had *Forbes* v. *Meer Mahomed*, 20 W R. (P C) 44 He is not also bound by the admission of the previous owner *Rungo* v *Raj Coomaree*, 6 W R 197; *Radha* v *Rakhal*, 12 C 3?;

judgment debtor *Dinendro* v *Ram Kumar*, 7 C 107 P C = 8 I A 65 = 10 C. L R 281, In *Lala Prabhu Lal* v *Mylne*, 14 C 101 (413) it was held that an auction purchaser is not a representative of the ju'gme

vidence Act

See also *Gour S*

aj Coomaree

6 W. R 197, 1

purchaser

is not barred

Koodep v *Govt of India*, 11 B L R 71 (P C) = 14 M I A 247 Where the property is sold in execution of a decree, it can not be correctly said that the owner gives any right to the purchaser,

Mulji v *Kashi Bai*, 10 B

judgment debtor to the exte

his wish, and he is not bound by some of the acts of the judgment debtor, such as alienations made by the latter to defeat the decree but that does not show

is not the

ny purpose

hari v *Hem*

not in my

By this

In a later

representative

o *Prosonno*

, 26 C 250

purchaser

held in execution of a simple money decree against a judgment debtor is a representative of th

the representative

the nature of the q

is between the judgment-debtor and the auction purchaser and the interests of the two are conflicting, the auction purchaser can in no sense be considered to be a representative of the judgment debtor *Narotam* v *Sukhraj*, A. I. R 1928

S. 18.

ckson v McCall, 10 Johns (N Y) ..3), to show that the ancestor had ... ence would have been admissible ... 69 N Y. 404 Stating the rule ... ver the admissions of an ancestor ... are admissible against an heir claiming under him by descent The principle upon which such evidence is ...

devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broaddus* v *James* ...

80 Conn 446, see also *Meath* v *Winchester*, 3 Bing N. C 183, *Mathews* v *Nuttal* 13 M. & R 15, *Carr* v *Mostyn*, 5 Ex R 369; *Doe* v *Cole*, 6 C & P 559 So also the admissions of a testator that his tenant was to pay no rent, are admissible against his executor *Cox.* v *Baird*, 11 N L J. 105-19 Am Dec 386 And the declarations of an intestate are admissible against his administrator, or any other claiming in his right *Smith* v *Smith*, 3 Bing N C 29; *Ivat* v *Finch*, 1 Taunt, 141 A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nana* v *Shanker*, 3 Bom L R 465

... applying the rule that a man's ... d his privies, care must be taken ... r life and that of a tenant in ... d by some statute, prejudice, by ... in adm ... tail is ... does, w ... So the ... in tail ... Giff 45 ... *Kanhai* ... Hindu ... Hand ... 82 Ind. Cas 1052; 86 Ind Cas 853 But by Act I of 1927 ... ons as regards acknowledgment have been made absolute The declarations ... tenant for life, do not bound the remainder man, as there is no privity ... on them, for a privy in estate is a successor to the same estate, not to a ... estate in the same property, and the statements of the tenant for years ... admissible against the owner in fee. *Hill* v *Roderick*, 4 Watts & S ...

Landlord and tenant Mortgagor and Mortgagee etc A similar relation ... s, parol declarations of a ... for fraud are admissible ... where such declarations ... *n* v, *Meyers*, 11 Wend ... ce established it ... tely, and the ... of his ... a possession of ... the relation of ... any succe ... well as tenant ... rental claims ... Ind Cas 614=10 ... or in title of ... this ... is sui ...

S. 18

[illegible] same rights of property [illegible] that the rights of [illegible] of the latter. [illegible] property. [illegible] owner [illegible] mentioned, [illegible] rights in respect of [illegible] same as that [illegible] for them [illegible] there is no [illegible] who [illegible] charged [illegible] against [illegible] that has [illegible] Dec. [illegible] are [illegible] therefore [illegible] object [illegible] in these cases [illegible] and [illegible] evidence, [illegible] of [illegible] is now [illegible] rule [illegible] against [illegible] only, [illegible] Cal. [illegible] 11 [illegible] as a [illegible] in [illegible] inter [illegible]

[illegible] relevant [illegible] Co. [illegible] admissions [illegible] Where [illegible] claims [illegible] as [illegible] would [illegible] 517 [illegible] of [illegible] 2 [illegible] to [illegible]

S. 18. Am . . dary [*Jackson* v *McCall*, 10 Johns (N Y) 377)]; . Wis 373), to show that the ancestor had made . ch evidence would have been admissible again . *Fouwer*, 69 N Y 404 Stating the rule more . whenever the admissions of an ancestor would . ng they are admissible against an heir claiming under him b . received is that the decla . his interests were suc . of his title or possession would have to his own . . . *Chadwick* v *Founer*, 69 N. Y 404. In the same manner the admissions of a devisor are competent against the devisee, those of an intestate against his administrator, and those of a testator against his executor *Broaddus* v *James*, 13 Cal App 464 Thus in an action by an administrator against the widow of his intestate for the conversion of property, declarations of the intestate that his tenant was to pay no rent are admissible for the defendant *Mooney* v *Mooney*, 80 Conn 446, see . . . N C 183 *Madison* v *Nuttal*, 1 M. . . 6 C & P . no rent, . *Cox* v. *Baird*, 11 N. L . Am De . intestate are admissible against his administrator, or any other claiming in his right *Smith* v *Smith*, 3 Bing N C 29; *Ivat* v *Finch*, 1 Taunt, 141 A statement by the testatrix suggesting any inference as to the execution of a will would be an admission relevant against her representatives and would therefore be admissible as evidence *Nina* v *Shanker*, 3 Bom L R 465

Life estate . admissions are . to distinguish be . tail A tenant for life cannot, unless empowered by some statute, prejudice an admission, the interest of a remainder man or reversioner, *but a tenant in tail* is regarded as representing the inheritance, and, therefore, what he says or does, will often be binding on the person entitled in remainder *Taylor* § 7.. So the remainder man is bound by release of equity of redemption *by a tenant* in tail in possession *Reyneldson* v *Perkins*, Amb 563, *Pendleton* v *Booth*, . Soundal's . 4 71, that . were not . *Venka* . *Rao*, 82 *Ind Cas* 1052; 86 *Ind Cas* 853 But by Act I of 19.. s 3 the decisions as regards acknowledgment have been made absolute The declarations of the tenant for life, do not bound the remainder man, as there is no privity between them, for a privy in estate is a successor to the same estate, not to a different estate in the same property, and the statements of the tenant for years are not admissible against the owner in fee *Hill* v *Roderick*, 4 Watts & S (Pa) 221

. . . . here such declara . *Meyers*, 11 Wend . v, established it . once . ely, and the . or remote . nts of l . nowledgme . predecessor as though they were his own *Jackson* v *Davis*, 5 Cow. (N. Y.) . An admission made by landlord, after creation of tenancy is not binding on tenant An agreement between two proprietors to become joint proprietors not binding on tenants *Puran* v *Dhanpat*, 52 Ind Cas 739 But the declarations of the tenant are not admissible to affect the title of the landlord *Jones* § 243

The admissions of mortgagor as against mortgagee are on the same footing as those of grantor and grantee, and evidence only in so far as they affect

S. 1

estate mortgaged, and are limited in point of time to those declarations made before the signing of the mortgage *Foote* v *Beecher* 78 N. Y 155 An admission by the surviving daughter of a member of a joint Hindu family, that the children of her deceased sister were entitled to her father's share was held to be evidence of the existence of the title before the suit *Gour Lal* v *Mohesh*, 14 W R. 181

Vendor or Assignor of personalty The same principle holds in regard to admissions made by the assignor of a personal contract or chattel previous to the assignment, while he remained the sole proprietor, and where the assignee must recover through the title of the assignor, and succeeds only to that title as it stood at the time of its transfer, in such case, he is bound by the previous admissions of the assignor, in disparagement of his own apparent title But this is true only where there is an identity of interest between the assignor and

already stale, or otherwise infected with circumstances of suspicion *Harrison* v *Vallance* 1 Bing 15, *Greenl Ev* § 190, *Taylor* § 790 *citing from Greenl Ev* § 190 Thus, the declarations of a former holder of a promissory note negotiated

is not to be cut down by the acknowledgment of a former holder that he had no title *Barough* v *White*, 4 B & C 325 explained in *Woolway* v *Rowe* 1 Ad & El 114 116, *Shaw* v *Broom*, 4 D & R 730, *Beauchamp* v *Parry*, 1 B & Ad 89, *Hackett* v *Martin*, 8 *Greenl* 77 So, so far as choses in action are concerned, this is one exception to the general rule already stated Therefore declarations of a former owner of negotiable paper are not admissible against one

of the indorser made while the interest was in him are admissible in evidence for the defendant *Bayley on Bills, 502, 503*, *Pocock* v *Billings* Ry & M 127

Admissions of I
the act of insolvency,
evidence against ano
ram v *Radha* 34 C L J 107=49 C 93 66 Ind Cas 15, see also *Re* v *Tollemache*, 13 Q B D 720 *Re Bottomley*, 84 L J K B 1020 So also evidence taken in the public examination of an insolvent cannot be used as against a third party to prove or disprove a title *Jnanendra* v *The Official Assignee*, 30 C W N 346, *Re Brunner* 19 Q B D 572 *In re Cooper* 19 Ch D 580 *Madkoram* v *Official Assignee*, 27 C W N 611

Illustrative cases of Admissible evidence In order to be a relevant admission, it is necessary to show that the person who made the statement had an interest at the time when he made the statement *Jogeswar* v *Akhoy* 19 C L J 1=22

as admissions only when the admissions are of a date prior to the date of their deriving interest Statements made by persons in possession of property and qualifying or affecting their title thereto are receivable against the party
Galstaun v *Mirza*
by
Te is
rtue
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ame foot
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S. 18. A I R ... by accused to a Police officer are ... under ss 17 and 18 of the Evidence ... his favour *Azimuddin* v. *Emperor*, 44 C L J 253 = A I R 1927 Cal 17 A statement made on oath by the accused before the Coroner at the time of the inquest is admissible in evidence at the trial as a statement made by a party to a proceeding under ss 18 and 21 of the Evidence Act *Emperor* v *Rannath*, 28 Bom L R 811 = 50 B 111 = 93 Ind Cas 690 A statement in a case drawn up by an attorney for the opinion of a pleader is admissible in evidence as it must be regarded as a statement of the persons on whose behalf he was acting and what is said or done by him in the course of his business and within the scope of his authority is said or done by the persons on whose behalf he was acting *Chandreswar* v *Bisesuar* A I R 1927 Pat 61 = 5 Pat 777 A party is bound by ... questions of facts, whether

... A I R ...

Ganesh, A I R 1929 All 146 The admission ... unsupported by other proof, should be rece... and caution *Mrs L* v *W L* A I R 1928 Sind 55 = 105 Ind Cas 410 A statement made by an agent to the effect that his principal was a bastard was admissible in evidence as an admission under section 18 of the Evidence Act *Raj Fateh Singh* v *Baldeo Singh*, 3 Luck 416 = 109 Ind Cas 310 = A I R 1928 Oudh 233 An admission if gratuitous, can be withdrawn at any time and therefore such a confession though against the interest of the party making it, is of little value *Badhu Ram* v *Uttam Chand*, A I R 1925 Lah 726 A Batwara paper signed by the Partition Deputy Collector and containing entries required by the provisions of Ch 7, is a record made in the course of official duty within the purview of s 35, Evidence Act It would also be evidence against the proprietors under ss 18 and 13, Evidence Act, because they ... A I R 1929 Pat 32 = ... tion ... such ... him *Jamuna* v *Ka las* A I R 1929 Pat 254 = 10 P. L T 183 A p... has authority to admit certain facts so as to dispense with the necessity of further proof in a criminal case at the appellate ... I R 1928 Bom 241 = 36 ... be proved by the plaint...

... accused under section 18 of the ... his favour *Azimuddy* v *Emperor*, 44 C L J 253 = A I R 1927 Cal 17

Illustratives cases—Inadmissible evidence An admission made by a creditor after transferring his debt to a third person to the effect that the debt had been paid to him in part or whole before he had sold the claim, is not binding upon the vendee under section 18 of the ... v *Wasawa Singh* 25 Ind Cas ...

... with the a... ... Ind Cas 566 ... made by his *Mukhtear* ... of the authority conf... I R. 1923 P 37. An ... emptor by another p... suit between plaintiff ... vendees *Ahmad* v *Jawahar*, 84 Ind Cas

257=A. I R 1923 Lah. 16. A party cannot be bound by admission of his pleader as to law in as much as the parties must be presumed to know what is correct law. *Chanloo* v. *Murlidhar*, A. I. R 1926 Oudh 311=13 O L J. 138=92 Ind Cas 732; *Fateh Ali* v. *Ahmad Din*, A I R 1927 Lah 281=100 Ind Cas. 833; *Panjabai* v. *Bhaguan*, 31 Bom L R 88=A I R 1928 Bom 89, *Muthia Chetti* v *Muthu*, A. I R 1927 Mad. 852=26 M L W. 465=39 M. L. T. 240; *Ulichi* v. *Nallamali*, A I. R 1928 Mad. 90 Recitals, regarding the boundaries in a document not *inter parties* and statements made by third parties cannot be admitted. *Sarat Chandra* v. *Sarala*, A. I. R 1928 Cal 63=105 Ind. Cas 6 [illegible] one of several defendants in [illegible] *Narindar* v *C M. King*, A. [illegible] I R 1929 Lab. 129 *Kishan* v. *Lachman*, A I. R 1930 Lah 138 Neither the declaration of a donor nor the declaration of [illegible] evidence as against the [illegible] R 1928 Oudh 111 [illegible] capable of being regarded as a stale or time barred claim, it is to his interest to make allegations which would save the claim from the bar of limitation Having [illegible] were actually made *Ammallu* [illegible]

Admission by one of the defendants that the land in a suit is ancestral is not binding on the others when they are not represented by him and have independent rights of their own *Kishore* v *Lachman*, 122 Ind Cas 109=A I. R. 1930 Lah. 230

The Mohants of *Deva Pitha Saheb* are managers A *Chela* must first be nominated [illegible] cannot be regarded as admissions [illegible] Worshippers are not bound by the admissions of previous *Mohants* *Ram Parshad* v *Shivomani*, A I R 1931 Lah. 161; but see *Vidya Purna Tritha* v *Vidyanidhi Tiratha*, 27 M 435; *Hargian* v. *Baldev*, 127 P R 1908=123 P W R 1908 (F B)

Admissions by persons whose position must be proved as against party to suit

19. Statements made by persons whose position or liability it is necessary to prove as against any party to the suit, are admissions, if such statements would be relevant as against such persons in relation to such position or liability in a suit brought by or against them, and if they are made whilst the person making them occupies such position or is subject to such liability.

Illustrations

A statement by C that he owed B rent is an admission, and is a relevant fact as against A, if A denies that C did owe rent to B

Scope of the section Ordinarily statements by strangers to a proceeding are not relevant as against the parties *Coole* v *Braham*, 3 Ex 183 But in some cases, the admissions of third persons, strangers to the proceeding are receivable *Greenl Ev* § 181, *Taylor* § 759 The admission of a third person against his own interest, when it affects his position or liability and when that [illegible]

S. 19. to add to the category of persons by whom a statement may be made before it can be considered to be an admission within the terms of the Indian Evidence Act The statements referred to in section 19 become admissible only provided that the ... as regards their nature and section 21 or an ... heir liability. *Per Tyabji J* in *Appavu* ... person whose position in relation to prope... to prove against another, is in the nature ... has not been ... statements are admissible ... of such persons at a particular time; in which case the practice is ... evidence in general as would be legally admissible in an action between the parties themselves *Greenl Ev* § *181* Thus in actions against the sheriff for not executing process against the de... ... of the debtor admitting his debt to be due to the execution ... the sheriff *Kempland* v *Macaulay*, ... 42, *Re Brunner*, 14 Q B D 572 ... person has been held sufficient evidence, on the part of the defendant, to support a plea *in abatement for the non joinder of such* persons as defendants in that suit; it being admissible in an action for the same cause *Clay* v *Longslow*, 1 ... of a bankrupt, made before the act of ... *Jarrett* v ... bankruptcy, ... use of the ... *Ev* § 181 ... *Edwards* ... B D 72 ... *Re Tollemache*, 14 Q B D 415, ... his being ... An admission made by a land... ... proprietors of certain land and others, ...

Mal, 11 Lah. 503=A I. R 1930 Lah 579=128 Ind Cas ... title, proceedings in a previous title suit instituted by defendant against third persons are relevant under this section *Jairam* v. *Loke Nath*, 125 Ind Cas. 782=A I R 1930 Pat 405

Illustrative Cases—Admissible Evidence Where in a case of a disputed deed of adoption the defendant alleged that the deceased executant had become shortly after the execution of the deed aware of its existence, purport and ...

taken regarding it, cannot be excluded as irrelevant, but is admissible ... Evidence ... sections 18, 19 or 121 or section 11 of the ... in a ...

... half share because ... for a long time is an admission in the defendant tenant's favour and ... amount to setting up a custom *Janaki Kuar* v. *Usman*, 62 Ind Cas 417, see also *Rameshwar* ... 60 Ind Cas 721 ... An admission made by a person ... against ano... from the for... ... question at issue was ... whom her mother was ... it was alleged, ... she was described as ... ich she stated that she

had been living with the alleged father for 10 or 12 years, even if admissible is of no weight for the reason that her statement does not amount to an admission that she was living in adultery *Maqbulan* v. *Ahmad Husain*, 26 A. 108 P. C = 8 C. W. N. 241 = 6 Bom L R. 233 = 31 I A. 38

S. 2

20. Statements made by persons to whom a party to the suit has expressly referred for information in reference to a matter in dispute are admissions.

Admissions by persons expressly referred to by party to suit

Illustration

The question is whether a horse sold by A to B is sound A says to B—"Go and ask C; C knows all about it" C's statement is an admission

Principle If a party, instead of expressing his belief in his own words, names another person as one whose expected utterances he approves beforehand, ement; and it " said *Ellen*- another upon s third person by himself." ontaining the true account of a particular matter, thereby making it evidence in regard to the particulars for which he has so vouched its correctness *Bricknell* v *Hulse*, 7 A. & E. 468, *Richards* v. *Morgan*, 33 L J Q B 114, *Wills' Ev* p 162

Admission by persons expressly referred to by party to suit. It not

cases, the party is bound by the declarations of the persons referred to, in the same manner and to the same extent as if they were made by himself *Burr Jones*, § 263, *Soloman* v *Herne*, 2 Esp 695, *Williams* v *Bridges*, 2 Stark 42, *Kempland* v *Macaulay*, Peake's Cas 65 In such a case the admission of a third person are receivable in evidence, against the party who has expressly referred another to him for information, in regard to an uncertain or disputed matter This species of admissions is well rec

unfairness in Esp 145, on a to A, and he ing "Where , what he says if it is connected with the business which is referred to him, is evidence" In *Daniel* v *Pitt*, 1 Camp 364 note, defendant said, "If C will say that he did deliver the goods, I will pay for them" In the circumstances C's admission was held admissible Similarly in *Brock* v *Kent*, 1 Camp (note) defendant desired the plaintiff to enquire of *Jones* about it, *Jones* being a person who had paid money *Jones'* statement was held admissible. In *Garrett* v *Ball*, 3 Stark 160, which was an action of trover for a horse the plaintiff had said "if the defendant would take his oath that the horse was his, he should keep him" The fact of the defendant's affi

1 C & P 532 the defendant

"him" he meant one H

was admissible In *Sybray* v

to a horse, the defendant sa

the horse was killed was

to charge the defendant, beca

agents" In *R* v *Mallory*,

receiving stolen goods by the accused, the accused referred the police to his wife for a list of the prices and dates of purchase of the goods, stating that he did

s. 20. not know them, and the next day the wife handed the police the list in his presence The list was received, as an admission of the prices and dates This

he principle of awards by

rests on a contractual basis

s pronouncement Wigmore

ct, infra. Such statements

which were in the nature of awards required no stamp even when in writing *Tay* § 701.

What questions may be referred In the application of this principle, it matters not whether the question referred be one of law or of fact; whether the persons to whom reference is made, have or have not any peculiar knowledge on the subject; or whether the statements of the reference be adduced in evidence

herefore where two parties had

on the construction of a Statute,

ated was held bound thereby

& Sel 105; *Downs* v *Cooper*, 2

can be referred to a third party

Sybray v *White*, 1 M & W 435; *Taylor* § 761

Reference must be express This rule must not be understood as giving the force of an admission to statements made by a witness as against the party who calls him *Gardner* v. *Moult*, 10 A & E 463, *R.* v *Latchford*, 6 Q B 567, 577, *Bricknell* v *Halse*, 7 A & E 456 There must be an express reference for information in order to make the statement an admission Thus if A says "I will pay ... the matter will

Killinger, 8 Wall (U S) 480 (*Am*) Thus, where a defendant stated that a book keeper would furnish whatever information was contained in the books, the

party makes the referee his accredited agent for the purpose of giving such answer. *Evatt* v *Hudson*, 97 Ark. 265 If a party, on motion before a Judge, uses the affidavit of another person to prove a certain fact deposed to therein, such affidavit is on any subsequent trial evidence as against him of this fact, and that too, though the person who made the affidavit is present in Court *Brickell* v. *Aulse*, 7 A & E 454, *Boilen* v *Rutlin*, 2 Ex. R. 675 (679), *Pritchard* v *Bughshaw*, 11 Com B 459, *Johnson* v *Ward* Esp 47; *White* v. *Aowling*, 8 Ir L R 128, *Tay*, § 764

does not affect the

a neces ary witness

irrespective of the

referee *McEluee* v *Troubridge*, 68 Hun 28 = 22 N Y Supp, 674 (*Am*); *Burr Jones* § 263

s bound by

the same

Lord

had

reced

n to have caused

o that ordinarily mere admissions are not conclusive as is provided in section 31, but admissions

Gordhan v *Husain*, A I R 1927 All 659=103 Ind Cas 34, *Himanchal Singh* v *Jatuar Singh*, A I R 1924 All 570=46 A 710=10 Ind Cas 16, *Muhammad Imtiaz*, A. W. N (1898) 200; *Keshoram* v *Piari*, 71 Ind Cas 761, *China* v *Venkata*, 42 M 625

Admission by interpreters To render the declarations of a person referred to equivalent to a party's own admission, it is not necessary that the reference should have been made by express words but it will suffice if the party by his

interpreter should be considered a

nd are in no sense hearsay, nor is it neces-

that his interpretation

A wife's statement

Schutter v *Williams*

ed by two persons

ication with each

statements of what

circumstances is

during a trial is

Schearer v *Harber*,

cannot be admitt

People v. *Ah Yute*, 56 Cal 119 (1m)

Depositi

of a party's w

the House of

21 ings as admissions *British Thomson Houston* v *British Insulated etc Co* (19 f) 2 Ch 160, *Phip Ev* 214 Unle s an express reference has been made to a witness on a certain question his statement will not constitute an admis on as regards that question L R 2 All 209

Criminal Cases This section is applicable to criminal cases as well Th s where the accused told a constable that his wife would make out a li t of certa n property, a list afterwards m de out by her was held evidence again t h r st was handed to the J expres ly refrain d effect of the pr son r e evidence and where he had asked for certain inquiries to be made, facts elicited in direct an wer or mere hearsay, are evidence aga nst h m v *Cambell*, 8 Cr App R 75, *R.* v *West cod*

Illustrative cases—Admissible Evidence The plaintiff and the defendant in a suit signed a wr the parties that G shall statement that he may against the plaintiff *Held* that the statement of G must be taken to be an admission made in the suit by a nominee of a party thereto which was effectual as an admission by the party himself *Himanchala* v *Jatuar* 80 Ind Cas. 16 A I R 1924 All 570, see also *Gordhan* v *Husain*, A I R 1927 All 609=103 Ind Cas 34, *Sita ram* v *Piari* 47 A 921, *Muhammad* v *Imtia* , A W N (1898) 200

Illustrative cases—Inadmissible Evidence A party to a l t gation is not bound by the statement of the mukte r of the opposite side who was cros examined by the parties *Mt Srimati Ausanbati* v *Ram Jas*, 4 U P L R 9 (Rev)

21 Admissions are relevant and may be proved as again t the person who makes them, or his repre en tative in interest, but they cannot be proved by or on beh lf of the person who makes them or by his representative in interest except in the following cases —

Proof of admissions against persons making them and by or on their behalf

(1) An admission may be proved by or on behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as between third persons under section 32

(2) An admission may be proved by or on behalf of the person making it, when it consists of a statement of the existence of any state of mind or body, relevant or in issue, made at or about the time when such state of mind or body existed, and is accompanied by conduct rendering its falsehood improbable

(3) An admission may be proved by or on behalf of the person making it, if it is relevant otherwise than as an admission.

Illustrations

(a) or is not forged

A n

a stateme

himself that the deed is genuine, nor can B prove a statement by him that the deed is forged.

S.

(b) A, the captain of a ship, is tried for casting her away

Evidence is given to show that the ship was taken out of her proper course.

A produces a book kept by him in the ordinary course of his business [illegible] day to day, and [illegible] A may prove [illegible] third parties, if he were dead, under section 32, clause (2)

(c) A is accused of a crime committed by him at Calcutta

He produces a letter written by himself and dated at Lahore on that day, and bearing the Lahore post-mark of that day.

The statement in the date of the letter is admissible, because, if A were dead, it would be admissible under section 32, clause (2)

(d) A is accused of receiving stolen goods knowing them to be stolen.

He offers to prove that he refused to sell them below their value.

A may prove these statements, though they are admissions, because they are explanatory of conduct influenced by facts in issue

(e) A is accused of [illegible]

[illegible] and told him it was genuine.

A may prove these facts for the reasons stated in the last preceding *illustration*

[illegible]

heads are receivable is discussed under each topic (*vide infra*)

to [illegible]

a ci [illegible]

[illegible] the general rule as an admission *Abdul Ghani* v *Emperor*, A. I R 1931 Lah. 763 The primary rule in section 21 is that an admission is relevant and may be proved as against the person [illegible] *Gulab* v. *Fadali*, 68 Ind Cas [illegible] evidence against him *Lachmai*. [illegible] *Ma Tha*, U B R. (1897-1901) [illegible] be proved in a criminal case just as much as an admission by the defendant in a civil suit under section 21 of the Evidence Act But an admission under that

s. 21 section is one made by the party against whom it is tendered before the proceedings in which it is sought to be given in evidence It does not refer to pleadings in the case or to an admission contained in such pleadings *Jeymma* v *Vas* 1? Ind Cas 961=10 M L T 506=(1911) 2 M W N 576 A statement whereby of money is in most cases an

to a police officer is not
if he is on his trial as an accused person yet it is acceptable in a civil suit as an admission under sections 17, 18 and 21 of the Evidence Act *Bishendas* v *Ram Labhaya*, 32 Ind Cas 18=106 P I
title which was non existent thoug
making it if the title admitted had
37 Ind Cas 983 A a member of a Hindu joint family, whose house was at Lucknow, practised as a pleader at *Hardoi*, and made considerable savings from his professional earnings He eventually became managing member, but was all along
District.
earnings i
so entered

he purchases in the name of B
B was a statement against his own
Suraj Narain v *Ratanlal* 40 Ind Cas 988=21 C W N 1065=20 O C 211=19 Bom L R 737=15 A. L J 684 A written agreement by a tenant to pay the *Swantantram* or *Thanduvaram* is admissible as an admission of the evidence of custom unless the tenant explains away the admission and its effect can not be discounted or neutralised on the ground that the admission is recent *Kumarappa* v *Manavala*, 44 Ind Cas 699=41 M 374=1918 M W N 350 (F B) An oral confession by an accused person not being open to exception under section 24, 25 or 26 of the Evidence Act is as an admission by an accused person a relevant fact, and may be proved at his trial under section 21, and therefore such a confession made to a Magistrate is relevant, and may be proved by the evidence of the Magistrate *Feroz* v *Emperor* 45 Ind Cas 843=11 P R 1918 Cr =19 Cr L J 651, see also *Per Heward J* in *Emperor* v *Maruti*, 51 Ind. Cas 465=21 Bom L R 1065=21 Cr L J 65, *contra Per Shah J* in *Ibid*. The statement of an accused person as a witness in a previous case is admissible against him under this section to prove admission of relevant facts made by him in that statement *Emperor* v *Banarsi*, 77 Ind Cas 829=22 A L J 144=46 A 254=25 Cr L J 477 An entry in the body of the bond that no further account is outstanding against the debtor does not bind the creditor in any way and is merely an admission by the debtor in his own interest. The *Gurdilla* v *Nabi Bakhsh* A I R 1926 Lah 381=93 Ind Cas 996 The statement that a document is a copy of the original ... when made by a deceased person in a docume
admission under s 21 *Seethaya*
W N 578 (P C) Entries in
purchase for clie
Ram v *Madan*
581 (P C) An
weight, but it i
operates as an e
after him his hei were untrue *Bai Dev*
v *Rabishankar* L R 109, see also *Hiranand*
v *Ahmed*, 1923 statements made by a soldier
before a military evidence against him on a
criminal charge in a *Civil Court* *R* v *Colpus*, (1917) 1 K B 574=86 L J
K B 150

164 and 61 of the Code might be proved as admissions by the accused,

wholesome provisions elaborately laid down in these two sections practically reduced to a nullity. *Queen Empress* v *Bhairab*, 2 C W. N 702 An oral

r section 24,

n, a relevant

ession made

Magistrate.

J 651; see

P R 1887

Cr; *Rajkumar* v *Emperor*, 9 Pat. L T. 449=A I R 1928 Pat 473; *Madan Guru* v *Emperor* 4 Pat. L T 381=73 Ind Cas 963=24 Cr L J 723; *R* v. *Crowe*, 81 J. P 28

against

his co accused

D to a

Police officer may

m, 106

P R

31 C. L. J 72

sible as admission *Satish* v *Bisesuar*, A I R 1930 Cal 559 But an admission of judgment by one of several defendants is no evidence against his co defendant *Rashiduddin* v *Nazimuddin*, 11 Lah L J 401=A I R 1929 Lah 721

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32, of the Evidence Act, or it must be relevant otherwise than as an admission In either case its value would be slight *Tarak Chandra* v. *Prosanno*, 78 Ind Cas 719=28 C W. N 679=39 C L J 389

Representative in interest

would be admissible against him

claiming under him by descent, and

the same manner as they would

Greenl Ev § 189, *Davis* v *Melson*

of one having or claiming title

him, they are competent against persons subsequently deriving title through or from him *Burr Jones* § 242 An admission against her own interest by the predecessor in title of the defendant is relevant under ss 18 and 21 of the Evidence

to shift the burden

Ind Cas 700 The

term "legal representative

C. P. C. cannot be

the estate of the deceas

Narain v *Jai Kishen*

are of three kinds, namely (1) privies in blood, such as ancestors and heirs (*Weeks* v. *Birch*, 69 L. T 759) (2) privies in law, such as executor of a testator or

S. 21. administrator to an intestate, and (3) privies in estate or interest as vendor and purchaser, grantor and grantee, donor and donee, lessor and lessee etc (*Lord Blackburne* v *Brougham*, 9 App Cas 307) *Phip Ev 4th Ed* p 219 The term "representative in interest" is rather vague (*Ishan* v *Beni*, 24 C 62, 72) but it seems to include most of the privies in blood, law or estate *Vide notes under section 18, Woodroffe Evidence* p. 255 So a party is bound by the admissions of his father and 1 A & E 114, *Doe* v *Pettell*, 5 B & A 22 . *Meath* v *Winchester* 3 Bing N C 183; also a statement by a party s predecessors *Doe* v *Lalim*, 7 C & P 481 But such admission is not binding on the successor if the statement is made after he has parted with his interest. *Doe* v *Webber*, 1 A & E 71, *Pocock* v *Billing*, 2 Bing 269 An auction purchaser in a money decree is a representative of the judgment debtor. *Ram Coomar* v *McQueen*, 18 W R 166=I. A Sup Vol 40; *Unnopoorna Dassee* v *Muffer Poddar*, 21 W R 14, *Ishan* v *Beni*, 24 C 62, *Kishore Lal* v *Ganga Ram*, 13 A 28, *Harihayal* v *Narayan*, 1924 Nag 208, *Mahomed* v. *Kishori*, 22 C 909, *Badri* v *Jainish* 16 A 483, *Sundara* v *Venkatavarada*, 17 M 228, but see contra *Manohar* v *Sumitra* 17 A 428 A purchaser at an execution sale is in privity with and the representative in interest of the judgment debtor within the meaning of section 21 of the Evidence Act, so as to be bound by his admissions Where therefore in a mortgage suit the mortgagor a[illegible] a prior mortgage, the purchaser of the

[illegible]

mortgagors and their representatives in interest under section 21 of the Ev[illegible] Act *Podam Kuwar* v *Nahu Singh*, 39 Ind Cas 635=1 P. L W 413, *Pa[illegible] Nath* v *Jadoonath*, 7 W R 441, *Gadian* v *Veerappa*, 26 Ind Cas 899=28 M L J 92, *Bulal* v *Bihari*, 76 Ind Cas 815; *Bakshu* v *Liladhar*, 35 A 303 [illegible] recital as to the passing of cons[illegible] admissible in evidence against the transferee [illegible] Act *Narain Singh* v *Bhikha*[illegible] *tauar* 17 Ind Cas 444=10 [illegible] =11 A L J 221=35 A 194 admissible against another re[illegible] through the former *Golab* v *Tadah*, 68 Ind Cas. 568

Admission cannot be proved in favour of the party making it Admissions are not admitted as testimony of the declarant in respect of any facts in i[illegible] *State* v *Willis*, 71 Conn 293 P's carriage was driven against M's carriage, whereby M's thigh was broken On the trial of an action by M against P for [illegible] for M

[illegible] to be [illegible] *Sutherland* v [illegible] rejected because [illegible] itself favourable [illegible] had a weak case [illegible] suborning wit-nesses to speak to having heard him make such statements A vast mass of the most worthless evidence would thus be imported in the case *Can Ex P* [illegible] 7 Cox 136, see also R v *Hard* [illegible] *Letchettine*, [illegible] 82—8[illegible] 352 [illegible] hearsa[illegible] by a person can[illegible] in favour of his [illegible] certain exceptio[illegible] person is admiss[illegible] stances which g[illegible]

S. 2

an admission made by the plaintiff's lessor in his own favour and was consequently not admissible under any of the provisions contained in section 11, 13, 21 or 32 of the Evidence Act *Radha v Sarbesuar*, 86 Ind Cas. 674=29 C W. N 469=A I R 1925 Cal 689

Ev § 520, *Phip Ev p* 223 The framers of the Indian Evidence Act in this

and (3) of the section The reason for these exceptions are thus given by *Mr Cunningham* "This rule (*i e* admission cannot be proved in favour of the person making it) however, if enacted without any relaxation would work harshly as there are some statements which though they are in the interest of the person making them, are yet from some particular circumstaces deserving of special credit Such for instance, are the statements mentioned in section 32 of the Act, to which illustrations (b) and (c) refer Practically the effect of this and the following exception is to let in a very large number of admissions as evidence in a man's favour,
given to them" *Cun Ev.* 137.
tive force An admission again
evidence, not only against privies in title, but also against strangers *Rajcoomar v Bissessur Dyal*, 10 C 688.

Clause (1) The securities which have been devised by municipal law for insuring the veracity and completeness of the evidence given in Courts of Justice vary, as might be expected, in different countries, and with the systems of law to which they are attached Several of those are principally relied on by the English law, such as the publicity of judicial proceedings, the compulsory presence of witness in open Court and the right of cross examination, etc *Best Ev* § 51 Of these safeguards against false testimony confrontation and cross-

another, cannot be received in any criminal Court to affect anybody except, him Every individual who stands upon his trial in a British Court of Justice has a clear right to have the witness brought in front of the Court, to be submitted to his cross examination, that he may have an opportunity of interrogating him respecting all the particulars of the fact.' We have seen that this rule is not violated when an admission is received against a party making it But the same principle is not available when the admission made by a party is received in

as a relevant fact must have some probative force So in eight cases where such

statements are made admissible by section 32, the circumstantial guarantee of *trustworthiness has been shown* Clause (1) lays down that an admission by a person may be proved by or in behalf of the person making it, when it is of such a nature that, if the person making it were dead, it would be relevant as

such admission is always admissible Section 34 of the Indian Evidence Act enacts that entries in books of account regularly kept in the course of business shall be relevant evidence though not sufficient of themselves to charge any person with liability *Josuant* v *Sheo Narain*, 16 A (157 (161)=21 I A 6 The admission of such entries on behalf of a person making them is an exception to the general rule laid down in section 21 of the Act But where the documents are not proved to be account books regularly kept in the course of business their admission is illegal because proof of the entries therein would be in violation of

ments against proprietary interest
custom or matter of public int
sions of
behalf
of pay
fall within the language ... of section 32 of the Indian Evidence Act
and although they ar
section 21 of the Act
purchased the holding

the entry in the sale certificate might be used in evidence in favour of ... landlord *Manik* v *Jagadindra*, 24 Ind Cas 283 see also *Faral* v. *Prosonna*, 73 Ind Cas 719=28 C W N 679=39 C L J 389 Statements as to the date of birth of a person contained in his deposition and in affidavits filed by him are admissible in evi
Act, if made b
or hearsay *Ra*
M W N 208
inter alia that
by one of the pl
in suit arose w
266 A statemen
certificate, obtai
decree against th
sion by him or his predecessor in title, and it cannot be used as evidence ... does not come under any of the exceptions to section 71. *Ramani* v *Mahanand*, 31 C 380 So also a recital in a writ of attachment is not admissible in favour of maker of the statement and is against persons who claim under an independent title *Moheeruddin* v. *Sumera*, 15 Ind Cas. 510 On the question whether the Courts below should or should not have received in evidence the testimony ... of a
docu
perso
suit
Act,
Babu Madho Das, 19 A. 77 P. C.

S.

section 21 of the Evidence Act and exclude road cess returns which are sought to be admitted in favour of the person by or on behalf of whom they have been filed

against persons other than the one who has made the return. *Chalho* v. *Jharo*, 39 C. 995. A cess-return file
by a stranger against anothe
Dina Nath, 43 C. L. J. 425.
of any person who claims
tive in interest. *Lachmi* v. *Jag Mohan*, 18 C. L. J. 633 (636), but see *Ramprosad* v. *Lala Sham Narain*, 6 C. L. J. 22, where it is ruled that section 95 of the Road Cess Act has no application to the case where the parties who tendered road cess returns in evidence were not the persons who filed them, in pursuance of the provisions of the Act. Road cess returns are admissible in evidence against the person by or on behalf of whom they are filed. *Hem Chandra* v. *Kali Prosonno*, 30 C. 1033 P. C.=8 C. W. N. 1, *Swarnamoyi* v. *Sourendra*, 89 Ind. Cas. 747=42 C. L. J. 14. The effect of section 95 of the Cess Act is to prohibit the admissibility of return when tendered in favour of person of filing it, and it has, and was intended to have no

immaterial whether it was put in evidence directly to prove an admission or indirectly for some other purpose. *Ram Narain* v. *Hara Narain*, A. I. R. 1926 Cal. 727=92 Ind. Cas. 104.

Clause (2). "Clause (2) has received no illustration in the Act, probably because it has already been

21. relevant admission when religion of deceased person is a fact in issue *Leong v Leon*, 7 R 720 = A I. R 1930 Rang. 42.

oncomitants of illness and of physical
mplain of pain and distress I think
ity of the case" *Denis J* in *Caldwell*
n *State v. Davidson*, 30 Vt. 383 (*Am*)
party are received to show the extent
general ground that such injuries are

incapable of
their effect"
It would be
character of pa
stateme
should l
removes
543; se
such ac
above
followir
able '
that the

suffering In some cases it seems to be required that the person be otherwise in an apparent condition of bodily ailment, of which his statements are the natural product *Penn Mutual L I Co v Wiler*, 100 Ind. 103 (*Am*); *McMurray v. Rigby*, 80 Ia 325 (*Am*), *Wigmore* §§ 1718, 1719

Who may testify as to statements The extrajudicial statement of one suffering pain or conscious of other bodily sensation may, as well as his coherent or incoherent ejaculation on the same subject, be testified to by any one who heard it Accordingly, a wife, parent, daughter, nurse, other attendant, or even a mere by stander is permitted to detail the statements to the Court. Even the declarant himself may testify as to his own statements. *Chamberlayne's Ev* § 2625.

to be of any degree of coherence Whatever this may be, whether that of a single word, or series of words, a disjointed or completed sentence, the evidentiary purposes is the same. We are dealing with circumstantial evidence, logically tending to establish the existence of a relevant bodily condition On this ground exclamations indicative of present pain suffering or distress, are normally received without objection. *Chamberlayne's Ev* § 2626

Kinds of fact narrated—statements of past events and conditions ex- ... of

because they do not relate to an internal state and thus other evidence is ...

S. 21

io narrative is admissible as to who caused *R. v Glostar*, 16 Cox Cr 471 (473) The rule *Cleveland C C & J R Co* v *Newell*, 104 Ind esent existing pain and of its locality . are admitted upon whether pain beyond the ne ings, pains or symptoms principle of guarantee of trustworthiness, for they are not naturally caused by the existing pain or other symptoms, but being deliberate accounts of past occurrences, to the toms, an ed in the same way. *Wigmore* § 1722.

Clause (3) This clause is intended to apply to cases in which the statement is sought to be used in evidence otherwise than as an admission, for ins xplaining a inadmissible by reference 21 = A I R is relevant 11, clause (1), as inconsistent with a relevant prisoner's innocence by circumstances

they will be excluded as So also "care must likewi *res gestae* The language

N 91 = 25 C 210, where the defendants 1 which they obtained under a parti he plaintiff and denied the said partition sly made by them, which went to show that there had been a partition and they had changed their attitude could be proved as against them and the statements were admissible evidence under sections 21 (3) and 11 (2) of the Evidence Act An admission may be proved *on behalf of the person making it under section 21 clause (3) of the Evidence* Act if it is relevant otherwise than as an admission If self serving statements are made in the presence of the opponent, and not denied by him, they are evidence for this purpose, so in the case of taking accounts, or where the entries are of a public nature (ss 35—37) or In the case of a house said to have

Raghunath v *Brindeshwari* L R 5 A 231 = 82 Ind Cas 582 = A I R 1924 All

21. which the defendant was *not* a party, might be admissible *in* evidence as against the latter either under section 21 clause (3) read with section 11 clause (2) of the Evidence Act, or under section 32 clause (5) or under section 157 of the Act. *Sayeruddin* v *Samiruddin*, 72 Ind Cas 985=A I R 1923 Cal 378 Self serving statements are admissible where they make relevant facts highly probable or improbable or they are *res gestae* *Harihar Prosad* v *Kesho Prosad* A I R 1925 Pat 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue, and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party is estopped from disputing their truth with respect to that person (and those claiming under him) and that transaction, but as to third persons he is not bound It is a well established rule of law that estoppels bind parties and privies, not strangers *Per Bailey J* in *Heans* v *Rogers*, 9 B & C 586 The person against whom an admission is proved is at liberty to show that it was mistaken or untrue When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is nothing in the Evidence Act and there is no general principle or rule of law to prevent the Court from deciding the case in accordance with it. *Mat J Mya* v *Ma Pha* U B R (1897 1901) Vol II, 377 An erroneous admission does not bind the person making such admission *Mangru* v *Shivanand* A I R 1923 All 575 When in a petition there is an inadvertant admission as to the nature of certain property it is open to both sides to give evidence as to whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement *Diwaban Ihu* v *Mani lal* 52 Ind Cas 113 Statements made by a party at a previous proceeding without any definite knowledge of his rights and liabilities do not operate as an estoppel. Where the previous proceedings were compromised at an early stage without any decision of Court the party can show in a subsequent suit that the statement previously made was untrue *Mahamed* v *Pir Mahomed* 65 Ind Cas 363=A I R 1922 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed [*vide* clause (5) section 32] all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on this distinction is either just or necessary *Wigmore* 1721

Illustrative cases—Admissible evidence Where in a *suit for mortgage* the defendant admits the execution of the document he also admits the receipt of the consideration *Seth Majanmal* v *Dalbortial*, 21 N L R 40=47 C L J 222=107 Ind Cas 113=A I R 1928 P C 39 The fact that a co defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared [illegible] plaintiff's title was admitted, is admissible *in* evidence though it is n[illegible] on the other defendants who claim under an in[illegible] 90 Ind Cas 643=A I R (1926) Cal 286 [illegible] the accused under s 342, Cr Pro Code prematurely at a time [illegible] sufficient to co[illegible] them with the crime, with the commission of which [illegible] charged, had b[illegible] it was held that although the Magistrate was wrong in [illegible] Criminal Procedure Code when it was impossib[illegible] the purpose of enabling them to explain *any* circumstance [illegible] nce against them, still their statements actually made cannot, if apparen[illegible] e and voluntarily given, be rejected as inadmissible in evidence on account of *this* irregularity of procedure; and that *prima facie* as admissions, these statements were relevant under section 21 of the Evidence Act *Queen Empress* v *Narayan*, Ind Cr C 679=Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be inferred are admissions and may be proved under section 21 *Raj Mal* v *Empress* 3 P R 1880 Cr *Mt Mehro* v *Crown*, 8 P R 1907 Cr=5 Cr L J 182, *Haroans* v *King Emperor*, 8 O C 335=2 Cr L J 811, *Nga Po* v *King Emperor*, 5 Cr L J 300

S. 2

Illustrative cases—Inadmissible evidence Under section 21, a Court is bound to receive in evidence admissions of a party but no such rule applies to denials *Janki v. Emperor* 49 A 482=25 A L J 327=A I R 1927 All. 383. A statement in an order for delivery of possession as to the rent payable in respect of the land is inadmissible in evidence in a suit between the landlord and the tenant in which the rent payable is in dispute *Chandra Mohan v Sheikh Elim* A I R 1926 Cal 415=87 Ind Cas 512 An admission by an agent in favour of his principal cannot be relied on by the latter to prove his title to property *Maula Baksh v Jafar Ali*, 4 Lah L J 437 A respondent's admission in a divorce suit is not evidence against a correspondent. *Gordon v Gordon*, 58 P R 1870. A party's income-tax paper may be used against him but not in his favour *Shah v Emamun*, 9 W R 275 A party cannot use in his own favour an admission by his predecessor in his own interest *Bijoy v. Kalipada*, 20 Ind Cas 78=17 C W N 1013=18 C L J 347

22. Oral admissions as to the contents of a document are not relevant, unless and until the party proposing to prove them shows that he is entitled to give secondary evidence of the contents of such document under the rules hereinafter contained, or unless the genuineness of a document produced is in question

When oral admissions as to contents of documents are relevant

Origin of the rule In evidencing the contents of a document, it has at least, his oral accounted for as advanced in early

English rulings, in a forceful op sion, *Parke B* declarations wer for w th that mentioned in the schedule, although such admissions involved the contents of a written instrument, not produced, and I believe my *Lord Abinger*, who was not present at the argument, entirely concurs. Indeed, if such evidence were inadmissible, the difficulties thrown in the way of almost every

party himself *admits to be true, may reasonably be presumed to be so'* The

an unprofessional or ignorant man may be led to believe it may be so and so, where is the real and true meaning may be the very reverse or something very

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the Act.
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A I R 1925 Pat. 68

Party can show mistake or fraud "There is no doubt that the express admissions of a party to the suit, or admission, implied from his conduct are evidence—and strong evidence—against him, but we think that he is at liberty to prove that such admissions were mistaken or were untrue and that he is not estopped or concluded by them, unless another person has been induced by them to alter this condition, in such a case the party with respect to that person (and their · but as to third persons he is not

privies, not strangers' *Per Bailey J* in
person against whom an admission is
mistaken or untrue When an admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue there is ' or rule
of law, *Maung*
Mya v *Ima ...*
does not bind the person making such admission *Mangru* v *Shivanand*, A I R 1923 All 575 When in a petition there is an inadvertant admission as to the nature of certain property, it is open to both sides to give evidence as to t acquainted with the *bandhu* v *Mammal*
proceeding without
perate as an estoppel
ly stage without any
decision of Court, the party can show in a subsequent suit that the statement previously made was untrue *Mahamed* v *Pir Mahomed* 65 Ind Cas 563=A I R 1922 Nag 67

Statements Post Litem Motam If the analogies of other exceptions be followed [*vide* clause (5), section 32], all statements made *post litem motam* are to be rejected as untrustworthy But it is questionable whether an absolute exclusion based on this distinction is either just or necessary *Wigmore* 1721

Where in a suit for mortgage
locument he also admits the receipt
...oorilal, 21 N L R 40=47 C L J
222=107 Ind Cas 113=A I R 1928 P C 39 The fact that a co defendant took part in certain *batwara* proceedings in which the land in dispute was measured and a map was prepared in which the plaintiff's title was admitted is admissible in evidence tho ... on the other defendants who claim u
90 Ind Cas 613=A I R
the accused under s 342,
sufficient to connect them with the crime, with the commission of which
ld that although the Magistrate
342 Criminal Procedure Code

under section 21 of the Evidence Act *Queen Empress* v. *Narayan*, Rat. Cr C. 679=Cr Rg 15 of 1893 The statements of an accused person, from which his guilt may be inferred are admissions and may be proved u/s
section 2 *R. Mehro* v *Crown*, 8 P W
R. 1907 *peror*, 8 O C 395=2 Cr
L J 811

S. 2

ie party tendering them is with-
ɔ admission assumes a degree
to possess as of a construction
e Judge may direct the docu-
F & F 653, *Boulter* v *Peplou*,
J C B 153) ;—*Phip Ev* 226

Scope of the section This section departs from the English law as laid down in *Slatterie* v *Pooley* 6 M & W 664 Following Mr *Taylor*, the views expressed in *Lawless* v *Queale* 1 Ir L R 352 has been adopted in the present Act Oral admissions as to
provided in this section are excluded
sions as to such matters, are howe
Cun Ev 140 So when the existence conditions or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his representative in interest, such written admission is admissible *Section 65 clause* (*b*) But written admission mentioned here must be distinguished from written admission made under section 58 This section does not exclude admissions which the parties or their agents agree to admit at the

8 B H C R A C J 163 (165) Oral admissions as to the contents of a document are admissible when the party is entitled to give secondary evidence of the contents of such document under sections 65 and 66 of the Act Such admissions are also admissible when the genuineness of the document produced is in question "Where the question is" says *Norton* "not what are the contents of a document, but whether the document itself is genuine—that is, in the handwriting of the party whose writing or signature it is alleged to be—evidence

... of the document produced is in question The effect of the last clause of this section seems to be that if such a document is produced, the admission of the parties to it, that it is or is not genuine, may be received *Nort Ev* 153 Even where the contents of a document may be established by admission they
cannot
can the
be so pr
is not necessary *Phip Ev* 226

Oral admissions of contents In
79=13 C L R 271 their Lordships

money is lent on terms
an, the lender suing
promissory note If
promissory note is
a case indepen-
3 (182)=A W N
da v *Alhoychurn*,

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See also *Damo*

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on this point
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23. final judgment a former action against the defendant. The Court used the following language The admissions of a party are not open to the same objection which belongs to parol evidence from other sources A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record Thus the statements of a party though the conveyance the production of written admissions of parties as what a party admits against himself may be reasonably taken as true The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury *Smith* v *Palmer* 6 Cush (Mass) 513 So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis* v *Wadhams* 8 Gray (Mass) 557], the existence of a partnership 6? Pa 374) the terms of a and the *contents* of a telegra other hand there have been that there is no principle in t the declarations of a party ev They point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by testimony so uncertain in character They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact *Halliberton* v *Fletcher*, 22 Ark. 453, *Bivens* v *McElroy* 11 Ark 23, *Flournoy* v *Newton* 8 Ga 306, *Burr Jones* § 208

Admissions in civil cases when relevant

23 In civil cases no admission is relevant, if it is made either upon an express condition that evidence of it is not to be given, or under circumstances from which the Court can infer that the parties agreed together that evidence of it should not be given

Explanation—Nothing in this section shall be taken to exempt any barrister pleader, attorney or vakil from giving evidence of any matter of which he may be compelled to give evidence under section 126

Principle of excl on principles which examination it would factory It would b the principles laid dow

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character has always been excluded and the rule has been so broad as exclude all admissions thus made Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy It must be permitted to men to endeavour to buy their peace without being

prejudiced by a rejection of their offers Hence, evidence of such offers or proposals is irrelevant, and they are not to be taken as admissions of the legal liability of the party making them But here a distinction exists between the cases of an offer to pay money to settle a controversy, and an admission of particular facts, connected with the case, made by a party pending a negotiation for a compromise The *more convenient rule might have been* that which is *applicable to communications between client and attorney, excluding as testimony, everything communicated in this relation,* which rule, if applied here, would exclude every admission made during the interview which was had for such compromise To some extent this rule was attempted to be introduced, excluding all admissions of the parties, even admissions of particular facts, where it appeared that they were expressly stated at the time 'to be made without prejudice' But the exception was soon introduced, that the evidence was competent where it was the admission of a collateral fact This theory is consistent enough with general theory of privileged communication, (vide ss 126 129) namely, that expeditious and extra judicial settlements are to be encouraged and that privacy of communication is necessary in order to encourage them, and there is indeed a privilege for a party's statements to an official conciliator In policy however it may be doubted whether the recognition of S. 2

that the supposed privilege does not fit the rule of law as it is everywhere accepted and applied *Wigmore* § 1061(*a*)

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entered into any contract by it if the offer contained in it is not accepted *Similarly Lindley L J* in *Walker* v *Wilsher*, L R 23 Q B D 335, said "What ... I think they mean,
f the terms he
e accepted, a
hout prejudice,
'This theory
contained in
be used for its
it contain the
express words 'without prejudice', may still be inadmissible in evidence and conversely'. *Wigmore* § 1061 (b)

Taylor § 795 'The essence of an offer to compromise ...
Thomson v *Austen*, 2 Drol & Ry 358, 361, 'is that the party making the offer ... on" 'Money paid upon

23. final judgment a former action against the defendant The Court used the following language 'The admissions of a party are not open to the same objection which belongs to parol evidence from other sources A party's own statements and admissions are in all cases, admissible in evidence against him though such statements and admissions may involve what must necessarily be contained in some writing deed or record ...

... the best evidence does not apply to the admissions of parties as what a party admits against himself may be reasonably taken as true The weight and value to the statements and admissions will vary according to the circumstances and must be determined by the jury" *Smith* v *Palmer* 6 Cush (Mass) 513 So the admissions of a party have been received to prove the contents of letters and of a deed [*Loomis* v *Wadhams*, 8 Gray (Mass) 556], the existence of a partnership based on a written contract (*Edward* v *Tracy* 62 Pa 374) the terms of a lease in writing ...

... point out the danger of mistake or misconception as to the terms of written evidence and also the danger of falsehood or fabrication and the difficulty of detection and the danger of following record titles to be lost by testimony so uncertain in character They lay down the rule that admissions rank only with oral testimony and that unless made in open Court, they are competent only where parol evidence would be admissible to establish the same fact *Halliberton* v *Fletcher*, 22 Ark 453 *Bizens* v *McElroy* 11 Ark 23, *Flournoy* v *Newton* 8 Ga 306, *Burr Jones* § 208

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... covered by this section are excluded ... rently by different Courts But on ... xplanations are more or less unsatis... the cases and to try to find out whether ... satisfactory

Principle anologous to that of privileged ... When an

... nu the usual way by which ... privilege is by stipulating that the ... *Ibid* In *Dickinson* v *Dickinson*, ... 'The rules of evidence, exclude to ... the declarations and admissions of a party Thus, the more fully to protect the rights of parties litigating all their communications with counsel are held to be privileged Evidence of this character has always been excluded and the rule has been so broad as to exclude all admissions thus made Another instance of exclusion of testimony is that of an offer of one party to another to pay a sum of money or other valuable consideration with a view to a compromise of the matter in controversy It must be permitted to men to endeavour to buy their peace, without being

S. 2

for granted, not because they are true, but because good policy constrains the temporary yielding of them to effectuate a greater good, is not admissible, truth being the object of evidence" 'The preliminary question always is,' says *Doe C J* in *Colburn* v *Groton*, 66 N H 151, 156, 'not merely whether an admission of a fact was made during a settlement or negotiation, but whether a statement or act was intended to be an admission It is a question, not of time or circumstances, but of intention' So it is apparent that the occasion of the utterance is not decisive, that is, it may or may not have been accompanied by a reservation or an injunction of secrecy, and it may or may not have occurred during negotiations for a settlement or a compromise. What is important is the form of the statement whether it is hypothetical or absolute If, making all implications from

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occurrence in the course of compromise negotiations or in other words a conces-

...allace v *Small*, 1 M & M 449 An offer of compromise, in the sense of a peace offer, may be made by an

where the authority of the alleged agent

for example, a wife acting for her husl

ment will be rejected *Chamberlayne's Ev.* § 1448 An offer to compromise might be very well made, without restriction as to confidence *Ibid* So also to pay money by way of compro... with a view to buy peace is not evidence

...*Bretton*, 4 C. P 462, *Gregory* v *Howard*,

143; *Turner* v *Railton*, 2 Esp 474,

...*on* v *Benson*, 1 P Wms 495 In *In re*

was whether a written notice sent by a

had suspended or was about to suspend

... be written "without prejudice" was admissible in evidence to prove an act of bankruptcy upon the hearing of a bankruptcy petition In admitting the written notice, *Vaughan Williams J* said 'Ir

prejudice'

with anot

23. See also *Grace* v *Baynton*, 21 Sol Jour 631. But now the question is whether the same rule applies in India also Such a question arose in a Bombay case but it is left undecided by the Appellate Court *Madhavrao* v *Gulabbhai*, 23 B 177 In that case the defendant pleaded limitation In reply the plaintiff relied on an acknowledgment of the debt by the defendant The alleged acknowledgment was written on a post card sent by the defendant by the plaintiff It was in *Gujrati* and was as follows —"I was bound to send Rs 30 according to my *vaida* (fixed time) but on account of the receipt of the intelligence of the death of my father I have not been able to fulfil my promise But now on his obsequies being over, I will positively pay Rs 30 at *Snet Meruanji's* You, Sir should not entertain any anxiety whatever in respect thereof As to whatever debts may be due by my old man, I am bound to pay the same as long as there is life in me

Therefore I w

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evidence To exclude it from evidence it would be necessary to hold that the words 'without prejudice' amounted to an express condition that the card should

In England apparently the card

of *Vaughan J* in *In re Daintrey*,

judge in the Court of first instance

quoted, are not, as the Subordinate Judge supposes, mere *obiter dicta* They state

documents marked without prejudice' has

in dispute or negotiation with another, and

the dispute or negotiation This rule is

to be found in many cases

"Probably a person ma

his demand being proved at t

for until the claim is not

only to enable negotiations to be entered into to settle an existing dispute.

marked 'without prejudice' but which contains

the terms be not accepted, can be admitted

v *Spence*, 58 L T 438=57 L J Ch 233.

an anecdote of a young attorney who has

d always,

that he

brought

an action for breach of promise of marriage against him When his letters

he merits of the cause and

her means" For the purpose

the parties, a letter written

without prejudice prevents it being read at the trial (*Pallock* v *Forrester* 3

3key 33),

Forrester,

has even

ter clearly

the correspondence should be privileged

Peacock v *Harper*, 26 W. R 109, *Oliver* v *Nautilus Steamship Co* (1903) 2 K.

B 639, *Powell* 293 The same rule is applicable in the case of conversations Unless there be a clear break between the conversation which is clearly *without prejudice* and subsequent conversation no admission of a party in the latter part of the conversation can be given in evidence *Thompson* v *Austin* 2 Dowl. & Ry 361 Correspondence marked "without prejudice" can be seen **S. 23**
s *Waller* v *Walsher*, 23 Q B
awarding costs. *Ibid* They
r these are marked "without
prejudice" *In re Daintrey* (1893) 2 Q B 116: *Peacock* v *Harper*, 26 W R 109.
the statements made during
It is ordinarily against public
A conviction based on such
mperor, 11 C W N 26 N, see
a dispute between two parties,

446), or where an agreement, though purporting to be a compromise, has been finally concluded (as, where it nd executed),
Frognell v *Lewelyn*, 9 Pr 122, , 20 C. W N.
1217. Where certain l tters wer the plaintiffs
it prejudice' and the defendant's

under s 23 of the Eviden
regards the letters it must be
intended to claim the sam
6 O W N 1088 = A I R 1930 Oudh 193 Section 23 is no bar to the use of admission in compromise which is not rejected *Sadhu* v *Botha*, 11 L L J. 446 = A I R 1930 Lah 293

In *Healey* v *Thatcher*, 8 C & P 388 *Gurney B* excluded a letter beginning
ddock v
ully M.
empt to
Thomas,
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adverse
party with a view to a compromise, or to an action, you must look with very

intention to admit liability to the extent of the claim" *Meaju* v *Animuram*,
41 C 130 = 20 C W N. 1217 = 25 C L J 12

24. Facts adn
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compromise" and therefore to be admissible. *Thomson* v. *Austin*, 2 Dowl &

348=4 Pat L J. 676=(1920) Pat 52.

which the Court can infer, etc This section
d the words "infer that it was the *intention* of the
fer that the parties agreed together that." In
England there has been some difference of judicial opinion as to whether adms

be drawn almost as a matter of course from the nature and circumstances of the case" *Wills' Ev 299* This difficulty is further more obviated by the words used in the section

Explanation The explanation refers to the obligation on the part of Barristers and others to answer questions as to professional communications made to them in furtherance of a criminal purpose or as to any fact observed showing the commission of a crime or fraud since the commencement of their employment *Cun Ev 141*

Illustrative cases Adm ... person to

it is for the Court dealing with the
proper to such an admission *Punjab Singh* v *Ramautar*, 52 Ind Cas
Admission made by the tenant defendant before the pleader of the plaintiff landlord, to whom one of the defendants went before the suit for compromise is admissible in evidence in the absence of any express or strongly implied condition that evidence of the same would not be given *Meajan* v. *Alimuddin Mean*, 20 C W N 1217=44 C 130=34 I A. 571.

A I. R 1926 Lah 509=92 Ind Cas 319

Confession caused by inducement, threat, or promise, when irrelevant in criminal proceeding

24 A confession made by an accused person is irrelevant in a criminal proceeding, if the making of the confession appears to the Court to have been caused by any inducement, threat or promise, having reference to the charge against the accused person, proceeding from

a person in authority and sufficient, in the opinion of the Court, to give the accused person grounds which would appear to him reasonable for supposing that by making it he would gain any advantage or avoid any evil of a temporal nature in reference to the proceedings against him S. 2

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defined in the Indian Evidence Act" says *Mahmood J* in *Queen Empress* v *Babu Lal*, 6 A 509 (F B) at p 539, "it, however, occurs under the category of admissions, and to make my meaning clear, I adopt the definition given by *Mr Justice Stephen* in Art 21 of his *Digest of the Law of Evidence*, by saying that a 'confession is an admission made *at any time* by a person charged with a crime, stating or suggesting the inference that he committed that crime" In *Queen Empress* v *Jagrup*, 7
follow the definition given
"was written in view of a pr

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, and
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out the spot to the effect that he
whether those statements amounted
25 *Held* that the above statements
as they suggested the inference that
not intended by the accused, as a
confession of guilt they were an admission of a criminating circumstance and would form a very important part of the evidence against the accused as showing

where at page 650, *Chandravarkar J* said
Evidence Act makes a clear distinction between an admission and a confession. It is only under s 3
accused persons jointly
as against the rest
affect both the person confessing
Yesuada taken by themselves do not fall within that category As *held* by the Allahabad High Court in *Emperor* v *Jagrup*, 7 A 646, the word 'confession' must not be construed as including a mere inculpatory admission which falls short of being an admission of guilt Section 30 must be strictly construed. The learned Sessions Judge has construed the statement into a confession by a process of inferential reasoning which is not what the terms of section 30 countenance" See also *Emperor* v *Nani Gopal*, 15 C. W. N 503 (613) = 38 C 569

In *Queen* v. *Mac Donald*, 10 B L R App 2, *Phear J* observed that there is a distinction in the Evidence Act between admissions and confessions, but the judgment contains no definition of the term This case was followed by

24. *Prinsep J* p.
the subject
Tribhovan M
statements which it is proposed to prove against an accused person to establish
an offence or in other words what admissions do amount to confession, remained
unanswered
Mullick, 15 (
meaning of
between admission and confession In *Queen Empress* v. *Nilmadhub*, 15 C 595,
Petharam C J also said at p 607 "If the contents of the document did not
amount to a e relevant as an admission
under s 21 of the learned *Chief Justice*
admitted the ex and confession but did
not give any definition of the word 'confession'. The High Court of Madras is
silent on this
reported Madras
sion" one shoul
Empress v *Jagru*
the Law of Ev
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26 Ind Cas. 161
ting the guilt o
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admission made at any time by a person
ing the inference, that he committed that
which amount to a direct acknowledgme
inculpatory statements which although they fall short of being
of guilt, yet suggest an inference of guilt or from which an inference of guilt
follows The factor determining whether a statement amounts to a confession
.. but the fact that it leads to an
. *Tha* v *Emperor*, 5 L B R 131=
16 P R 1886 Cr;

ing the inference that he committed the crime *Hakman* v. *King Emperor*
P L R 1905=20 P R 1905 Cr; *Queen Emp*
(707), *Superintendent* v *Lalit Mohan Singa*,
In *Queen Empress* v. *Jave Charan*, 19 B 363

him; it was no admission whatever of criminating circumstances It was therefore, admissible. The statement held to be inadmissible in *Imperatrix* v. *Pandharinath*, 6 B 34 was of a different char
admitted possession of a cheque alleged
one of the criminating circumstances which
against the accused. In the present case the statement does not amount directly or indirectly, to an admission of any criminating circumstance, and is, therefore, outside the principle of the ruling cited." "In the result," says *Candy* J. in

Barındra Kumar Ghose v *Emperor*, 14 C W N 1114 at p 1197 = 37 C 467 "it seems to me that each case must be decided as it arises with reference to the question whether the particular statement concerned, whether it be positive or negative, verbal or expressed by conduct, is or is not a confession See also *Muthu Kumar Swami* v *King Emperor*, 35 M 397; *Emperor* v *Cuna*, 22 Bom L R 1247, *Ganapati* v *Emperor*, 6 N L R 180 = 12 Cr L J 60 = 8 Ind Cas. 1181 "By confession I understood not necessarily a full confession of guilt, but any statement made which, being relevant to the issue, may be put in evidence against the person making it" *R* v *Wong Chin Kuai, Roscoe, Cr. Ev* 37 Confessions of other crimes not relating to the charge *e g* showing or admitting a general tendency even to the crime charged, are inadmissible *R.* v *Cole, 1810*, *Roscoe, Cr Ev 37*

S. 2

In *Smith* v *Emperor*, 13 Ind Cas 605, at p 611, *Phillips J* said "There is no definition of confession in the Evidence Act but I take it that it must be something more that a mere admission In *Emperor* v *Kangal Mali*, 26 Ind Cas 161 – 15 Cr L J 713 = 41 C 601 when dealing with the admissibility of statements, it . they were put . of the accused as . be found to amount to confessions Accepting both these propositions I would add that in order to make

... inating, I am doubtful whether the fact that it does become incriminating owing to subsequent events would make it a confession" See also *Pan Gong* v. *Emperor*, 19 Cr L J 42; *Jasoda* v *Emperor*, 53 Ind Cas 691.

An admission of all the ingredients required to constitute an offence is a confession A confession is an admission made at any time by a person charged with

... associates and the police recovered stolen articles from the house of the person making the confession and from the persons named by him, *held*, that the confession was not rendered untrue merely because the person making the statement minimised his share in the dacoity 126 Ind Cas 498 = 31 Cr L J 1017 = A I R 1931 Oudh. 74 A statement of the following ... sion of complicity in an offence "I told ... kill my husband, they were at liberty ... against them But when they arrived at ... t, I endeavoured to restrain them and was ... r threats to kill me and my son if I ... part in the murder, nor did in any way assist the murderers after my husband was put to death" *Bhag Singh* v *Emperor*, 4 Ind Cas 429 = 21 P W. R 1909 Cr = 153 P. L R 1909 A statement of an accused to the effect that under threats of death he was forced to sit outside the

Gul Hossain v *Crou* ...
A confession must ...
tute in law the offen ...

... R. 133 Where the ... complainant, it is unfair for the Magistrate to treat the circumstance as an indication of the accused's guilt. *In re Abdul Rahman*, 4 L W 556 = 17 Cr. L J 462 = 36 Ind Cas 142 To constitute a 'confession' under the Evidence Act, it is not necessary that the person confessing should make a full and explicit ...

24. of his guilt so clean as to leave no other hypothesis tenable. *Smith* v *Emperor*, 43 Ind Cas 605=19 Cr L J 189 The fact that the accused did not claim a piece of cloth as his own before the Police but admitted at that time that it belonged to the deceased might have been due to this that the defence is not

forgery case be regarded as confession w ... 1929 Cal 539

Confession, meaning of—English Law Stephen defines that "a confession ... with a crime, stating or ..." If the words 'any time' ... ime they seem too wide

2 K B 108 *Phip Ev* 255

Confession, meaning of—American view The general rule that a confession, a statement by one accused of crime directly or by necessary inference admitting his guilt, is receivable in evidence, provided it complies with certain requirements of procedure, is not questioned in any quarter It necessarily follows from the very definition of a confession that it must, as a total, incriminate the declarant, as to the crime charged in the indictment. But while every confession must be an incriminating statement, it by no means necessarily ... The confession ... confession as to ... to the knowledge ... or not conceded, ...

...ssion, but ... to be established"

"A confession in a legal sense is restricted to an acknowledgment of guilt made by a person after an offence has been committed and does not apply to a mere statement or declaration o... ...ay be inferred" *State* v *Reinhar*... *Ev* § 1476; *Wigmore* § 821 ... that an acknowledgment ... an inference of guilt is properly desig...

... or subordinate fact or ... of facts which could be true whether the main fact existed or not" *Riley* v *State*, 1 Ga ... marked difference ... the main f... admitting ... with innoce...

On the other hand, the term confession has been strictly confined, by ... Bd Court, to distinct concessions of liability, nothing being left to inference So "to constitute a declaration a confession within the legal meaning of the term it must amount to a confession of the crime charged, or participation in

such commission, as distinguished from admissions or other statements tending to prove guilt or innocence, or of facts from which, taken together, guilt is directly deducible" *Encyclopoedia of Evidence*, Vol III, p 298

Confession
of admissions,
a criminal charge
exists and a special rule based on the general testimonial principle of trustworthiness exists, and a special rule, based on the general testimonial principle of trustworthiness of narration, becomes applicable. That rule satisfied, the confession occupies the status of ordinary admission; its relation to other rules of Evidence is therefore determined by its quality as an admission For example, as an extra judicial statement, it would ordinarily be obnoxious to the Hearsay rule but admissions are either not within the prohibition of that rule, or are an

law that it will not force any man to accuse himself; pain and force may compel men to confess what is not truth of facts, and consequently such extorted
Gilbert Ev 6th Ed (1801) p 123,
Wainwright, 8 A & E 691 (700),
Wills' Ev 2nd Ed 150, *Taylor* §
ived on the same principle as that
d, *viz*, the presumption that a
against his own interest *Taylor* §
K B 346 So it is clear that
Hearsay exception for statements
a qualified witness, and could to day be so regarded, where the accused, not being compellable, fails to take the stand *Vide section 32, clause 4 and notes thereunder*; *Wigmore* § 816 (*Foot note*) As in the case of admissions, certain vicarious admissions, *i e* those of agents and other persons are often receivable, so also in the case of confessions, the confessions of co accused, co conspirators, and others are also receivable. *Wigmore* § 816

the second half of the 1700s, the matter begins to be considered, and it is recognised that some confessions should

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suspicion of all confessions to repudiate them upon the

of changing the law or the practice" *Wigmore* § 817.

The Evolution of Reason To a certain extent, the history of the evolution of the law of confessions is that of most rules in the law of evidence. As is said elsewhere the early history of t be witnesses down to the close decreasingly one of administrati as part of the executive of the cro jurors as to what they might were practically no rules, certainly none having the force of law At mo action of the judges in this respect was determined by the custom, or practice of the various circuits of the King's Courts The effort was to administer the customs of the realm or other provisions having the force of law with legal reasons, as that term was then understood, for the attainment of substantial though, of course, conventional

In respect to confessi fessions by way of pleas of gu make sure that the prisone was fully aware of the conse the penal code then in force, for comparatively unimporta accused laboured, it seemed but just that before the judge should allow a pris undefended by counsel without the aid of witnesses, and hurriedly tried, often plea of

not necessarily be taken at his word, he was to be warned and even, occasio advised to retract his plea Of this judicial administration, as of any other, the characteristic guide and test was reason

The political events of the seventeenth century in England, to which brief reference is elsewhere made, were united with the assumed necessity for concealing valuable judicial legislation, the temper and philosophy of the times and much else, to evolve the use of reason into the direction of establishing rules of law in place of those of practice or administration During the eighteenth and most of the nineteenth centuries the rules of evidence were being formed To a very large extent, this development was marked by a change from administration, as represented by the practice on the several circuits, into rules of substantive law relating to procedure Positive regulation of admissibility establishing classes of facts to be received or rejected had taken the place of legal reasoning as freely applied in the administration to the facts of the individual case It might almost be said that practice had hardened into into law It seemed to the mind of the e protection of individual liberty as of the reasoning faculty, that a species and the like, which

substantial justice

From this period or stage of legal evolution has come the multiplicity of conflicing decisions, each having the force of precedent, concerning the

S.

a [illegible] of confessions, claimed to have been [illegible] voluntary naturally, it has resulted from the rule of substantive [illegible] procedural law that all confessions made after certain [illegible] have been [illegible] to the defendant by designated classes of persons shall be rejected [illegible] in every case such statements would be calculated to mislead a party. That miscarriages of justice have been many and conspicuous. To a certain extent this evil consequence has been found to attend the operation of any rule [illegible] whole classes or species of facts regardless of their probative effect in any particular instance, even where any alternative [illegible] can be secured in no any other way. It has therefore come to be felt [illegible] applied to the individual case rather than employed in the creation of [illegible] classes to which the quality of admissibility is once for all assigned or denied by the substantive law relating to procedure. In other words, while the feeling of the last century in favour of having a rule of law with regard to the conduct of legal business and the rights and liabilities of [illegible] a far reaching judicial distinction of [illegible] regarding the work of the courts is to be noted. Where the matter is one relating to rights or liabilities where certainty is important, a fixed rule of law, having [illegible] precedent and capable of codification, results from [illegible] judicial action in any particular case. Should, on [illegible] civil law, the law of actions, the [illegible] to be attained, the enforcement [illegible], the expediting of trials and the [illegible] are to be reached. At this point sound legal reasoning, the flexibility of administrative action, properly takes the place of the rigid rule of law, the precedent enforceable on appeal. Into this stage of legal evolution, the increasing admixture of the element of reason, the modern law of confession is and for some time has been, gradually emerging. *Chamberlayne's Ev.* §§ 1617, 1618.

Narration as affected by Motives to Confess guilt. The trustworthiness of confessions of guilt has been a constant theme of argument in the administration of justice. From the point of view of logic, the question is whether the confessional narrative is explainable by any motive other than that of a consciousness of guilt arising from actual guilt. Obviously a double inference is involved,—first from the utterance of the confession to a consciousness of guilt as its motive cause and secondly from that [illegible] cause than the actual doing of the deed. There have been false confessions [illegible] in each case whether at [illegible] the confession to the [illegible] ords, of the confession being a voluntary one, the process was one of *choice of motives*. If the confession was a false one, [illegible] of utterance with [illegible] non-confession [illegible] who is [illegible] confessor chooses [illegible] though damag- [illegible] es of damaging [illegible]

gence, his physical condition (hunger, fatigue, fear), and his environment. E. g. in the old English case where (under the then trial rules of Evidence) a confession was excluded because some one had promised the accused a glass of beer if he would confess, we could hardly conceive of ourselves making such a choice of motives; but we might have to believe that this particular man did make it, after we learn all the data about him. So, too, the oft-repeated case

4 in China of a man falsely confessing and impersonating the guilty one out of
ecution, rests on motives which would not be
merican
between the observer's idea of the choice
of motives that he would make and the choice of motives that the accused being what he is, is alleged to have made And the observer finds it difficult to judge the choice from any but his own experience and standard The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable

Hence the decision in such cases calls for wide acquaintance with the human nature of confessions and an estimation of the probabilities that one of the rare or unusual motives is indeed present and dominant in the case in hand —*Wigmore's Principles of Judicial Proof* § 222

Same—Motives for confession 'The confession is a very extraordinary psychological problem (1) In many cases the reasons for confession are very obvious, the criminal sees that the evidence is so complete that he is soon to be convicted and seeks a mitigation of the sentence by confession, or he hopes through a more honest narration of the crime to throw a great degree of the guilt on another (2) In addition there is thread of vanity in confession—as among young peasants who confess to a greater share in a burglary than they actually had (easily discoverable by the magniloquent manner of describing the actual crime) (3) Then there are confessions made for the sake of care and *winter lodgings* The confession arising
political criminals and others) (4) There
nobility, from the wish to save an intimate
such as occur especially in conspiracy are m
of the real criminal or for the destruction of
in the latter case guilt is admitted only until the plan for which it was u has succeeded, then the judge is surprised with a well founded regular and successful establishment of an *alibi* (6) Not infrequently confession of small crimes is made to establish an *alibi* for a greater one (7) And finally there are the confessions catholics are required to make in confessional and (8) The death bed confessions The first are distinguished by the fact that they are made freely and that the confessee does not try to extenuate his crime, but
aiming to make amen
nite penance Death b
the desire to prevent
person (9) A number of cases may perhaps be explained through I rous
of conscience
persons who are
would appear o
ceases, etc If the confessor only intends to free himself from the e
means of confession, we are not
but more or less with disease
it where such hallucinations are
the confession is made freely
in response to mere pressure, we have a cause of conscience There is always considerable difficulty in explaining these causes To deny that there are such is comfortable but wrong, because we each know collection of cases in which no effort can bring to light a motive for confession The confession is made because the confessor wanted to make it, and that is the whole story' *Wigmore's Principles of Judicial Proof* § 223 citing from *Hans Gross*, Criminal Psychology '

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but does not know that legally he is not guilty (*R v Lambillee*, 5 C S..., *Nemo v R*, II C 401). In m... st cases false confessions are intentionally made to escape vexation and this includes all those false confessions which are extorted from a prisoner by bodily or mental torture. A second motive is a desire to shield others, which may be illustrated by the case of a man falsely accused of a comparatively trifling crime, hoping by a confession to throw off suspicion as to some crime of greater magnitude which he has already committed. A third motive is ... weariness of life. A fourth motive, originating in the relation of sexes, is thus described by *Bentham*, to whom we are originally indebted for the whole of this branch of the question —"In the relation between the sexes," says *Bentham* ... treating of the subject of false confessions, "may be found the source of the most natural examples ... of this as of many other eccentric lights. The female ... punishment as for seduction ... the ... for the purpose of keeping off rivals ... the alliance. The female married—the like ... even though ... with a view to marriage through ... A fifth motive is vanity. *Best* takes the following extract from *Bentham* — "... vanity, without the aid of any other motive, has been known (the force of moral sanction being in this case ... against itself), to afford an interest strong enough to engage a man to sink himself in the good opinion of one part of mankind under the notion of raising himself in that of another." A sixth motive is the desire to benefit others. A seventh motive is the desire to injure others, this ...
the crim... and ...
revenge ...
expense of their own p...
Taylor's Evidence, ... also ... 1368 § 560—573, *Wigmore's Principles of Judicial Proof* § 223.

...hology of the true confession has
not ... more than one kind of motive is
found ... that in the normal person (not an habitual criminal) the consciousness of guilt of a serious crime, plus the nervous strain of avoiding detection, lead naturally to a confession upon being detected and arrested.

The process is one of a suddenly relaxed inhibition. Upon doing a heinous act the person is conscious of an emotional shock at violating common morality and at finding himself in danger of punishment and ruin upon discovery. He therefore now inhibits every form of conduct that could reveal his guilt. The nervous strain of these multiple inhibitions cumulates hourly and ... If, finally (and as ... for the murder of X, he ...ally if facts are stated ...so all the inhibitions ... released. A flood of normal nervous consciousness returns. A full nervous relief is felt—equal to the physical relief given by a purgative after long constipation. There is no longer any strain of inhibition. And the ... ak...

...is condition, however, lasts only a short time. The normal coolness ...

reasonable hope of escaping discovery; *Empress* v *Dade Ana*, [15 B 452 (479)].

and half savage nature of the accused (*Taylor's Trial of cases*, para 135 cited

24 in China of a man falsely confessing and impersonating the guilty one out of ecution, rests on motives which would not be merican between the observer's idea of the choice of motives that he would make and the choice of motives that the accused, being what he is, is alleged to have made And the observer finds it difficult to judge the choice from any but his own experience and standard The alleged choice of false confession by the accused could have been due only to the dominance of a motive so unlikely and so queer (from the observer's experience) that the explanation seems far-fetched and improbable

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charge . . . . According to the rules of evidence, what a prisoner has said respecting a particular fact is admissible evidence, not in the nature of a confession, but as evidence of the particular fact.' "The distinction between a confession and an admission, as applied in criminal law, is not a technical refinement but based upon the substantive differences of the character of the evidence deduced from each. A confession is a direct acknowledgment of guilt on the part of the accused, and, by the very force of the definition 'excludes an admission' which, of itself, as applied in criminal law, is a statement by the accused 'direct or implied' of facts pertinent to the issue, and tending, in connection with proof of other facts, to prove his guilt but of itself is insufficient to authorize a conviction." *Per Holloway, J in State v. Guie*, 56 Mont 485=186 Pac 329. S. 2

What are confessions and what are not confessions were very lucidly explained by *Bean, J* in *State v. Porter*, 32 Or 135=49 Pac 964 (966) where he said "We take it that the admission of a fact or of a bundle of facts, from which guilt is directly deducible, or which within and of themselves import guilt, may be denominated a confession but not so with the admission of a particular act or acts or circumstances which may or may not involve guilt, and which is dependent for such result upon other facts or circumstances to be established. It is not necessary that there be a declaration of an intent to admit guilt; it is sufficient that the facts admitted involve a crime, and these import guilt, or as put by *Mr Wharton*, I am guilty of this, and "this" imports the admission of all the acts constituting guilt. It is necessary however, that the accused should speak with an *animus confitendi* or an intention to speak the truth touching the specific charge of guilt and when he with such intention, narrates facts constituting a crime the guilt becomes a matter of inference, a resultant feature of the narration without an explicit declaration to that effect. So that we conclude that whenever the statements or declarations of the accused, voluntarily made, are of such facts as involve necessarily the commission of a crime, or in themselves constitute a crime then the facts admitted import guilt, and such admissions may properly be denominated confession." So it is admitted on all hands that there is a distinction between admission and confession *R. v. Macdonald*, 10 B L R App 2, *Empress v. Debee Prosad*, 6 C 530=7 C L R 531, *R v Buddho* 3 N L R 51=5 Cr L J 131, *Emperor v. Mahomed*, 5 Bom L R 312, *R v. Gopal*, 7 C 96=8 C L R 171 *R v Chooramoni*, 11 W. R. Cr 25, 26, *R v. Jay Comar*, 2 C L R 62, *R v Meher Ali*, 15 C 598, *Empress v. Nilmadhab* 15 C 595 (607), *Q v. Jaffir Ali*, 19 W R Cr 57(62); *Taju Pramanik v. Empress*, 25 C 711, *R v. Hurribole*, 1 C 207, *Hari v. Emperor*, A I R 1927 Lah 650

Confessions—Division of Confessions may be divided into two classes — *Judicial* and *Extra judicial* *Roscoe Ev* 37 *Judicial* confessions are those which are made before the magistrates, or in Court, in the due course of legal proceedings, and it is essential that they be made out of the free will of

consequences of the

as a complainant

Magistrate, or in Court, this term embracing not only explicit and express confessions of crime but all those admissions of

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Oral confessions

may be in any form. A favo

S. 24 confession may properly be in written form and the accused may either prepare it for himself or adopt it as his when prepared by another For example a prisoner s confession taken down by some one else and signed by the declarant is as much his written declaration as would be one prepared by his own hand As to the manner in which a written confession should be authenticated to the tribunal, no established rule exists That some authentication is necessary is obvious *Chamberlayne s Ev* § 1572 In case no written document exists covering the confession, its statement may be proved by the evidence of any person who heard them *Ibid* § 1571 It may be in the form of a letter *Booh v R* 15 Cr L J 55=18 C W N 386

Form of confession writing—Best Evidence Rule Where a confession has been reduced to writing by the witness and signed by him the document itself is preferred in proof of it being the best evidence' Parol evidence therefore will not be received until the absence of the document has been explained to the satisfaction of the presiding Judge *Chamberlayne's Ev* § 1573 But when some body else has it down the confession may be proved by oral evidence of some witness who heard it made *R* v *Layer* 19 Win Abr 96

To whom Extra judicial confession is Made An extra judicial confession can be made to any person or collection or body of persons (*Harbans* v *K E* 8 O C 395, *Chanon* v *Crown*, 21 Ind Cas 468=14 Cr L J 596, *Keshri Mal* v *Emperor*, 15 Cr L J 502=24 Ind Cas 590 It is not necessary that the statement should have been addressed to any definite individual It may have
85 Gi 69) The great majority
by persons in authority, upon the
Though it is in connection with

confessions so made that th
carefully scrutinized, no reaso
what has been said to him
even the trial judge are equal
voluntary confession by one
statements made, or letters written
prosecutor (*R* v *Heal* 69 J P 224),
2 K B 108 where the letter wa

Gardner, 85 L J K B
against him, if independently proved And it is immaterial whether the per
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clear, consistent and convincing The evidence of an admission of guilt to villagers may be as strong evidence against an accused person as a confession before a Magistrate It requires no corroboration The Court is to decide whether the persons before whom the admission is said to have been made are trustworthy witnesses *Mannu* v *Emperor*, 134 Ind Cas 1018=A I R 1931 Oudh 415

Extra judicial confession—Proof of corpus Delicti as corroboration Whether extra judicial confessions uncorroborated by any other proof of the *corpus delicti* are of themselves sufficient to found a conviction of the prisoner has been gravely doubted in England In the Roman Law naked confessions amounted only to a *semi plena probatio*, upon which alone no judgment could be founded, and at most the party could only in proper cases be put to torture But if voluntarily made in the presence of the injured party, or if reiterated at different times in his absence and persisted in they were received as plenary proof *Greenl Ev* § 217 *Taylor* § 868 In each of the English cases usually cited in favour of the sufficiency of this evidence, some corroborative circumstance will be found *Ibid* In the United States the ... held

receiving and weighing the evidence of confessions in other cases, and it seems countenanced by approved writers on this branch of the law. *Greenl. Ev.* § 217; *Taylor Ev.* § 868; *Gulli's Case*, 5 Halst. 168, 185, *Long's Case*, 1 Hayw. 524, 2 Russ. C. & M. 825 826.

Weight of confession. The evidence of verbal confessions of guilt is to be received with great caution. For, besides the danger of mistake, from the misapprehension of witnesses, ... express his own meaning, ... that the mind of the prisoner ... and that he is often influenced by motives of hope or fear to make an untrue ... offenders, ... persons ... which are exaggerated into sufficient proof, together with the character of the persons necessarily called as witnesses, in cases of secret and atrocious crimes, all tend ... to its rejection, ... Ev. § 214 ... decided conflict of ... of confessions. On ... affirming the slender ... classical predecessor's language. O... in equally positive ... kind of evidence ... side of the controv...

judicial confession has been made ... testimony. Such testimony is often ... associates, angry victims, and over ze... testimony of these persons the suspicio...

S. 24 of all evid c III, section 8, see also *Greenl Ev* § 214, *Earl* v *Simmons*, 6 C & P 540 That remark is ssions and for the following rea o 'Proof m y are often misreported—whether th rou h ignorance inattention, or mal t, he is equally affected in either case, and they istruction, and without this, evidence is not m disproved by that sort of negative evidence by which the proof of plain facts may be and often is confronted In other words, the suspicion that he has found it necessary to entertain is directed entirely to the work of proving an alleged confession "This is the reason above suggested as the real cause of the distrust we are ready enough to trust the confession if there really was one, but we are going to doubt and suspect for a long time before we accept it as a fact' *Per Tell r J* in *Damas* v *People*, (1917) 62 Colo 418 *Mr J Earle* touched the kernal of the subject when he it is the best e This seems to if we distinguish the confession as evidence, we find that few have ever really doubted value, while the second is always to be susp

So the remarks that "confession should be received especially oral confession' (*U S* v *Mc Kenzie*, 35 Fed Rep 826) and that the books are full of admonitions from the wisest and best Judges in this respect" (*Per Grover J in Feachout* v *People*, 41 N Y 7, 19) are applicable to the evidence of confession and not to the confession as evidence *Emperor* v *Pramatha*nat 30 C L J 503, see also *Mellor* v *Muthia Chetty*, 48 Ind Cas 931=35 M L J 518, *R* v *Nazir*, 9 C W N 474 The reason for this caution is that under the charge of a highly criminal offence, the mind must always be agitated and may be influenced by hopes or apprehensions which it is difficult, if not impossible sometimes to comprehend *U S* v *Nott*, 1 Mc Lean (*U S*) 499 Besides being satisfied that the witness who testified to the confession speaks truly the jury must be satisfied that the witness could not be, or was not mistaken in the substance of the confession *U S* v *Hughes*, 34 Fed Rep 732 In the last named case *Mc Cormick J* in charging the jury at p 736 said 'For want of an ex and make who made the confession

But it is generally agreed that voluntary and deliberate confessions of guilt are among the most effectual proofs in law, on the presumption that a rational being will not make admissions prejudicial to his interest and safety, unless urged by the promptings of truth and conscience *Moore on Facts* § 1151, *Greenl Ev* § 215

Conclusions from witnesses are not to be accepted In *Queen* v *Soobjan*, 10 B L R 332, (335) *Phear J* said Now, it is to be observed that these statements are in general terms and so are merely statements of a conclusion at or once

for the opinion formed by the Court, because, it may turn out that the taken together with the questions and the circumstances under which the questions were put, do not in truth amount to a confession of guilt such as the witness chose to represent it ' See also *R* v *Ali Husain* 23 A 306 300, *Kha Hlaw* v *Emperor*, 4 L B R 116=7 Cr L J 82 *Nawab Bibi* v *R*. 22 P R 1883, *Queen* v *Babu Lal*, 6 A 509 (519), *R* v *Mohan Lal*, 4 A 46, *Nur Ali* v *Emperor*, 31 Ind Cas 530=5 L 140 But where the actual words used in the confession are not given it does not affect the admissibility but the weight to be given to such evidence *Ibid*, see also *Desraj* v *Emperor*, 1923 Lah 38=29 P L R. 486 There is no rule of law which requires an extra judicial confession to be recorded 11 P R (1918) Cr, 21 P R 1881 Cr, 21 Bom L R 1065, 111 P R 1887 Cr.

S. 24

Confessions made by signs or gestures Under this head we may group direct ... made in ... the pers ... a case ... because ... ponse to ... the ... gestur ... cannot ... often ... and vehement language "A direct confession ... whenever the spoken or written word would be excluded" *Underhill Cr Ev* § 141 But where an accused, not shown to have understood English, is asked ... responsible for the act and he nods his ... act does not amount to confession It is ... ised understood to be the meaning of remarks addressed to him as to his complicity in the crime and without being satisfied that the accused exactly understood the meaning and the import of the ... , standing by themselves ... erstood what was sought ... which were intended to be ... his questioners ... nproved and so ... Cas 539=31 Cr L J 141=A I R 1930 Lah 81

Confession—Test of Truth A true confession made by a person who takes part in a murder invariably adds something to the knowledge already possessed by the investigating officer and that is the greatest test of its truth. *Mata Din* v *Emperor*, 132 Ind Cas 228=32 Cr. L J 854=A. I R 1931 Oudh 166

Confession must be taken as a whole When a confession is used against an accused person, the whole confession must be introduced So where an accused person makes a confession, the confession is evidence in his favour as well as against him and must be taken as a whole *Queen-Empress* v *Dada Ana*, 15 B 452, *Kalua In re* 88 Ind Cas 455=26 Cr L J 1142 *Emperor* v ... 1 (F B), *Queen* v *Greedhory*, 7 ... *ung Po*, 1 Bur 324; *Wafadar*, ... v *Sahadu* Rat Un Cr C 771, ... 7, 22 C W N 834; *Srinivas* v *E* ... justice to the accused person ... a confession to ... tion therewith, ... *Com* 10 Bush ... 2 Ala 154, 160

... part which is against him, and disbelieve that which is in his favour *R* v *Higgins*, (1829) 3 C & P 603, *R* v *Clewes*, (1830) 4 C & P 221; *R* v *Steptoe*, (1830) 4 C & P 397, *Halsburry* Vol IX p 398, *Taylor* § 870, *Kamoda* v *Emperor*, 46 Ind Cas 705 There were earlier rulings to the contrary *R* v *Jones*, 2 C & P 629, *Bosanquet Serjeant*; *R* v *Llyod*, 1 Phill Ev (3rd Ed) 399 In determining whether the statement is true or not, the jury should consider wh ... inc ... *Jo* ... an ... it ... go

24. only fair measure is to take confession as a whole *Maung Po Thin* v *Queen Empress*, L. B. R (1872-1892), 321; *Queen-Empress* v *Eligh*, L B R (1872 1892), 327; *Crown* v *Summundur*, 4 P R 1872 Cr; *Queen* v *Bishoo*, 9 W R. Cr. 16, *Queen* v *Sheikh Boodhoo*, 8 W. R Cr 38, *Queen* v *Chaka Khan*, 5 W R 70; *Queen* v *Sonaoolah*, 25 W. R Cr. 26; *Golok e* v *Magistrate of Chittagong*, 25 W R. Cr 15; *R* v *Gour Chandra*, 1 W R. 16(17); *R* v *Beshor*, 18 W R Cr 29; *Pika Beua* v *R*, 16 C W N 1055; *Pulin* v *Emperor*, 40 C 873, *Queen* v *Soobjan*, 10 B L R 332 So a prosecutor is not to be allowed to give in evidence part of a confession made by a prisoner, *but it must be put in proof as a whole*, so that the jury in one case, and the Judge and the assessors in the other may have the fullest means of testing its accuracy and forming their opinion as to whether the whole or part, and what portion of it, can be believed For example, if a passage in a statement made by a prisoner standing by itself amounts to an

passages quali

merely because

point *Empre*

1926 Lah 554,

Ind Cas 178=

with the general tenor of the confession *Queen* v *Nityo Gopal*, 24 W R Cr 60 *The mere fact that* the accused has been interrupted, and therefore has not stated all that he might

consequences (1) The prosecution must put in the whole of the accused's statement, including the portions favourable to himself as well as those unfavourable But this does not prevent the use of statements which are separate in themselves though not forming all the accused's utterances nor of such fragments of a

ion of a crime, the pr has a right to lay before the Court the whole of what was said in that conversation not being confi

against him,

occasion, relat

Queen's Case,

C 46 § 5, *R.*

Case, 9 Leigh

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the jury for their consideration, precisely as in other cases where one part of evidence is contradictory to another,

of a confession are entitled to equal cr

charges the prisoner, and reject that

grounds for so doing *Q E* v *Jhina Vala*, Rat. Un Cr C 436, *Reg* v *Lmz*, 10 B H C R 500; *Kamoda* v *Emperor*, 19 Cr L J 785 (Nag), *R.* v Rat Un Cr. C 370 *Mata Din* v *Emperor*, 1930 Oudh 113, *Lakshmayya* v *Emperor*, 1930 M W. N 785 If what he said in his own favour is not

contradicted by evidence offered by the prosecutor, nor improbable in itself, it will generally be believed by the jury; but they are not bound to give weight to it on that account, but are at liberty to judge of it like other evidence, by all the circumstances of the case (1) And if the confession implicates other persons by name, yet it must be proved as it was made; not omitting the names, but the Judge will instruct the jury, that it is not evidence against any but the prisoner who made it ' *Greenl Ev* § 218

A Judge ought to decide the question of the admissibility of a confession first an[illegible]
should [illegible]
in its en[illegible]
ordinar[illegible]
him an[illegible]
coming that this can be pressed to the extent of requiring that no part be accepted as true without accepting the whole *Hasan v Emperor*, 53 Ind Cas 145 = 20 Cr L J 737; see also *Kimoda v Emperor*, 16 Ind Cas 705 = 19 Cr L J 785, *K E. v Injleo*, 15 A L J 15, *Q E v Lma*, Rat. Un Cr. C 371

of the guilt of
[illegible] are false *Mata Din v Emperor*, A I R 1930 Oudh 113

Uncorroborated confession, evidentiary value of If there is no reasonable
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Shue Pat v Queen
accused's confession
sion of the crime w[illegible]

[illegible] v *Sangappa*, Rat Un
[illegible] H C 137 But convic
[illegible]ssion alone *Probhu v Crown*, 21 P W R 1907

cannot appropriately be
[illegible]fession The statements

S. 24. of an accused person are not subject to an examination on oath compelling his

other than the deponent *Emperor* v *Yellaraddi*, 6 Bom L R 7 3 The
ble violence used to the accused for h
ised in the police custody for more than
the marks on his person, were held to
have vitiated the voluntary character of his confession, which was, therefore

thus confirmed by the fact is proved to be true, and not to have been fabricated in consequence of any inducement It is competent, therefore, to inquire whether the prisoner stated that the thing would be found by searching a particular place and to prove that it was accordingly so found, but it would not be competent to inquire whether he confessed that he had concealed it there 1 *Phil Ev* 411 *Warickshall's Case* 1 Leach Cr Cas 298, *Mosey's Case* 1 Leach Cr Cas 301 N, *R.* v *Gould*, 9 C & P 364; *R* v *Harris*, 1 Mood Cr Cas 338 This limitation of the rule was distinctly laid down by *Lord Eldon* who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a
East P C 657; *Harvey's*
is 130, *Greenl Ev* 231
and delivered them up
to the prosecutor, notwithstanding it may appear that this was done upon inducements to confess, held out by the latter there seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery, and

prisoner, thus improperly induced, and of the information given, by him ... search for the property or person in question proves wholly ineffectual no proof of either will be received The confession is excluded, because, being made under the influence of a
and information of the pr
firmed by the finding of
The influence w'
groundless cond
Confession
out the place of
dacoity and buri
with the aid of the jury *Naga Methu* v *Emperor*, (1911) 2 M W N 191 = Cr L J. 488 = 12 Ind Cas 96

Where the circumstances of the case compel a tribunal to reject all the other evidence and act only upon a confession the confession must be used *literatim et verbatim*, and due effect must be given to every statement contained therein whether in favour of the accused or against him *Jagdeo* v *Emperor*, 15 A L J 15

The law does not require that the confession of an accused person should be corroborated before it can be acted upon It is for the Court to decide whether it believes a confession or not *Emperor* v *Dhani*, 52 Ind Cas 881 = 20 Cr L J 721 The fact that the confession was retracted before the committing Magistrate would not deprive it of its voluntary character. *Sheo Prosad* v *Emperor*, 52 Ind Cas 50 = 20 Cr L J 562

S. 2

272 Apart from ... inadmissible in evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person To base a conviction on such a confession is not safe *Des Raj v Emperor*, A I. R 1928 Lah 858 = 29 P. L R 186 The evidence of an admission of guilt to villagers may be as strong evidence against ... Magistrate. It requires no corroboration ...

... 698 When ... which clearly ... r the convic-

prisor ... anoth ... them down, or by some one else who heard them *In the case of Munger Bhoo jan*, 10 W R Cr. 56

Confession how construed Where people are so ignorant as the Burmans are, of the ... an admission ... the acknowle...

Circumstances strengthening Testimony to Admissions or Confessions Among these would be the fact that the confessi...

jury; that the witness and th... and both of them addicted to dri...

... oof of them lessens its probability but does not necessarily establish the untruth of the main feature *Moore on Facts* § 1182

ions ... the ... ney ... l of ... 390 ... d in ... l of ... the ... the

Section 164 of the Cr Pro Code and Judicial Confessions Judicial confessions indicate confessions which are made on a magisterial investigation

S. 24.

sion, than they ... other than the deponent *Emperor v. Yellaruddi*, 6 Bom L R ... admitted ill usage, *viz* the unjustifiable violence used to the accused for his arrest illegal detention of the accused in the police custody for more than twenty four hours after his arrest, and the marks on his person were held to have vitiated the voluntary character of his confession, which was, therefore not admitted ... 1 Bom L R 397 The object of a ...

R. v *Gould*, 9 C & P 364; *R* v *Harris*, 1 Mood. Cr Cas 338 ... tion of the rule was distinctly laid down by *Lord Eldon* who said that where the knowledge of any fact was obtained from a prisoner, under such a promise as excluded the confession itself from being given in evidence, he should direct an acquittal, unless the fact itself proved would have been sufficient to warrant a ... 2 East P C 657, *Harr*... is 430, *Greenl Ev* 23 ... and delivered them up ... that this was done upon ... seems no reason to reject the declarations of the prisoner, contemporaneous with the act of delivery and ... they may amount to a confes... but ... act of delivery, is to be rejected And if ... prisoner, thus improperly induced, and of the information given ... search for the property or person in question proves wholly ineffectual no proof of either will be received The confession is excluded, because, being made under the influence of a promise, it cannot be relied upon, and the acts and information of the prisoner under the same influence, not being confirmed by the finding of the property or person, are open to the same objection The influence which may produce a groundless confession may also produce groundless conduct *Greenl Ev* § 232

Confession four days after the offence and the fact of the accused pointing out the place of the burial of the body is admissible in evidence In a case of dacoity and burial of the corpse, the Sessions Judge need not have tried it with the aid of the jury *Naga Methu* v *Emperor*, (1911) 2 M W N 197=12 Cr L J 488=12 Ind Cas 96

Where ... stances of the case compel a tribunal to reject all the other evidence and ... accused ... *et verbatim*, ... obtained ... whether in favour of ... *Emperor*, 15 A L J 15 ... son should ...

... trite would not ... 52 Ind Cas 50=20 Cr. L J 562

No doubt the extra-judicial confession is of great importance but it must be a true extra-judicial
additional evidence
to be a weak cau
the question wheth
evidence, they are not of such a nature as entitles them to any weight, because it is impossible to ascertain the exact words used by the person To base a conviction on ... *Emperor*, A. I. R 1928 Lah 858=29 ... of guilt to villagers may be as ... s a confession before a *Magistrate.* ... *to decide whether the* persons before whom the admission is said to have been made are trustworthy witnesses *Emperor* v. *Ba lal*, A I R 1928 O 393=5 O W N 698 When the accused were unable to explain away their confessions which clearly indicated the guilt, *held* that the confessions alone were sufficient for the conviction *Sitai* v *Emperor*, 5 O W N 968

Confessions of prisoner in another case—how proved The confession of prisoner in one case in which he was convicted cannot be used against him in another case, unless they are deposed to on oath either by the person who took them down, or by some one else who heard them *In the case of Munger Bhooyan*, 10 W. R Cr 56

Confession how construed Where people are so ignorant as the Burmans are, of the most elementary legal principles, it is extremely dangerous to accept an admission as a plea of guilty without the closest scrutiny of the meaning of the acknowledgment *Mi Nyein* v *Q E*, U B R (1897-1901) Vol I, 72

but does not necessarily establish the untruth of the main feature *Moore on Facts* § 1182

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Section 164 of the Cr Pro Code and Judicial Confessions *Judicial* confessions indicate confessions which are made on a magisterial investigation.

24 Section 164 of the Criminal Procedure contains the provisions for recording confessions by Magistrates The evidence of witnesses who are sent up by the police for the purpose of having their statements recorded under s. 164, Criminal Procedure Code, and who have been presumably in police custody until their production before the Magistrate, should not be recorded by such Magistrate, unless he has some assurance that their attendance and statements were voluntary. *King Emperor* v. *Bhutnath*, 7 C W N 315 The provision of this section is imperative *Indar Dath* v. *E* ... *r*, 32 Cr L J 818 = A I R 1931 ... e to presume when an accused p ... Code before him is to ask him, ... If he says he does not, the ... If he does, the Magistrate shou ... the statement ... be) and ask the ... ascertain clearly wl ... be made with a view ... as though h ... *Gaya Singh* v ... recording a ... been in custo ...

... ubt upon ... *ror*, 133 I ... should ... it was made. *Emperor* v *Patey Singh*, 133 Ind Cas 593 = A I R 1931 All 609 A Magistrate must not put any question to accused which tends to incriminate h ...

... section 164 and prepare a record *Lalu* v *Empress*, 4 P R 1893 Cr Great care and circumspection are necessary in recording a confession under section 164 of th ... is necessary to reco ...

... ry and has not been procured by threats or inducements *Kandhai* v *Emperor*, 15 Cr L J 633 = 25 Ind Cas 833, see also *Kesho Sing* v *King Emperor*, 20 O ... *Empress* v *Kura*, 1882 A. W N 166, *Imperator* ... *K E* ... 1 Cr L J 385 *Balgirala* v *Crown* ... 183 ... what ... ad of ascertaining whether the accused ... hat the Magistrate had not acted properly ... *e Rayappan*, 2 Weir 136; *In re Fisan* ... should ascertain whether a confessional ... beginning of the statement, and not at the end *In re Rayappan*, 2 Weir 136 ... 7 O. C 191 *Pal* ...

... There is no provision for the admission in

evidence of a confession made to a Magistrate unless it is recorded in the manner prescribed by law, and even if such confession may, under special circumstances be proved otherwise, where the confession of the accused is shown to have been made under the inducement, such fact deprives the evidence of its value *Nga Myat Kyan* v *Queen Empress*, U B R (1897—1903) Vol I, 41 Where a Magistrate inadvertently omits to certify the voluntariness of a confession recorded by him under section 164, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanehi* v *Emperor*, 9 Ind Cas 118=12 Cr L J 15 *Queen Empress* v *Ingi Valayan*, 22 M 15, *Empress* v *Jiwan*, 8 C P L R Cr 6, *Lana Singh* v *Emperor*, 89 Ind Cas 1026

Section 164 of Cr Pro Code does not enable a Police officer, who has obtained a ... made by some person to send such ... under custody, to have him examined at ... enquiry or trial for fixing him down to that statement in the subsequent judicial proceeding *Q E* v *Jadub* 27 C 295=1 C W N 129

Section 164 of the Criminal Procedure Code, absolutely prohibits the employment of a Police officer to take down ... an accused person ... such a confes ... on the Magistrate ... ed person but he ... e facts of the case ... 1 C W N 864 But he may ask as regards any ambiguity in the statement *Ibid* v *Emperor* 128 Ind Cas 793 Under s 164 Cr Pro Code and s 24 Evidence Act, a confession made under an inducement to confess, is not a voluntary confession, and as such is inadmissible in evidence *Queen Empress* v *Nga Shwe*, L B R (1893—1900), 52 Where the accused pleads not guilty, a conviction cannot be based on a confession which is not recorded in the manner prescribed in ss 164 and 364 of the Cr Pro Code *Nga San Ya* v *Emperor*, 11 Cr L J ... 9=U B R 1909, Vol. I, ... form without showing ... re it appears that the ... strictly with the law ... v *Queen-Empress* U B R (1897—1901) Vol I 47, *Queen Empress* v *Karim*, S C 102 Oudh

Where there is no positive evidence that the precautions required by s 164 ... n and the certificate required by sub ... f the confession, the presumption is ... were duly taken *Majhi* v *Emperor* ... 1927=104 Ind Cas 247=A I R 1927 Lah 682, *Akeman* v *Emperor* 6 Lah 58=88 Ind Cas 18, *Pratap Singh* v *Emperor*, A I R 1925 Lah 605 *The Code* contains no provision as to a confession being made in open Court, and where it is of ... th, a Magistrate may avoid its being ... ase the proper procedure is not to return ... until it is fully recorded *Nilmadhub* ... 09=27 Cr L J 957=A I R 1926 Pat ... 30 C L J 503=21 Cr L J 266,

... rding a statement ... question of the ... 29=23 A L

... L R 1 2=7 Lah L J 170

Cr. L J 1279=88 Ind Cas 1055 A

S. 24 a Magistrate under sectic
in exculpatory nature,
Gulam v *Emperor*, 4 Pat
recorded by a Magistrate is admissible in evidence under section 164 Cr Pro Code, whether taken on solemn affirmation or not *Bahadur* v *Emperor*, 26 Cr L J 1063 = 88 Ind Cas 7 = A I R 1925 Sind 289

A confession recorded in answer to the only question viz (after due warning) "do you want to say anything?" cannot be accepted as being in accordance with law in the absen any indication as to what due warning wa 129 = 59 Ind Cas 551 = 22 Cr L J 119 A in accordance with the provisions of section 164

gui

improbability of his guilt *Madan* v *Guru*, 4 Pat L T 381 = 73 Ind Cas 963 = 24 Cr L J 723

perso Magistrate on questioning the made to believe that it was voluntarily Magistrate should question the person making the confession must large depend on the particular facts of each case *Thibu* v *Emperor*, 4 Pat L T 2 = 73 Ind Cas 569 = 24 Cr L J 649 = A I R 1923 Pat 356, see also *Pul Tanti* v *Emperor*, 40 C 873 = 22 Ind Cas 169 = 15 Cr L J 25 It is highl desirable that a Magistrate in recording the confession should put variou questions to an accused to enable him to decide whether the confession is voluntary one or not *Emperor* v *Dewan Kahar*, 72 Ind Cas 961 = 24 Cr L J 497 = 4 Pat L T

mperor 25 Cr L J 116 = 76 Ind Cas 180 agistrate, showing that he observed all the Procedure Code, is sufficient and the con *Emperor*, 3 Pat 872 Magistrates recording hand of the persons making them, should to ascertain how long such persons have police and, in recording their reasons for the subject *Empress* v *Madar*, A W N 1885, 59 (F B) Section 164 of the Criminal Procedure Code does not apply to any statement of the accused taken by the Magistrate holding the enquiry *Empress* v *Chattar*, A W N 1884, 84.

trate t the Magis questi , and upon so voluntarily; and that the record made by the Magistrate should contain a full and true account of the statement made by the accused *Nga We* v *K Emperor*, 2 L B R 317 When the Magistrate who recorded the confession took all possible precautions to satisfy himself n was made at the time e would get *Mohyal* v Cr L J 752 = 1 Luck 223 Where the confession was recorded on a sunday and at the house of the Magistrate and the Magistrate while certifying and stating satisfied himself that the accused wa ot record the questions put and a that the evidence was recorded in that the irregularities in recording *Abdul* v *Emperor*, A I R 1931 Lah 163 = 133 Ind. Cas 55; see also *Khanum* v

Crown, A I R 1930 Lah 171=31 Cr L J 759 Where the confession of a prisoner is made in a language foreign to the recording Magistrate, and is interpreted to him by some person who is not an official interpreter, such confession can not be regarded as properly proved by the testimony of the Magistrate which is only hearsay evidence The signature of the accused in the translated record of the confession is no evidence of its correctness, when there is no proof of the record having been accurately translated to the prisoner *Queen Empress v. Lakhsmya*, Rat. Un Cr C 875 S. 2

Section 364 of the Criminal Procedure Code —The rules laid down in section 364 of the Criminal Procedure Code are applicable to the examination of the accused under section 342 *Emp v. Nagar*, 4 Bom. L R 161 All that a Court has a right to do under s 364 Criminal Procedure Code, is to ask the accused person to explain the circumstances wh
him *Tufani v King-Emperor* 15 C L J 32 ...
283 In examining an accused person under
improper to ask him such a question as ' If yo
who did ? " *Chelon v King Emperor* 7 O C 1
person to a statement re
presence and under the con
Bhika, Rat Un Cr C C ...
statement by a prisoner in
Mapp v Chendramma, 2 Weir 437 Where the Magistrate instead of asking separate questions to the accused puts him a long composite question, the examination of the accused is irregular and not in accordance with law *Hasni v Emperor*, 103 Ind Cas 847=28 Cr L J 767=A I R 1927 Lah 650 If the prisoner is not prejudiced in
questions put to him does not make t

in any way in his defence
1=100 Ind Cas 821=A I R
...l should be strictly observed,
and they are applicable al... to confes...

... Code, s ... by the presiding officer of the Court The whole of it need not be in the Court's handwriting *Empress v Riaz Ali*, A W N 1900, 203 The recording of confessions should be made by Magistrates with their own hands *Criminal Cir Memo No 7 of 1873* But a confession recorded by a clerk, under s 164 of the Code, in the presence of a Magistrate, in the form of a narrative and without the questions being recorded would not be illegal if the accused was not prejudiced
cused makes a statement in
) be inferred that the statement
held that such a statement is
... Procedure Code *Emperor v Taranath*, 37 C 735=8 Ind Cas 653.

error has not injured the accused as to his defence on the merits ' Section 533, Cr Pro Code, is intended to apply to all cases in which the directions of the law have not been complied with, without any distinction between omissions to comply with the law and infractions of it Under that section, if the record of a confession is inadmissible owing to failure to comply with the law such as
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proved,

24 that it has not affected the merits of the defence *Queen Empress v Raju*, 23 B 221. Section 533 is to be interpreted liberally, and though a conf... recorded by a Magistrate was in the fir t instance and by itself inadmi ible as not being in the form of question and answer, not being recorded in the vernacular of the accused, and not bearing the signature or mark of the accused, it will become admissible by the taking of the evidence of the Magistrate that the accused duly made the statement recorded *Empress v Tularam*, 8 C P L R C ... not to a Police officer and not improperly the Evidence Act is always admissible ...*nj-Emperor*, 8 O C 395=2 Cr L J 811 ... ts to certify the voluntariness of a confession recorded by him under s 164, Cr Pro Code, the defect may be cured by the evidence of the Magistrate *Ram Sanchi v. Emperor*, 9 Ind Cas. 148=12 Cr L J 15; see also *Khudiram v Emperor*, 9 C L J 55 The Sessions Judge

as a witness nor was evidence taken that the accused duly made the statement so recorded *Held*, that as it could not be presumed without some evidence that the statements had to be recorded in English as they could not be recorded in the language in which they were made, there was no justification for their being record
could
taken
Judge was wrong in admitting such a record of the statements against the accused *Bawa v King Emperor*, 10 O C 112=6 Cr L J 94; but see *Ludda v Queen Empress*, S C 277 Oudh

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the confessi
Code, provi
person "dul
either the Magistrate himself or some other person who was present when the statement was recorded *Empress v Mussammat Ituari* 8 C P L R Cr 6, ... J B R ... r s 164 ... he was ... H, th t ... under ... volun-tarily made *Ma On Nyun v King-Emperor*, 1 U B R (1902—1903) Cr Pro Code, 13

This section has no
made of a confession
211=19 Ind Cas 307=3
Magistrate shall record
making it, he has reaso
where laid down that the
he has put to the perso
made voluntarily But it is advisable that the Magistrate should always record a memorandum showing that he has, by questioning the person making it, satisfied himself that the confession is made voluntarily *Kheman v Emperor*, 6 Lah 58=... P L R 316=A I R 1925 Lah 315; ... d Cas 1029=26 P L R ... 26 C ... Under section 533 Cr Pro Code 1882,
in accordance
provisions have
that the confession or other statement was duly made *Queen Empress v Bhairab*, 2 C W N 702

Section 80 of the Evidence Act and confession So far as section 80 of the Evidence Act is concerned, the Court is bound to make the presumptions specified

in that section in respect of the document purporting to be a confession of the accused *San Bau* v *Crown*, I L B R 310 F B Both the memorandum and the certificate required by s 164 should be attached to the confessions The effect of these is to afford proof of the accuracy of the record, of the presence of the Magistrate, and of the voluntary nature of the confession. *Reg* v *Shivya*, 1 B 219; *Pratap* v E
R Cr 5, 15
"Magistrate"
India *R* v
R, 9 Cr L J
169=16 Bom L R 261=15 Cr L J 433

...essions, so made by a prisoner, to any person at any moment of time, and at any place, subsequent to the perpetration of the crime, and previous to his ... ived in evidence as ... *Best Ev* § 524; *Will's* ... promise of benefit, or a threat of harm, it is untrustworthy because it has been associated with an attraction too strong to reject ... person which causes our dist... two alternatives, one of which ir... truth or falsity —*Wigmore* § 82... is a pseudo confession It is not a confession at all It is not made *animo confitendi* It is merely a self serving statement masquerading in the garb and under the name of a confession Accordingly, it has not the relevancy of a true confession, a self disserving statement, and is, in consequence, rationally to be regarded with suspicion As ... ous impairment of probative value due t...

... The object of the rule relat... to the ... sion of confessions is ... y the prisoner being ... iself to be guilty of an ... *J* in *R* v *Court*, 7 ... every case it is for the ... iner and under such ... is to induce the prisoner to make a confession of guilt whether such confessions were true or no"

Declaration must be voluntary Confessions it is said, must be voluntary The reserve statements that a confession will be received in evidence, are equally familiar The difficulty experienced in understanding precisely what, in ... ese expressions given out of the fact ... other words several distinct ideas ... by it Perhaps at the present day the most commonly and widely accepted meaning of the term "voluntary is that which is employed when a confession is rejected as involuntary because the speaker has been over persuaded, coaxed by hope or driven by fear into making it ... statement ... it was true ... matter covered by his declaration and honestly endeavoured to state it An incriminating st...

... ill not be received ...

S. 24. under a misleading inducement is therefore, said to be involuntary *Chamberlaynes Ev* § 1479

Meaning of the term 'voluntary' The terms voluntary and involuntary are apparently used in respect of confessions indiscriminately in three but not entirely separable situations —(1) Where the will of the declarant has been left entirely unconstrained
to his judgment in such a
incriminating statement for s
the declar
statement
subject, (3
cular statement To put th
incriminatory declaration b

misleading inducement, by a judicial compulsion to break silence or the

states of fact is found to exist, and what are the real considerations affecting question of admissibility in any particular case in which they are present *Chamberlaynes Ev* § 1480 A confession may reasonably be deemed to be voluntary' when it is made with the concurrence of the will,—where the volition is not for
a voluntary one,
the exact truth r
however a confess
mental influence
rejected by a rule of procedure,—even though as a matter of experience of this incriminating statement, though subject to criticism or the argument of counsel would still warrant the jury as reasonable men in acting in accordance with it *Chamberlaynes Ev* § 1483

Scope of section 24 In this section the framers of the Act perhaps properly avoided the use of the word voluntarily or involuntarily which is of doubtful import but stated the circumstances under which a confession if made ... by saying that a confession is ... of receiving some benefit ... on with pending proceedings ... in authority over the course ... Section 24 of the Evidence Act provides that a confession of an accused person is irrelevant in a criminal proceeding if the making of the confession appears to the Court to have been caused by any inducement having reference to the charge against the accused

of voluntariness' 2 Bom L R J 228 The reason for rejection of confessions ... thus stated by *Eyre C B* A confession forced from the mind by the

S. 24

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given to
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counsel
—of the
a conse-
mes the
You are
overestimating it The law does not presume it is untrue, but rather that it is uncertain whether a statement so made is true" *Lord Campbell, C J* added "I doubt whether the rule excluding confessions made in consequence of an
nfession is
, and that
drawn from
same case
Pollock C B said "There is no presumption of law one way or other . There is no presumption that it is false, or that the law considers that such a
, but such confessions are rejected because it
erous to leave such evidence to the jury"
nsfield 11 Cox Cr 639 *Williams J* said. "It
saving the truth elicited that these confessions are excluded, but the law is jealous of not having the truth" Similarly in *Scott's Case*, 1 D & B 58, *Campbell L C J* reiterated 'It is a trite maxim that the confession of a crime, to be admissible against the party confessing, must be voluntary, but this only means that it shall not be induced by improper threats or promises, because under such circumstances the party may have been influenced to say that which is not true, and the supposed confession can not be safely acted upon" 'The principle upon which all this class of cases is founded is that by inducement being held out to the prisoner, he may be led to suppose that he will be more mercifully dealt with if he confesses, and that ...

temperament, may falsely acknowledge guilt This possibility arises wherever the innocent person is placed in such a situation that the untrue acknowledge-

preferable' The law cannot attempt to weigh testimony before even listening
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gmore § 822
ection 24 of
the Indian Evidence Act Section 24 contains an absolute rule which is not affected by the proviso made for a different purpose in section 27 When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely
confession rendered irrelev
that are irrelevant under
other section of the Act
promise can be relevant, e
King Emperor v *Nga Po Min*, 2 L B R 168, *Nga Sanya* v *King Emperor*, U B R 1909 1st Qr Evidence 3 = 11 Cr L J 41 4 Ind Cas 759, but see *Amiruddin*, v *Emperor*, 45 C 557 = 22 C W N 213 A confession to be

S 24. But, in coming to a decision law and principles which Justice and should not be in recording what should be ... evidence adduced *Nga Shwe* v *Queen Empress*, L B R (1893—1900) 145

A confession by an accused person is not made irrelevant if otherwise relevant merely because the accused person has been sworn or affirmed *Raj* v *Empress*, 3 P R 1880 Cr An oral confession by an accused person ... 24 25 or 26 of the Evidence Act is, as an

Emperor 45 C 557=22 C W N 213=27 C L J 148=44 Ind Cas ... Cr L J 305, but see *Emperor* v *Nga Aung*, 35 Ind Cas 962=17 Cr L J 402=U B R (1916) Vol II 114 *Tara Singh* v *Emperor*, 29 Ind Cas 817 ... P R 1915 Cr =16 Cr L J 545

If the case against the accused entirely rests on the confession made by the accused and there is a conflict as to the manner in which the confession ... obtained, the accused is justified in asking the Court to give him the benefit of doubt *Rahman* v *Emperor* A I R 1930 Lah 88 Where a person of sound mind and of full age makes a confessional statement in ordinary simple language after he has been warned he must be bound by the language of the statement and by its ordinary plain meaning and a subsequent retraction of the same is of no effect *Hazari* v *Emperor*, 127 Ind Cas 247=A I R 1930 Oudh 353=31 Cr L J 1210 Where the confession made before the police was found by the Court not to have been voluntary it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Safi* v *E*... A I R 1930 Nag 259=124 Ind Cas 459=31 Cr L J 661 A confe... made by an accused person is not invalid merely because it was made under the ... benefit by making it *Public Prosecutor* ... I R 1929 Mad 92 A confession is ... a criminal case The making of a counterfeit coin is not a statement and hence the evidence of persons who say that the accused made counterfeit coins in their presence is not barred by s ... or 26 *Brij Nandan* v *Emperor* 133 Ind Cas 151=A I R 1931 All ... confession alleged to have been made by the accused person in the jail to the warder in the absence of any evidence on the part of the prosecution to prove ...

... 200=21 A L J 143=73 Ind Cas 62=24 Cr L J 526

v *Emperor*, 26 Cr L J 937=86 Ind Cas 1001=A I R ...

Where the Magistrate who recorded the confession took all possible precautions to satisfy himself that the confession was made voluntarily and that the accused ... confession ... and he ... Held that the con... Ind Cas ... 8 Cr L J 712=8 A I C R 116

The mere fact of a person being in custody cannot be a good basis for a S.
inducement,
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24,
Evidence Act *Dip Singh* v. *Emperor*, 27 Cr L J 158 = 101 Ind. Cas 891 = A. I R. 1926 All 216.

that a certain set of words used in a particular case has been held to be in the nature of an inducement *Kunja Subudhi* v *Emperor*, A I R 1929 Pat 275 Where there is veiled threat as well as inducement, a confession so obtained is invalid *Kunja* v *Emperor*, A I R 1929 Pat 275

Made A confession made to one person by the accused is irrelevant, even where the inducement, threat or promise is held out by a different person if the
C R 416 But un-
ession by the use of a
to carry either into
e time of making the confession, would
upon his mind, and the confession
ommonwealth v *Tuckerman*, 10 Gray
s seems to be that a confession is not
exhortation, or admonition, or other
r time from some one who has nothing
prisoner, for a
promise made by a perso ... of this kind is
not to be presumed to have ... prisoner as to
induce him to confess tha ... innocent' 3
Russ Cr p 393

Accused person The expression "made by an accused person" in this section, means that person must be an accused person at the time of the confession *Per Sundara Ayyar J* in *Kumara Swami* v *K E* 35 M 397 (535) see also *Empress* v *Jadab* 4 C W N 129 The words 'accused person' in
used,
e in
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sion
it is sufficient if the person ultimately comes to be an accused person with reference to the charge in respect of which he is said to have made the confession *Per Shah J* in *Emperor* v *Chima* 33 Bom L R 1347 = 89 Ind Cas 324,
R 1931
matter of
be applied
the time
e when he

24. was present when the deceased was killed, then stated that he and not the accused had shot the deceased, is properly excluded unless the person whose statement is offered shall be produced as a witness *Selby v Commonwealth* (Ky) 80 S W 221 The prisoner may of course, disprove his guilt by proving the guilt of some other person But he cannot do that by introducing the extra judicial confession or declar
commit, or that he had committed th
never conclusive upon the declar
because of this so called confession,
To receive such statements as exculpatory proof would be to open wide the door for the practice of fraud whereby the acquittal of the real criminal would be assured *Underhill Cr Ev* § 145

If it appears "The words lend some colour to the argument that the confession ought to be made to appear to the Judge to have been improperly induced—in other words that the *onus probandi* is in the first instance on the prisoner I do not accede to that argument A confession may appear to the Judge to have been the result of inducement on the face of it, and apart from any proof at all In every case, I contend, where a prisoner says he has been forced to confess the Judge is put upon judicial enquiry, and as I ended before, I end now, that enquiry shou d *precede* the admission of the confession and any examination into its truth" *Lex,* 2 Bom L R (Journal) 163 "A confession
een made voluntarily
med in section 24 of the
same Act When ad
, and acted on only if it
is believed t ... *admitted*
in 2 Bom ... *Basuanta*
25 B 168= ... The use
of the word ... probability
than would ... perhaps in
a particular case fairly hesitate to say that it was proved that the confession had been unlawfully obtained and yet might be in a position to say that such appeared

case, it appears to the Court that there is reason to suspect that a confession was

take into consi ... ached on surmise
conjecture *Em* ... Ind Cas 961=
Cr L J 497= ... bility of a confession
depends upon a ... evidence antecedent
to ... hat it is liable to rejection
und ... d upon this issue and
dec ... upon the contents of the
con ... =26 Cr L J 937=
Ind Cas 1001=A I R 1925 All 606

In *Emperor* v *Panchkari Dutt,* 29 C W N 300=52 C 67=86 Ind Cas 111=26 Cr L J 782=A I R. 1925 Cal 587, *Mr Justice Mookerjee* ad

"There are words and expressions in this section to which one must pointedly direct his attention in order to construe the section. There occurs the word 'appears', the 'inducement
against the accused person'
is said is to the person
inducement, threat or promise would in the opinion of the Court be sufficient to give the accused person grounds which would appear to the accused person (and not the Court) reasonable for supposing that by making the confessions he would gain an advantage or avoid an evil of the nature contemplated in the section. It will be seen therefore that the mentality of the accused has to be judged rather than that of the person in authority. That being so, not merely actual words, but words accompanied by acts or conduct as well on the part of the person in authority, which may be construed by the accused person situated as he then is, as amounting to an inducement, threat or promise, will have to be taken into account. A perfectly innocent expression, coupled with acts and conduct on the part of the person in authority together with the surrounding circumstances may amount to inducement, threat or promise. In scrutinising a
ct the Court will
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ertain grounds,
l to see whether
pposition that is
the confession
appears to have been caused in consequence of the inducement, threat or promise. The use of these vague expressions has been deliberately made with the object

this direction. A study of the cases, bearing upon the question, which are too numerous to mention, would show that anything ranging between the barest suspicion on the one hand and absolute certainty on the other has been held to be sufficient to satisfy the requirements of the section. In this connection reference may be made to *Reg v Balavant* 11 B H C R 137, *Shafi v Emperor* A I R 1930 Nag
ina 15 B
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tion is not
h is not as strong an expression as proved
N 1112=A I R 1929 Cal 226. The true view seems to have been taken in the case of ...

Thompson, (1893) 2 Q B p 12
matter, with regard to which there
opinion in this country as well
of the Indian Evidence Act and also to the presumption attaching to certain recorded confessions and arising under section 80 of the Act the true and

been obtained by use of threat, persuation etc. Anything from the barest

24 suspicion to positive evidence would be sufficient for a confession being discarded *Raghha v Emperor*, 23 A L J 821=89 Ind Cas 903=I R 6 All Cr 161=6 Cr L J 1431=A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the

2 Q B 12, *R v Rose*, 18 Cox 717, *Ibrahim v R* (1914) A C 599 (610, 611)=18 C W N 705 (P C) where all the English cases have been reviewed, *Ph* 18) 1 K B 351 But *Prof Wigmore* interpreted *hompson* in a different way He ... middle path, and seems to receive the confession ... improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R v Thompson* (1893) 2 Q B 12, 18, *Cave J* (in case of doubt) See also *Chamberlayne's Ev* § 1579

Burden of Proof American view 'Under the early English procedure which has been followed and still prevails in a majority of American Courts (*R v Thompson*, [1893] 2 Q B 12, *R v Warringham*, 2 Den Cr 447, *Thompson's Case*, 1 Leach Cr L 3rd Ed 328 *Emperor v Bhagi*, 8 Bom L R 697) the burden of evidence is upon the prosecution to satisfy the Court upon the tender of the confession in evidence that it was voluntarily given, to the extent at least, of showing that no threats promises or other misleading inducements were held out to the declarant by the person to whom the confession was made Where objection is taken to a confession as 'involuntary' its voluntary nature must be affirmatively established in the first instance by the prosecution to the reasonable satisfaction of the presiding Judge This may be done either by direct or circumstantial evidence Such a requirement will, however, receive a fair construction The state need not show beyond a reasonable doubt that there was not the slightest fear or the least possible hope of benefit in the mind of the declarant' *Chamberlayne's Ev* § 1579 The view has also found representatives that the prosecution must not merely in the above circumstances, but in all cases show the absence of an inducement from any one else and not merely from the person receiving the confession (*State v Garvey* 28 La An 929 This is an absurd extreme A few jurists regard the confession as *prima facie* admissible and require the defendant to show that the alleged improper inducement existed ... for there is any reason to object to the ... to Of course he should ... r the Court's ruling, ... *layne's Ev* §§ 1577 1578

Introduction of confession into Evidence It is a natural, if not inevitable' says *Mr Chamberlayne* 'result of the rules of procedure rejecting confessions deemed, for some reason 'involuntary' that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one Usually the chance for success on the main issue of the trial is entirely dependant upon his ability to keep that confession from the jury Much ... e, as a rule, been expended upon the subject ... therefore, constantly present them selves ... manner the question of the voluntary nature ... preliminary to its admission into evidence In the absence of statutory regulation, or binding precedent, the presiding Judge will be called upon to consider (1) Shall he decide the question of admissibility upon ... the pro ecution or shall ... examine the governm ... (2) Is it better that ... jury or after their retirement from the counter room ? (3) Would it be, ... of whole, sounder admini ... the prisoner's statemen- alternative instruction they find that it was not 'voluntary' as that term is defined by the ... procedure ?—*Chamberlayne's Ev* § 1577

1112; *Emperor* v *Panch Kori*, 29 C. W. N 300=52 C 67, *Wigmore* § 861, *Bolton* v *State*, 107 Ala 108; *Emperor* v *Keshav*, 11 Bom L R 332 The right

both parties, at the stage of *voir dire*, to enter upon an extended range of enquiry into all facts bearing upon the voluntary nature of the confession, tracing any attendant circumstances under which it was made and also the physical, mental and moral characteristics of the declarant The Judge, on the other hand, as is elsewhere said, may receive the confession in evidence upon a *prima facie* showing by the prosecution that it is relevant;—leaving to the defendant at an appropriate later stage, an opportunity of showing that the confession was in fact involuntary ' Among considerations tending to exclude the evidence of the accused at that stage is the very important one that it is not customary to consume time by hearing affirmative defences resting upon controverted fact on *voir dire* It is not, moreover likely that a Judge will overlook the further consideration that evidence, as a rule, is admitted whenever the jury might reasonably act upon it, and that, unless the facts are such that

probable that it would be within
short, conclusive point dispos
expediting the trial of receiving the evidence at once is obvious It has been said that where, the burden of evidence is upon the defendant to show the

heterodox rules prevalent in
in admitting evidence 'In

"(1) The Judge must hear the defendant's evidence (including evidence

may be introduced

R 338=A I R 1930
voluntarily made and was
it in evidence once it
not *Emperor* v *Kesari*, 11 Bom L R 332—2 Ind Cas 917

The maxim of the English Courts is
ie influence used, or decide upon its
... 36 But the Indian Act places

In *Reg* v *Navroji Dadabhai* 9
leaves it entirely to the Court to fo

evidence which would be rejected in

S. 24. suspicion to positive evidence would be sufficient for a confession being di car d *Ragjha* v *Emperor*, 23 A L J 821 = 89 Ind Cas 903 = L R 6 All Cr 161 = 6 Cr L J 1431 = A I R 1925 All 627 P C

Burden of proof—English law The question of voluntariness is for the Judge; and it is now settled that it lies upon the prosecution to establish, and not upon the accused to negative the element, it being the duty of the prosecution to satisfy itself therefore before putting the statement. *R* v *Thompson*, (1893) 2 Q B 12; *R* v *Rose* ... 18 C W N 705 (P C) ... *Ev 7th Ed* 256; *R* v ... the ruling laid down in ... modern English rulin... unless attacked by evidence of an improper inducement, and then in case of doubt leaves upon the prosecution the burden of convincing the Court of the admissibility *R* v *Thompson*, (1893) 2 Q B 12, 18, *Cave J* (in case of doubt)" See also *Chamberlayne's Ev* § 1579

... view 'Under the early English procedure ... prevails in a majority of American Courts (*R* v ... *Warringham*, 2 Den Cr 447; *Thompson's Case*, 1 Leach Cr L 3rd Ed 328, *Emperor* v *Bhagi* 8 Bom L R 697), the burden of evidence is upon the pr... of the confession in evidence ... least, of showing that no threats, ... held out to the declarant by the person to whom the confession was ... Where objection is taken to a confession as 'involuntary' its voluntary nature ... to the

declarant' *Chamberlayne's Ev* § 1579 "The view has also found representatives that the prosecution must not merely in the above circumstance, but in all cases, show the absence of an inducement from any one else and not merely from the person receiving the confession (*State* v *Garvey*, 28 La An 929). This is an absurd extreme A few jurists regard the confession as prima facie admissible, and require the defendant to show that the alleged improper inducement existed This is the ... reason ... Of cour... the Co... *layne's Ev* § § 1577, 1578

Introduction of confession into Evidence "It is a natural, if not inevitable' says *Mr Chamberlayne*, 'result of the rules of procedure rejecting confessions deemed, for some reason, 'involuntary', that a prisoner's counsel is tolerably certain to contend that his client's statement of guilt was not a 'voluntary' one Usually the chance for success on the main issue of the trial is entirely depen... Much learning ... subject Nice qu... selves to a trial ... nature of the stat... evidence In the absence of statutory regulation, or binding precedents presiding Judge will be called upon to consider (1) Shall he decide the question ...

jury or after their retirement from the counter room ? (3) Would it be ... not

confession, it is obvious that the various situations can be best grouped according to the nature of the inducement But as the strength of the inducement depends more or less upon the power of the person offering it, the rule of law must first specify the kinds of persons from whose mouths the inducements may be … Though a too restricted … "person in authority" in this … had authority to interfere in … be sufficient to give him that authority *Emperor* v *Kutul* 57 C 188=A I R 1930 Cal 633 Unless the person attempting to obtain a confession has the power (apparently to the confessor) to carry out the threat or promise, there is no reason for treating the …

facts which may amount to a confession, and such statement, if not privileged by reason of the relation between the accused and the party to whom it is made may be used For example, X, who is charged with the murder of A, is induced by the chaplain of the jail to confess his sins He accordingly confesses the crime with which he is char… voluntary *Reg* v *Gilham*, 1 … tried at Exeter Summer Assize … prisoner to confess a murder … the denunciations of scriptur… it could be used against him, and *Best C J* refused to allow the clergyman to … that it was improper in the clergyman to … by the prisoner, and expressed a strong … *les* cited Peake, 78, *Williams*, v *Williams*,

On principle, such a promise should be of no consequence unless the promisor was one having (apparently) the power to arrest or prosecute *Wigmore* § 829 In England the older and more usual view was that inducement to exclude must come from a person who has legal interest or authority in the arrest and prosecution *R.* v *Row* R & R 153, *R* v *Gibbons*, 1 C & P 97, *R* v *Warringham*, 2 Den C C 447, *R* v *Taylor*, 8 C & P 734 In 1839 *Lewin* in his note to his 2 Lew Cr C 125 said "The cases seem to establish the principle that where a confession is obtained through the medium of a … the prisoner can have nothing to hope … *R* v *Dunn*, *R* v *Slaughter*, 4 C & P … telling a prisoner that it will be better … confession made to him See also *R* v *Spencer*, 7 C & P 776 Finally in 1852, the earlier view was confirmed, and the existence of a legal interest in the prosecution was taken as the test—not the mere existence of actual control or influence growing out of social or commercial relations of the persons. *Wigmore* § 829 In connection with an inducement held … *Moore*, 2 Den Cr C 522 said … (when it was

. 24. England without a moment's hesitation" 2 Bom L R J 227 But it must be remembered in this connection that the English practice which is based on drastic procedural rule has provoked much unfavourable comment from Judges seeking to operate a rational system of judicial administration Vide *Per Baron Parke* in *R.* v *Moore*, 2 Den Cr C 522 (527), *Chamberlayne's Ev* §§ 1507, 1508

Was the inducement sufficient by possibility to elicit an untrue confession of guilt While no one seems to have questioned the fundamental principle of exclusion of confessions, there has been a decided difference of practice in the kind of test used in applying the principle It has been seen that the reason for distrusting a confession arises when the person is placed in such a situation that an untrue confession of guilt (more correctly, a confession of guilt irre

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false confession more attractive at the moment than the mere possibility of freedom, coupled with temporary restraint, which attends silence Again, where a mob's threat of hanging has induced a confession, the alternative of present certain and future possible safety proves naturally more attractive than present certain death Thus in both cases—a promise and a threat—the confession is untrustworthy because it has been associated with an attraction too strong to resist In general, then, the position of the confessing person which causes distrust is that of being compelled to choose between two alternatives, one of which involves a confession of guilt irrespective of its truth or falsity Each

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and roughly, was the inducement such that there was any fair risk of a confession? *Wigmore* § 824

of the

Person in authority

procedural rule' says *Mr*

or, in other respects, to direct the course

y, 14 Q B 789. Authority in this connection may be delegated expressly or by implication (*R* v. *Garner*, 2 C & M ... The term 'person in authority' may therefore extend so far as to designate any one who acts in the presence

colour of his power in the matter

on questions of this nature and ...

in authority, and must have some relation to the crime charged ... the inadmissibility of a confession depends on the relative strength of the inducement to confess falsely, as measured against the prospects attached to ...

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seem to be 'had the person authority to interfere with the matter?' and any concern or interest in it would appear to be held sufficient to give him that authority as in *Queen* v *Warringham*, 2 Den C C 447 N, where *Parke Baron* held that the wife of one of the prosecutors, who was concerned in the management of their business, was a person in a
down in *Archbold's Criminal Practice*'
the prosecutor *Ashutosh Dutt* v *The*

inducement
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ound that the confession
, 53 Ind Cas 605=19 Cr
to the words "persons
A village Magistrate is a
. . . 2 Weir 733, but the son of a village Magistrate is not a person in authority *In re Kuppa Thachan*, 2 Weir 733 So also is a police patel (*R* v *Rama Birappa*, 3 B 12), a police constable (*R* v *Luchoo*, 5 N W P 86), a Police Inspector (*R* v *Ramdayal*), 15 P R 1885 A travelling auditor of a Railway is a person in authority so far as a Railway clerk is concerned *Reg* v *Na*
9 B H C R 358
or not the accused had
intercourse with the r
admitting that they were guilty of murder, *held* that the provisions of section 24 of the Evidence Act, could not be
members of the *Punchayat* were not in a
of that section,
reference to any A 46=A W
N 1881 84 B is was leading
the accused to believe that he had that authority, *held* that a Court would be justified in holding that he was 'a person in authority' within the meaning of section 24 *Nazir* v *Emperor*, 9 C W N 474=2 Cr L J 256; *Emperor* v *Josha*, 11 C W N 904 But a member of the Punch is not a person in authority *Emperor* v *Philip*, 4 Bom L R 785 A jaildar is a person in authority *Mutsaddi* v *Crown*, 221 P L R 1911=12 Ind Cas 642=12 Cr L J 554, *Karam* v *Emperor* 34 Ind Cas 642, so also is the *thugyi* or headman of a village *Nga Kya Hin* v *Emperor*, 15 Cr L J 681=26 Ind Cas 129, see also 10 Bur L T. 270 A zamindar is a person in authority *Imperator* v *Dabud*, 4 S L R 209=9 Ind Cas 718=12 Cr L J 119, *Debendra* v *Emperor*, 101 Ind Cas 881 A president of a *panchayat* is a person in authority *King Emperor* v *Aushi Bibi*, 20 C W N 512=23 C L J 477=17 Cr L J 183=33 Ind Cas. 828 *Zamindars qua Zamindars* are not persons in authority under section 24 of the Evidence Act. *Crown* v. *Long*, 10 S L R. 140, see also 49 A. 57.

S. 24. But wherever Zamindars are directly concerned in the investigation by the direction of the Police, then they clearly are persons in authority within the meaning of s 24 of the Indian Evidence Act *Crown* v *Long*, 10 S L R 140 A headman is a person in authority *Zeta* v *Emperor*, 18 Cr L J 106=37 Ind Cas 314=10 Bur L T 270 A confession made to a police patel is invalid *Emperor* v *Ramadhan*, 31 Ind Cas 340=17 Bom L R 898=16 Cr. L J 740 A Lambardar is [illegible] *un*, 4 Lah L J 235=A I R 1922 [illegible] *ayatdars* are not persons in authority [illegible]

The expression [illegible] than the actual prosecutor and the test is, 'has the person authority to interfere in the matter and any concern or interest in it is sufficient to give him authority *Smith* v *Emperor*, 43 Ind Cas 605=19 Cr. L J 189 The mere fact that the accused [illegible]

185=A I R 1931 Lah 408

An Artificial Rule, repudiated [illegible] person extending a misleading indu[illegible] and necessarily, to be a person in au[illegible]

[illegible] ere yet the confession is voluntary [illegible] admissible So intangible a distinction between actual and ostensible authority has, very reasonably failed to commend itself to certain distinguished courts who extend the function of "persons [illegible] the language of the Supreme Court of [illegible]

[illegible] be fairly supposed by him to [illegible] mised, or to influence the threatened [illegible]

Confession made before coroner In England, it is now the practice to admit statements or depositions of the prisoner before the coroner if properly proved Formerly there was some doubt as to their admissibility and the cases on the subject were conflicting Vide 2 Russ Cr (8th ed) [illegible], *R* v *Wheeley*, 8 C & P 250, *R* v *Owen*, 9 C & P 83, 238, *R* v *Haworth*, Greenw Coll Stat 137, *R* v *Sandys* C & Mar 345 In 1844, [illegible] admit [illegible] by the [illegible] F 100, [illegible] 1, *R* v [illegible] which [illegible] inquest [illegible] of the [illegible] R 51

A statement made on oath by the accused before the coroner at the time of the inquest is admissible in evidence at the time as a confession made by him where the accused was told he need not make any statement but he insisted upon doing so Such a statement is a pure voluntary statement Section 20 of the Coroner's Act provides that a coroner shall be deemed to be a Magistrate for the purposes of section 26 of the Evidence Act *Emperor v Ram Nath*, 28 Bom L R 111=50 B 111=93 Ind Cas 690=A I R 1926 Bom 151; *Emperor v Mahomed*, 30 Bom L R 86 But it would be wrong of a coroner to examine an accused person on oath on the ground that he did not know that the person was an accused person and thereafter use that evidence in a trial for a charge based on that evidence *Emperor v Kris*, 28 Bom L R 79=50 B 56=A I R 1926 Bom 141 S.

Confession when caused by inducement, threat or promise The terms of the ... promise a threat of pro ecut ... veness if it is (*Wills' Ev 2nd* ... and fast rule as to what constitutes inducement The question is one for the discretion of the Judge, and its decision will vary in each particular case *Nort Ev* 161 The inducement need not be expres ... Cox 69) it need not be made to the ... , and does come to his knowledge *R v* ... *W Ev 106*

"Before a confession either judicial, or extra judicial can be received as such it must first be shown that it was in every respect freely and voluntarily made ... y any sort of threat or ... ever slight the hope ... And while circum stances are usually invoked to determine whether the confession is voluntary yet as a safe general rule, it may be said that the statement will be presumed to be volunt ... procured ... *Underhill* ... 'voluntar ... obscure th ... choice be ... subject to a choice As between the rack and a false confession the latter would usually be considered the less disagreeable, but it is none the less voluntarily chosen The term 'voluntary' then, is describing the absence of the vicious element which excludes a confession is, in ultimate exactness unsound All concious verbal utterances are and must be voluntary, and that which may impel us to distrust one is not the circumstance that it is involuntary, but the circumstance that the choice of false confession is a natural one under the conditions The choice of false confession is associated with a prospect (namely ... sting that it is not human nature to resist ...

... whether the confession has been obtained ... by a third person to the prisoner's mind But this after all is merely one of several tests or rule, which have been employed as representing a general principle underlying these differently phrased tests 'The foundation of all rules upon this subject rests upon an anxiety to ...

... petent is not because any wrong is done to the accused in using them, but because he may be induced, by pressure of hope or fear, to admit facts unfavourable to ...

. 24. found only in frequent
ment held out to the
one" *R.* v *Thomas*, 7
1 Den Cr C 331; *R*
whether there had been a ... of such a nature that from fear of it the prisoner was likely to have told an untruth If so, the confessions should not be admitted Its exclusion rests on the connection with the inducement, they stand to each other in the relation of cause and effect If it is apparent that no such connection exists, there is no reason for the exclusion of the evidence" *Williams* v *State*, 63 Ark 527, *Greenl. Ev* § *219 (a)* "The well recognized misleading motives under the influence of which procedure anticipates danger to judicial administration under certain circumstances, are hope and fear The risk run by a tribunal in relying upon incriminating statements so induced has found judicial expression of great frequency ...
as distinguished ...
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... hope or fear are such as to make them unsafe as evidence

It is much more common to ...
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or a threat
is made thre...
and this has
or promise
155, *Bonne...*
early, histor...
confession w...
so indefinite
tion with the ... relied on as a subordinate test *Thomson's Case* 1 *Leach* Cr C 293, *R* v *Fennel* 7 Q B D 150, *R.* v. *Thompson*, (1893) 2 Q B 17, *State* v *Jones*, 54 Mo 479, *Greenl Ev* § *219 (a)*.

A confession induced by a false allegation is irrelevant even if it is true. *Queen Empress* v *Chintaman*, Rat Un Cr C 153 When the statements made by the accused amount to saying that the other accused were really guilty, and any share they had in the offence was owing to compulsion, they are not confession which can be used against the other accused *Queen* v *Kasa*, 7 W R. 8

Confession was made by the ...
Judge did not disbelieve it
by the accused under the belief
this was not a confession in
is not invalid. *Public Prosecut...*

The question whether or ...
as being a confession or not usually arises in the ...
a Police officer or ..."
the police *Ambar* ...

For a threat
as to give the accuse...
would gain an adv... In this case, before the accused confessed the Magistrate said to him "It is no use your trying to get out of it You were seen with the pair of shoes" *Held* that though the language used might be considered to overcome the mind of an uneducated and inexperienced boy, yet, it was not sufficient to overcome the mind of a man of the age, experience, education, and position of the accused, so as to induce him to make a confession, and, that it therefore, did not invalidate the confession *Mukherji* v. *Queen Empress*, L B R (1897—1901) Vol. I, 147

A *punchayat* is not a Police officer, but only a person in authority within the meaning of section 24 of the Evidence Act. Therefore a confession made by an accused before a *Panchayat* is admissible in evidence, if the *Panchayat*

does not make use of any inducement to admit his guilt *Emperor* v *Jasha Bewa*, 11 C W. N 901=6 Cr L J 151 But where an inducement to confess a crime proceeds from a member of the *Panch*, the confession made in virtue of such inducement is not bad under s 24 of the Evidence Act, the member of the *Panch* not being a person in authority *Emperor* v *Philip Ju e Fernand*, 4 Bom L R 785 S. 24

Even in cases where certain words used by the Police officer to the accused amounted to a threat, that fact would not render inadmissible in evidence the information given by the accused which led to the recovery of articles which are the subject matter of the offence *Emperor* v *Pilak*, 17 Cr L J 33=32 Ind C ...

es the admission of a confession the latter telling him to speak ... ss the case against him would not come out *Zeta* v *Emperor*, 18 Cr L J 106=37 Ind Cas 311=10 Bur L T 270

to the Act in W N 451=45 Ind Cas 284=19 Cr L J 524 When a confession was made after Police custody for several days and and the investigating Police officers the confession was made under c... *Mobarak Ali* v *Emperor*, 23 C W N 886=53 Ind Cas 929, *Emperor* v *Pramatha*, 30 C L J 503; *Rasna Teli* v *Emperor*, 54 Ind Cas 881=21 Cr L J 177

sion was made was called him were made freely, hen drawn up that at the nt, that the hand cuffs told the accused that he was a ated, *held* that the confession voluntary and truthful *Daulat* sion made by an accused person ce officer in a subtle way in the Magistrate is inadmissible in

mprisonment made a statement the offence for which he had a witness he denied implication t made to the Magistrate was was convicted *Held*, that the ...n *Khan* v *Emperor*, 18 A L J 18=54 Ind Cas 893, see also *Emperor* v *Cunna*, 59 Ind Cas 321=22 Bom L R 1247=22 Cr L J 68

e l informs , it becomes is inadmis-

24 Misleading Inducements—Hope The real question is whether there has been any threat or promise of to tell an untruth from fear of thre v *Reason*, 12 Cox Cr 229 "

be seen that his mind is entirely free from every false hope or fear that would be likely to operate upon his mind and induce him to say that which is not true That is the principle upon which all these cases are decided *R. Hornbrook* 1 1 Cox Cr 54

Misleadi nection with fear which lea certain circu the truth for f to the resulting statement a high degree of probative force In like manner a fear lest an innocent person should suffer for the crime and a feeling that therefore an obligation exists to tell the truth at all hazards naturally calls

to the emotion instilled by duress It is the fear of the coward of the man colloquially speaking, is but for the reason tha worse off, in connection statement apparently desired Such an emotion, united to a lively imagination may possess many of the elements of terror and render a declaration affected by it entirely worthless for evidentiary purposes Under its influence backed at times by the counsel of injudicious friends perfectly innocent persons have not only confused that they were guilty of crimes which they did not commit but of wrongs which of crimes which in degree of fear, assum ment is not material so far as the exclusion of the statement is concerned if the fear has been applied in connection with the proceedings by some person in aut in que effect

general principles to withdraw the confession from the jury In like manner the operation of fear in a given case may have been such that the will of the declarant has been actually forced and controlled, the act is not his

centuries It is the subordination of reason exercised on the facts of particular cases to reliance upon a general rule for which certain instances furnish a reason A hearsay statement may mislead a jury, therefore all hearsay statements whether actually prot confessions induced declarations so influe

of a confession, can be regulated or measured In *Hope* v *People*, the Court observed, "The admissibility of such evidence so largely dep

t it is difficult, S. 2
cases, as the
, and since his
Courts have
wisely forbor n the limits of admission and
exclusion ' anguage used to the prisoner
would, under case, constitutes such a threat
or promise The sex, age, disposition, education, experience, character, intelligence and previous training of the prisoner are elements to be considered in
Williams
geous and
nity, as a
State, 97
Ma 1 6, 7, *Underhill Cr Ev* § 1?8

Inducement at an end ' If the impression produced by the promise or threat is clearly shown to have been removed *e g*, by lapse of time or by intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement, a confession subsequently made will be strictly received *Phip Ev* 255 *R* v *Clewes*, 4 C & P 224, *R* v *Howes*, 6 C & P 404 *R* v *Richards*, 5 C & P 318, *section* 28, *infra*

Having reference to the charge against the accused The charge here means a criminal charge or a charge of an offence in a criminal proceeding The words "having reference to the charge against the accused read with the words " in a criminal proceeding antecedent and the words ' in reference to the proceedings against him ' following imply that the inducement, threat or promise must be with reference to the charge of an offence in the Criminal Courts of the country, and the language is wide enough to admit of the construction that the charge need not have been framed nor any criminal proceedings begun at the time of the confession In other words, the object of the person ain a confession of having comm which will be, the subject of a with the intent that the confession may be used in the subsequent criminal proceedings In this view it is difficult to understand *Queen* v *Hicks* 10 B L R App 1, 5 M L J Art p 26 The inducement must have reference to any charge against the accused person *R* v *Mohan Lal*, 4 A 46, *R* v *Garner*, 2 C & K 920 A promise or threat to render a confession irrelevant, sonably imply that the prisoner s r worse according as he confesses 2d 210 302 An inducement to confession as to another and different one *R* v *Warner* 3 Russ Cr 6th Ed 489 *(n)* But this rule is not applicable where the two offences are so blended together as to form in fact but one transaction *R* v *Hearn*, 1 C & M 109 *Tay Ev* § 891 Where a confession has been obtained by an inducement having no connection with the charge

without the charge being stated
upon a confession was made, it was
1 D & P 245=6 Cox C C 213
been obtained from the accused by an inducement relating to some collateral matter unconnected with the charge *Roscoe Cr Ev* 43

out the inducement or threat But a rule has been laid down in different

24. precedents by which we are bound, and that is, that if the threat or inducement is held out actually or constructively by a person in authority, it cannot be received, however slight the threat or inducement, and the prosecutor, Magistrate, or constable, is such a person and so the master or mistress may be. If not held out by one in authority they are clearly admissible." So also section 24, whilst offered by a person in authority, leaves it entirely a opinion as to whether the inducement, threat or the prisoner to suppose he would derive some temporal nature by confessing. *Per Sarjent C J* in *Reg* v *Navroji*, 9 B H C R 358 (367); see also *Per Earle J* in *R* v *Garner* 2 C & K 920.

Sufficient to give accused grounds .. avoid any evil The Courts have construed these words liberally in favour of prisoners. Considering the ignorance of the people of this country and their dread of persons in authority, the

holding out a hope of forgiveness from God would therefore be admissible evidence. In *Empress* v *Mohan Lal*, 4 A 46, the threat employed was ex communication from caste for life. This was an evil probably temporal ... L J J 29

Misleading inducements—Hope and Fear—Necessity for determining Actual mental State For several reasons, it may be essential to determine in any particular case, the actual effect produced upon the mind of the declarant by the

offered that the falsifying motive actually operated on the mind of the accused Logically considered however, it is frequently essential to determine the actual influen him in ord involu on the who h was the actual result produced, under the circumstances disclosed, influence exerted. A secondary consideration, also requiring the determination of this question of actual mental state, is that it may become the province of the jury, to find the probative weight to be accorded the confession, the infirmative consideration arising out of the inducements. Should the be submitted to the psychological effect to his will in view of *layne's Cr* § 1488

or wa deter with ... calculated to create such an impression may be considered by the Cou... confession made ... to appear that the ... each other in the ...

of cause and effect.

Such an enquiry will divide itself roughly, into three main lines (a) A consideration of the resisting power of the declarant's mind (b) Examination of the kind and strength of pressure brought to bear upon it (c) What administrative or procedural assumptions may properly be made as to the continuance of any mental state once shown to exist In other words, the effect of a misleading inducement upon the mind in any given case is a resultant of two factors —

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its objective aspect It will then remain to examine the extent, if any, to ... inducement may be taken to have ... declarant at the time of making his

(A) Subjective considerations In deciding in any given case, what was the actual effect of a misleading inducement it is necessary to consider not only the quantity and quality of the pressure but the resisting power of the person whose confession is offered in evidence The logical test of admissibility is the question Have the emotions of fear or hope, either as aroused by himself or ... rthiness ... itution ... hibition ... tending to direct or coerce it into a particular channel While a statement if made on account of its truth, is not rendered incompetent because it is the utterance of a person labouring under some mental disability, natural or superinduced by his voluntary act, in judging whether a given statement is true the mental capacity of the declarant to resist ... capacity may be natural, as ... feeble minded persons, idiot ... case of insanity, or intoxication —*Chamberlayne's Ev* § 1490

Children, Feeble minded etc Whether a confession of guilt made by a child shall be deemed relevant because truthful, is a question for the decision of the Court in view of the special facts of each particular case under proper circumstances, the incriminating statement of a child legally ... special ... readily ... sons in ... quence, ... y if at ... may well entirely control the volition of a ... will he fail to notic... confession by one of ...

... it is probably less

Feeble minded persons ... tion very similar to that occup... is such that the presence of ...

Subjective considerations—Intoxication A confession is not rendered ...

was furnished him by one in authority for the express purpose of inducing him to talk, and by leading the conversation in certain directions, to persuade him to confess, do not suffice to exclude a declaration so secured Such a course of conduct ranks as a mere deception like any other, and, unless more appears than the mere fact of unguarded loquacity brought about by intoxication, no ground for rejecting the confession is furnished In other words,

24 loosening the ... the brai is n t sufficient to ... and incompe nt. So long as the ... knows what he is talking abou, ... alsbu / 7 (C & P 187) When the later stages c ... longer knows the effect of ... because entirely untrustworthy

(B) Objective considerations—Hope The objective strength of the inducement which operates by way of hope or fear to bring about a confession may be as varied as is the subjective strength of individual accused to resist them Things promised may range, in intrinsic value from those deemed highly desirable by persons of well balanced judgment down to considerations so slight as to render the conduct in question practically unmotivated If the hope should in any case be regarded as having induced a confession it is essential that the latter should have been made at such a time that the inducement may fairly be regarded as still operative It is further necessary if hope is to be regarded as in action, that some benefit, not necessarily specified should have been distinctly presented to the mind of the declarant and his ability to obtain it conditioned upon his confessing Any mere suggestion as to the general desirability of confession or of confessing of guilt is not sufficient to show the influence of hope Should the declarant before ... a promise of benefit had been ... confessing his guilt and the ... d to have acted in accordance ... As intimated it is not essential ... confession would be

worse off ... way of hope ... something ... in connection with the p ... if he speaks ... need not be specified it may be left in dubi ... tween a mere exhortation to confession because it is right and the vague promise of material benefit in the same event is not in all cases one easy to draw *Chamberlayne's Ev* § 1495

Inducement must be material The thing hoped for must be of a material nature Admonition to speak out based on moral grounds, *e g*, that confession is a better thing than guilty silence is not, legally speaking, an inducement, *R* v *Akhilesuar* 4 P 646=89 Ind Cas 961 The words used in the section are of a temporal nature The word "temporal" is opposed to spiritual or religious A confession induced by holding out a hope of forgiveness from God would therefore be admissible In *Empress* v *Mohan Lal* 4 A 46, the threat employed was ex communication from caste for life This was an evil probably temporal 5 M L J 29 But confession induced by moral or religious exhortation will not be excluded *R* v *Gilham* 1 Moo C C 186 *R* v *Jar* ... C. L R 1 C C R 96 *R* v *Reeve* L R 1 C C R 362, *R* v *Hall* 1 Moo C C 452, *R* v *Sleeman* 6 Cox C C 245 A simple request for a clean breast ... a given matter, though made to the accused by the person aggrieved fails to affect adversely a subsequent confession made in accordance with it *Chamberlayne's Ev* § 1496

Influence of a religious or of a moral nature In *R* v *Rawford* 1 Mood C C 102 a clergyman ... the heinousness of the crime charged ... the denunciations o ... thereby But *Best* ... be dangerous after ... to receive ... and

crime of which he was not guilty, or that a man under ... falsehood, with his spiritual relation with God could hope to please God by a falsehood, if his confidence created' between him and his pastor, or the being thrown off his guard by his confidence should induce him, not to confess (that it would naturally do if he were guilty), but induce him to confess falsely Such spiritual

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convictions, or spiritual exhortations, seem from the nature of religion, the most likely of all motives to produce truth They are therefore of a class entirely different from those that exclude confessions A confession is excluded because the motive which induces it is calculated to produce untruth because it is likely to lead to falsehood If temporal hope exists they may lead to falsehood Spiritual hope can lead to nothing but truth" *Joy Confessions*, 51, *R* v *Gilham*, 1 Mood. Cr C 186, *R* v. *Gilney* Jebb Cr C 15, *R* v *Wild*, 1 Mood Cr C 452; *R* v *Sleeman*, 6 Cox Cr 245 Proof that an incriminating statement was made by one accused of crime under the influence of a moral or religious inducement to make a statement, is in reality a ... irment of its probative force. ... exhortation to tell the truth by ... *Emperor* v *Wholesnar*, 89 ... I R 1925 Pat 772 The fear ... trustworthiness of a confes-

Threats made but not influencing the accused Where threats are made to the accused but the accused made the statement deliberately, *i e* uninfluenced by the threats this section does not apply *Emperor* v *Inandarao*, 19 B 612= *27 Bom L. R 1034=89 Ind Cas 1016=26 Cr L J 1478*

Advice that it would be better to tell the truth 'On principle says *Prof Wigmore* the advice by any person whatever that it would be better to tell the truth cannot possibly vitiate the confession, since by hypothesis the worst that it can evoke is the truth, and there is thus no risk of accepting a false confession The confessor is not obliged to choose between silence and false *confession* ha... utterance of ... is nothing in t... for if it has ... But that theory does not obtain in England A confession obtained after the advice that it would be better to tell the truth is excluded in England *R* v *Enoch*, 5 C & P 539; *R* v *Hearn*, C & M 109, *R* v *Laugher*, 2 C & K 225; *R* v *Garner*, 1 Den Dr C 329, *R* v *Baldry* 2 Den Cr, C 42, *R* v *Waringham*, 15 Jur 318, *R* v *Gellis* 11 Cox Cr C 69, *R* v *Bate*, 11 Cox Cr 686, *R* v *Dogherty*, 13 Cox Cr 23, *R* v *Fennell* 7 Q B D 147, *R* v *Enoch*, 5 Car 539, *Queen* v *Uzier* 8 W R Cr 13, *R* v *Thompson* (1893) 2 Q B 16, 18 ... 'It can hardly be said ... to confess what he ... 96 *Kelly C B* said ... meaning that they ... confessions Some cases have gone the length of saying that a statement is inadmissible if it is ... er tell the truth For my part, I ... that he had better tell the truth ... had better confess, when you do not know whether he is guilty or innocent' *Per Peacock J* in *In Nobodeep Chandra*, 1 B L R Cr 15 'Much conflict says *Mr Chamberlayne* exists among the ... as to whether ... exhortation, advice or suggestion that

received in evidence a statement *prima facie* so induced The ruling seems justified as, upon the surface the inducement if any, held out to the declarant is a moral one It is required that no threat or promise or favour by one in authority should have accompanied the suggestion On the contrary the use of but slightly varying expression such as 'it will be better for you to tell all you know' or 'you had better tell the truth', has been held to exclude a confession so induced' *Chamberlayne's Ev* § 1517 A mere exhortation to

S. 24. the accused to speak the truth could not be construed into an inducement, threat or promise, and, least of all, into an inducement to make a false confession and is not enough to exclude evidence of a confession ... ess, 9 P R 1894 Cr ... s made by a superior ... 24 of the Act Nga Pye ... 5 Cr R 3?

the moral or religio... an officer or other p... the latter's presence ... goes so far as to pro... will do what he can ... The subsequent co... statement of the person in authority frequently both in tone ... language ... ake The ... better for ... covert thre... case if he ... *frequently* ... tion with the proceedings, will accrue in the manner requested There is plainly danger in such a situation ... volition of the accused be over-powered, that he will state the truth not as it is but as he thinks will be pleasing to the officer, or other person in authority to have him say that it is Adopting this distinction the Courts of several jurisdictions have regarded the statement of an accused person thus influenced as inadmissible under the rule, because involuntary' *Chamberlayne's Ev* § 1516 1518

or perhaps under the violent pain of the rack, he thinks of nothing ... present relief from agony which his confession will gain him *Wigmore* § 833. A confession is not admissible, which has been made immediately after the prisoner with others had been threatened with a loaded rifle It was immaterial that the threat was not made to extort a confession, but to suppress an attempt at mutiny *Queen* v *Hicks*, 10 B L R. Ap 1 It is a mistake to suppose that a confession cannot be irrelevant under section 24 unless it can be alleged that there was torture leaving marks of personal violence Under the section the confession becomes irrelevant if the making of it appears to have been caused by any inducement, threat or promise *Queen Empress* v *Narayan*, 25 B 543= 3 Bom L R 122

Promise of pardon A confession by promising immunity from prosecution of another case is not admissible against the confessor *Kaloo* v *R*, 12 P W R 1907 Cr — 5 Cr L J 437, see also *Abdul Karim* v *K F*, 1 A L J 110=1 Cr L J 211 *Mahommad Shafi* v *Empress* 1 P R 1899 Cr *Crown* v *Radha Kissen* 9 P R 1869 Cr *R* v *Ashjai* 2 A 260, *Nga Io* v *Queen Empress* L B R (1872 1892) 396 *Ima* v *Emperor*, 45 A 633, *Emperor* v *... Anant* 32 C L J 201=60 Ind Cas 417 — 22 Cr L J 225, *Queen* v *...* W R Cr 33, C 50 (73), *In re Kora Govindan* ... *Gi...* *Baidulla* v *R* 10 P R 1895, ... *Was* 11 Cox Cr 69, *O Hojan J* ... ud ... ... minst the prisoner induced by a person in authority to make the information ... I think ... ing himself by the hope of obtaining the immunity of an approver ... that he was He became a Crown witness in a reasonable expectation that he would escape punishment as a return for his accepted services in bringing offenders to justice' Where a promise of safety was made by a Police officer to whom the accused confessed, which confession was repeated before the committing Magistrate and the accused also made a confession, although diff... in

it the confession before the S.

is an inducement or threat ithhold my matter within voluntary statement given in evidence as against him *Reg* v *Abbhai*, 8 B H C. Cr 103

Inducements involving a higher punishment, mild treatment in prison or a reward of money "It is scarcely conceivable" says *Prof Wigmore* "(except

persons for the ends of justice, be encouraged ey do so they will receive lenient punish- *entirely wrong impression and to be* , *King Emperor*, U B R (1916) 2nd Qr. p 113=17 Cr L J 102=35 Ind Cas 962, 820, *People* v *Johnson*, 41 Cal 153, *Smith* v in treatment while in confinement cannot a false confession *R* v *Green*, 6 C & P 655, *Com* v *Dillon*, 4 Dall 116 Although ld be voluntarily bartered result has some- times bee *lackburn*, 6 Cox. Cr. 337 esser offences are often con be housed and

and to reject absolutely a confession so induced Where the circumstances of a obably thus induced, let it be excluded the basis of so unusual a contingency Evidence" *Wigmore* § 835

Promise of cessation of prosecution release from arrest etc A promise has ich "If you will tell me where my goods are I will be favourable to you *Could J* cy are secutor if he o *R* v *Simpson*, 1 Moody Cr C 410 It was disallowed as it was obtained do all he could Similarly in *R* because there the prosecutor said if you will not tell we of course can do ient was ch But promise v *Mans* *ase* 6 Cr exclude 3rd ed

Assurance that "what you say will be used for you" or "used against you" The advice of one in authority promising that "what you say will be used for you" was regarded in many cases as excluding a confession As regards confessions thus obtained *Coleridge J* said "I cannot conceive a more

24. direct inducement to a man to make a confession than telling him that what he says may ... *R* v *Dieu*, 8 C & P 140 The learned ... *v Hornbrook*, 1 Cox Cr 55, where he

430 by *Lord Campbell C J*, *Pc*
But in *R* v *Moore* 2 Den Cr C 5
that "however slight the threat
Wigmore § 837

Assurance that "you had better confess" The phrases "it would be worse for him if he did not confess or better for him if he did" (East Pl Cr ... "it will be
654, *R* v *Kingston*, 4
better for you to tell
Cr C 410), "you had
6 C & P 353), "you h
7 C & P 579), "if any other person had to do in the case, it is better you ... tell," (*R* v *Moody*, 2 Cr & D 347), "you may as well tell me" (*R* v *Croydon*, 2 Cox Cr 67), "because it would save him the shame of a search warrant" (*R* v *Collier*, 3 Cox Cr 57), "it would be best for him if he would tell how it was transacted" (*R* v *Warringham*, 2 Den Cr C 447, "if you do not tell, it would be worse for you" (*R* v *Cheverton*, 2 F & F 833, *R* v *Coley* 10 Cox Cr 536) and "it will be right thing for M to make a clean breast of it" [*R* v *Thompson* (1893) 2 Q B 12, 18] were held to be vitiating inducement "In a given case" says *Prof Wigmore* "the exclusion may occasionally not be improper under all the circumstances, but that such a phrase, or its equivalent, should in itself and as a rule operate to vitiate the confession is wholly bad on principle and in common sense" *Wigmore* § 838 "The mental effect of a suggestion that the accused had better confess is much the same as that of a declaration that he had better tell the truth; although, in form at least the injunction to tell the truth presents an alternative of self exculpation which the ... on the surface does not As however, the advice to tell the ...

confession
tendered
when offered ...
be deemed to hide a threat, equally intangible, in case the admonition had disregarded Viewed in this light an intimation to the declarant that he had better confes ... if he does not, has been treated as an ... may reasonably be assumed to ... the wish that the accused should make ... authority or made to him by the injured person does not impair a confession given in compliance with the suggestion" *Chamberlayne's Ev* § 1520

... proceedings 5 M L J ...
1 L ... to the proceedings ...
must
Naur
must
that ... W P ...
... d (*Empress* v ...
... sentence, that he will ...
... he like —5 M L J

Art p 29

S.

Retracted confession—Corroboration of To use a confession as evidence against the accused, the Court must be satisfied (1) that it is voluntary, and (2) that it is substantially true Moreover, it is a general rule of practice not to act upon retracted confessions, unless they are corroborated on material points by credible independent evidence. *Crown* v *Motan*, 2 S L R Cr 34=10 Cr L J 201, *Muhammad* v *Crown*, 5 P L R 1915=3 P W. R 1915 Cr =16 Cr L J. 157=17 Ind Cas. 221 *Harprosad* v *Emperor*, 36 Ind Cas 133=17 Cr L J. 453; *Sher Khan* v. *Crown*, 2 P W. R. 1917 Cr =75 P L R 1917 Cr , *Queen Empress* v *Gunu*, Rat Un Cr C 817 It is a recognised rule of the Law of evidence, that a retracted confession may be used against the person making it, but not against other accused jointly with him *Chet Singh* v. *Crown* 28 P W R 1907=7 Cr L J 227, *Yasin* v *Emperor*, 28 C. 683 A Judge should in the first instance, see whether a retracted confession is voluntary or has been improperly induced The mere fact that prisoner puts in a plea of guilty
made it by allegation

nduced That is a
If, upon weighing
it appears to the
Judge that the confession has been improperly induced, no matter how true it may be, he is bound to exclude it, it then becomes evidence and liable to be appreciated and weighed with the rest of the evidence in the usual way *Emperor* v. *Bhagi Vedu* 8 Bom L R 697=4 Cr L J 332, *King Emperor*, v *Durga* 3 Bom L R 441, *Majhi* v *Emperor* A I R 1927 Lah 682=104 Ind Cas 247,

certified by a Magistrate, is not enough
unduly induced *Queen Empress* v

by credible and independent evidence, it is unsafe in the majority of cases to found a conviction on a retracted confession A retracted deposition does not of itself afford a sufficient corroboration of a retracted confession *Empress* v *Chutia* 13 C P L R 107 *Queen Empress* v *Bharmappa*, 12 M 123=2 Weir 376, *Empress* v *Tila Ram*, A W N 1886, 52; *Queen Empress* v *Rangi* 10 M 295=2 Weir 361, *Queen Empress* v *Ramu* 19 M 482=2 Weir 745, *Empress* v *Balai Ghosh* 124 Ind Cas 486=A I R 1930 Cal 141, *Safi* v *Emperor*, 124 Ind Cas 459=31 Cr L J 661=A I R 1930 Nag 259, *Mian* v *Crown*, 30 Cr L J 340=A I R 1929 Lah 597, *Sheonarain* v *Emperor*, 8 Pat 262=A I R 1929 Pat 212; *Kunja* v *Emperor*, 8 Pat 289=A I R 1922 Pat 275; *Bijan Singh* v *Emperor*, 30 Cr L J 1046

an approver had been
made
should be examined at the
trial,
is a witness preferring
to deal with him as a co accused, his retracted confession would be irrelevant under *s* 34, *notwithstanding the special provisions of cl 2 of s 339 of the* Criminal Procedure Code *Mohammad* v *Empress*, 1 P R 1899 Cr , *Crown* v *Radha Kishen*, 9 P R 1869 Cr , *Yasin* v *King Emperor*, 28 C 689=5 C W N 670

Where a confession was made before a Magistrate under circumstances not liable to suspicion, and, to all appearances, fulfils the requirements of the law, the fact that it is retracted in the Sessions Court does not negative the presump*tion of the genuineness of the confession* *Queen Empress* v *Bindu*, A W N. 1890, 173

A confession before the Magistrate, though afterwards retracted in the Sessions Court, is evidence against the party making it *Queen* v *Jema*, 8 W.

S 24. R. Cr 40; *Chit Sun* v. ... 17 W R Cr 4,
R v *Gharya*, 19 B ... *Jaikulal*, 20 A 153,
R v. *Kelvie* 29 A 434; ... be laid down a
an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt, without independent corrobo ... d confession must depend ... as originally given, and the ... the reason given by the prisoner for his retraction *Sajjad Hussain* v. *Emperor*, 16 P. R. 1903 Cr = 153 P L R 1903; *Emperor* v *Bissesuar Dey*, 26 C W N 1010 *Pada Pyga* v *Queen Empress* L B R (1872-1892) 423, *Nanhey* v *Emperor*, 134 Ind Cas 876 = A I R 1931 Oudh 412

A confession though made voluntarily by an accused person before a Magistrate, if subsequently retracted, is not sufficient by itself to justify a Sessions Court in acting upon it *Queen Empress* v *Balya*, Rat. Un Cr C 9..., ... 842, *Nga Tha* v *Queen Empress*, L B R. ... n, 38 P W R Cr 1910 = 24 P R 1910 = ... h is explained away is like a retracted ... A I R 1927 Lah 519 A retracted ... sufficient to warrant conviction *Rahaman* v *Emperor*, A I R 1930 Lah 88 = 30 Cr L J 1080; *Nawab* v *Emperor*, 6 O W N. 545 = 118 Ind Cas 757 = A I R 1929 Oudh 381; *Sanwal Das* v ... v *Emperor*, 1929 M W N 791, ... 29 M W N 901 = A. I R 1929 Mad. ... r, 31 Cr L J. 26 = 120 Ind Cas ... 35, *Durga* v. *Emperor*, 132 Ind Cas

... value of confession seems to be this

of an acc ...
voluntary ...
and simpl ...
the use to ...
matter rat ...
up its min ...
to believe ...
that, in the ...
convict or ...

... the retraction, not withstanding its having ...

kind that not only confirms the general story of the crime but also, unmistakably, connects the ...
P. L R 1914 = 15 C ...
R 1914 Cr; see a ...
Chitsun v *Crown*, 1 ...
Cal. 633 It can ...
made and subsequently retracted by a prisoner cannot be accepted as evidence of his guilt without independent corroborative evidence The weight to be ...

retracting them were true. An omission on the part of the Judge to ... circumstance ... to the Jury amounts to a misdirection ... Weir 533; *Queen Empress* v *Bhagi*, Rat. ... ja, 19 B. 728. If a Judge

S. 2

believes that a confession made by a prisoner although subsequently withdrawn, contains a true account of that prisoner's connection with a crime, the Judge is

indicate that it is a natural narrative of what took place in the presence of the man making it, and is not at variance with any evidence in the case which is believed

mouth

224; Q...

Empres

W

fession

was not liable to be convicted on the confession alone *Queen* v *Hardeua*, 5 N W P. 217 But confession of a co accused, though subsequently retracted is admissible in evidence against his co accused *Sardara* v *Emperor*, 125 Ind Cas 639=31 Cr L J 877=A I R 1930 Lah 667 Where the confession made before the police was found by the Court not to have been voluntary, it cannot be corroborated by the confession of the accused as an approver, subsequently retracted *Safi* v *Emperor* 121 Ind Cas 459=31 Cr L J 661=A I R 1930 Nag 259

In capital cases, the jury should often refrain from convicting on retracted confessions *Queen Empress* v *Ruppya*, Rat Un Cr C 245=Cr Reg 12 of

in a criminal case was the confession of the

but subsequently retracted, and where it

the prisoners who confesse

ly retracted, such a very good corrobora-

ground that it was ter admission, is to be Evidence Act, and the proper course for

the Judge to take evidence about the circumstances before admitting the

given in the

W N 380

understood

in another

what statement was made by the accused It is not the practice to base a conviction upon a retracted confession, unless it is corroborated That a person,

and while not ignoring the difficulties that surround retracted confessions, it

evidence by reason of the person making it having retracted it before the committing Magistrate *Sahib* v *Empress*, P L R 1900, 19 Cr There is nothing in section 30 of the Evidence Act which would exclude, as against

S. 24. persons being jointly tried for the same offence, a confession made by one of the accused duly proved, simply because at the trial the confession is withdrawn or denied *Aung Them* v *Crown*, 1 L B R 133 Certain accused persons made confessions which led to the arrest of certain other persons The confessions were subsequently retracted, but were corroborated by the evidence of the approver *Held* that the retracted confessions taken behind the back of the

ade them,

conviction

J 73=13

of J by

fracturing her skull C made a confession before a Magistrate, which she retracted in the Court of the trying Magistrate Except the evidence of one witness, who said he saw the two wou

whatever to show that C committed the cr

convict the accused person on his retracted

borated *Held* also, that production by

with

n *Mt Chandan* v *Crown*, 3 P W R 1901

-38 cannot be accepted as proper corroboration of a confession made to a Magistrate and retracted at the sessions trial, especially when that confession was not fair

Empress v *Jadub*, 27 C 295=4 C

where a confession was recorded und

when it was corroborated in material

King-Emperor v *Mohiuddin*, 25 M 1

made under the

164 of the Crimina if retracted afterwards

Nga Thin v *Queen*

A confessing prisoner should not be condemned upon a retracted confession unless it is corroborated in material particulars *Emperor* v *Mussamat Jauai* 70 P L R 1918=19 P W R Cr 1918=44 Ind Cas 179=19 Cr L J 2..., *Har Prosad* v *Emperor*, 36 Ind Cas 133=17 Cr L J 453; *Behari* v *Emperor* 60 Ind Cas 789=22 Cr L J 293

An accused's confession subsequently retracted and not tallying with the other evidence in the case, cannot be pressed as strong evidence against him. *Emperor* v *Tilak*, 32 Ind Cas 321=2 O L J 468=17 Cr L J 33 In the absence of corroboration in material particulars, it is not safe to convict on a retracted confession, unless from the peculiar circumstances in which it was made and judging from the reasons, alleged or apparent, of the retraction, there remains a high degree of certainty that the confession, notwithstanding its having been retracted from is genuine *Khushi* v *Emperor*, 31 Ind Cas 821=16 Cr L J 815 But it cannot be laid down as an absolute rule of law that a confession made and subsequently retracted by a prisoner cannot be accepted as evidence of the plaintiff without independent corroborative evidence The weight to be given to such a confession must depend on the circumstances under which

n and the circumstances under which it was

N 1010=24 Cr L J 115=A I R 1923 Cal 217; *Bassireddi* v *Emperor*, 9 L J 613=18 L W 607=33 M L I H C 37, *Manna Lal* v *Emperor* O & A I R 947, *Moti Ram* v *Emperor*, 75 Ind Cas 152=21 Cr L J 401

The duty of a Judge presiding over the trial by Jury is to prevent the production of inadmissible evidence, whether it is or is not objected to by the

They will be admitted only if they are voluntary If the Judge is satisfied as to the truth of a confession but doubts voluntary character he is bound to exclude it under the law, though such rejection amounts to excluding truth from the Court *Emperor* v *Panchkari Dutta* 29 C W N 300—52 C 67=86 Ind Cas 414—26 Cr L J

It cannot b
and subsequently
guilt without and
of a confession is a matter to be decided by the Court in the circumstances of each particular case *Manna Lal* v *Emperor*, A I R 1925 Oudh 1 In deciding whether a retracted confession is to be admitted in evidence it is necessary to examine not only the statement of the prisoner as to how he came to make it, but all the circumstances of the case There is no rule of law which compels a Court to raise an inference of improper inducement from the mere fact that a confession is retracted *Partab Singh* v *Emperor*, 6 Lah 415=7 Lah L J 482=A I R. 1925 Lah 605, *Mohor Sing* v *Emperor*, 96 Ind Cas. 717=27 Cr L J 982 Confession
though retracted,
although certain
detailed confession
explained the con
381 Conviction based on retracted confession which was voluntary and was sufficiently corroborated is legal *Iqbal* v *Emperor* 103 Ind Cas 112—28 Cr L J 656

Procedure to be followed—Where admissibility of confession is objected to—English Practice Now the

uch alleged admission A
voluntarily It must have
...ed to make it by any promise
or favour, or by any threat held out by a person in authority *R.* v *Thompson*, (1893) 2 Q B at p 15 So the only question in these cases really are—was any promise or favour or any menace or undue terror made use of, to induce the prisoner to confess? And if so was the prisoner ...

the evidence *R* v *Thomp* ... 95

It is also important to note that the question as to the admissibility or otherwise of the alleged confession is a question for the Judge and not for the Jury

"No
until objec
prosecutio
gist of it,
has been determined by the Judge

Very often, however especially in cases at quarter sessions it is not unusual to
ment was
into the pro
of the evidence is to be taken by the defence And then when the evidence in chief is be
statement,
of the det
the Judge in the absence of the Jury

"It must be obvious to any person that such a procedure must be very damaging to the accused because even if the objection is sustained the Jury must naturally conclude that something not in the prisoner's favour is being withheld from them

S. 25. "What then is the correct procedure to be adopted in such case It is

be followed in such cases And that procedure appears to be as follows The prosecution, in opening, should make no reference whatever to the accused's statement, and should not even mention the fact that the accused made a statement.

"In examing his witness or witnesses, the prosecution must in the same way refrain from asking the witness whether the accused made a statement. When, however, that st [illegible] defence should state [illegible] this stage of the procee[illegible]

"In the absence o[illegible] witness or witnesses [illegible] examined and re-exami[illegible] be entitled to call witn[illegible] can be called in support seems to be a moot point Thus, in *Salvage's case* application was made by the defence to call the prisoner to give evidence in support of the allegation that the confession was made involuntarily, but such application was refused by the Judge

"It is difficult to see, however, on what grounds the Court can refuse to hear the prisoner on the question of admissibility

'It is submitted that the prisoner is entitled to call other persons to prove that the confession was made involuntarily, persons, for example, who would say that they were present when the alleged confession was made, but that it was made in response to an inducement [illegible] time to the

[illegible] If the Judge has ruled out [illegible] [illegible] ll to the statement must be made If, on the other hand, he has hel[illegible] prosecution will continue their examination [illegible] such evidence stopped in order to allow the q[illegible] of the evidence to be argued in the absence [illegible] statement will, of course, be given It wi[illegible] examine the witness again, but before the [illegible] ment was made involuntarily, the Judg[illegible] the Jury the reason why their retirement was requested, and also his reason [illegible] deciding to admit the evidence

"The defence in opening will, *inter alia* deal with the question of the [illegible]

[illegible] *case cited in* 33 Cr L J pp 1 2 (Journal)

When [illegible] accused is [illegible] the truth or [illegible] form an a[illegible] were so, pra[illegible] *Emperor*, 88 Ind Cas 283=26 Cr L J 1115

Confession to police officer not to be proved

25 No confession made to a police officer* shall be proved as against a person accused of any offence.

Difference between English and Indian Law "Sections 25, 26 and 27 differ widely from the law of England and were inserted in the Act of 1861 (from a

*In the Upper Burma insert ' who is a Magistrate," *see* s 4(3) (c) of the Burma Laws Act, 1898 (13 of 1898).

S. 2

which they have bee[illegible] police for the purpose England confes ions o[illegible] threat or promise *R* v *Kerr* 8 C & P 176, *R* v *Berryman* (1854) cited in *Roscoe Cr Ev* 19, *R* v *Best*, (1909) 1 K B 692, *R* v *Man* 17 Cox C C 689, *R* v *Kershaw*, 18 T L R 357, *R* v *Dougal*, 67 J P 325, *R* v *Leibling*, 2 Cr A R 315, *Rogers* v *Hawkins* 19 Cox 122, *Ibrahim* v *R* (1914) A C 599 = 18 C W N 705 P C, [illegible] 206, *R* v *Hirst*, 18 Cox C C 374, *R* v [illegible] *Harris*, 24 Cox C C 66, *Darling J* said [illegible] be done to induce or threaten, but short of that, if the person is not in custody, it is certainly not the law that the constable may not make enquiries which may lead to his getting evidence from a person which he may use against the person" But a constable has no right to elicit admissions from those he suspects *R* v *Mathews*, 11 Cr A R 23, see also *R* v *Voisin*, (1918) cited in *Roscoe Cr Ev* 51.

Reason of the Rule This law is applicable only in India The following extract from the First Report of the Indian Law Commissioners shows the reasons which prompted the Legislature in enacting ss 25 and 26 The Police in the province of Bengal are armed with very extensive powers They are prohibited from enquiring into cases of a petty nature but complaints in cases of the more serious offences are usually laid before the police *daroga* who is authorized to examine the complainant, to issue process of arrest, to summon witnesses to examine the accused and forward the case to the Magistrate or to submit a report of his proceedings according as the evidence may in his [illegible] lence taken by the [illegible] sessions of 1832 and [illegible] abundantly shows [illegible] ses of extortion and [illegible] y exercised by the [illegible] the conclusion that [illegible] the facilities which

[illegible] ssession of such [illegible] Regulation XX [illegible] y confession it [illegible] ns for preventing

character of the confession confessions are frequently extorted or fabricated A

[illegible]

by getting up a case against parties whose circumstances and character are such as are likely to obtain credit for an accusation of the kind against them This is not unfrequently done by extorting or fabricating false confessions and when this step is once taken there is of course impunity for the real offenders

25. result of which is to constitute a written document This of course will not prevent a police officer from receiving any information which any one may voluntarily offer to him, but the police ... any statement made by a party accused

As regards sections 25 26 and 27 ... v *Babu Lal*, 6 A 509 at pp 521 522 I have stated the effects as introductory of the observations which I am about to make that the rules contained in ss 25 26 and 27 of the Evidence Act were not originally treated in British India strictly speaking rules of evidence, but rather as rules governing the action of police officers, and as matters of criminal procedure I may take it that no such rules existed either in the Muhammadan Law or in the English rule of evidence the only two systems to which the Courts resorted for guidance on questions of evidence in criminal matters' Then after making mention of previous legislation on the subject he added at p 523 These legislative provisions leave no doubt in my mind that the ...

... accused persons Section ... prisoners accused of offences ... *Solam* v *Emperor* 43 Ind Cas ... in *Queen* v *Hurribole* 1 C 207, 4 A 198 (204) The reason ... confession made by an accused ... it be made in the immediate ... apprehension that a police officer ... persons may unwillingly excite terror in their minds and extort false and involuntary confessions and his duty to investigate criminal cases and to detect offenders and bring them to justice may make him feel tempted to obtain confessions from accused persons by threat promise or other improper influence *Queen Empress* v *Bijai* 2 C W N 71

Origin of the section As far back as the year 1817, the Legislature repealing the older rules upon the subject passed Regulation XX of that year which *inter alia* had for its object the ...

... can be ... as in the rule ...

... section provided that 'no compulsion ... found either towards parties or witnesses for the purpose of obtaining any

ned not on any occasion or S 2
pprehended upon a criminal
s of a prisoner by holding
sunding or inti-
any species of
landholder or
farmer, or by any other person whatever, whether with a view to extort a confession or to procure information will subject the offender to ex... punishment, on con... ying down these ... whenever a confes... olice thana the sp... o daroghah's report ... event mal practic... ns in order to gain ... XX of 1817 remained undisturbed in the statute-book up to a recent time when they were
l Procedure Code of
s 19 of Regulations

... The next three sections 148 149 and 150 contained even more important rules which perhaps did not properly belong to the province of of Criminal Procedure but to that of Evidence. Section 148 ...

... person accus... amounts to a ... fact discovered ...

only fit and p... Evidence which ... 150 of Act XXV of 1861 were exiled from t... they found no place in the new Code Act ... proper place as ss 25 26 and 27 of the ... Admissions They have been imported bodily ... in the Code of 1861 they are the ...

Scope of the section In section 25 the criterion for excluding the con... To whom was the confession made? If officer the law says that such confes... n evidence because the person to whom ... ving such a confession, and he is more

25. over
Queen
R 11
made, in the first instance, to two policemen, and taken down in writing, and the prisoner was then brought before the Deputy Commissioner of Police Mr *Lambert*, in the Police Office in Calcutta, when he again affirmed the truth of his former statement to Mr *Lambert*, and Mr. *Lambert*, in his capacity of a

confession made by a prisoner in custody, to any person other than a Police Officer, shall be admissible, unless made in the presence of a Magistrate I am of opinion that is the true meaning of the 25th section Its humane object is ... any undue ... to which ... for reading ... *R*, 11 C ... 193, *In re* ... cer by an ... *a fortiori*

it is inadmissible against a co-accused *Emperor* v *Hari Singh*, 12 Bom L R 899 = 8 Ind Cas 622 = 11 Cr L J 690; *Nga Phakin* v *Emperor*, 36 Ind Cas 480 = 17 Cr L J 512 This section is absolute *Kodamji* v *Emperor*, A I R 1932 Mad 24 A confession contained in a statement made by an accused person to a stranger in the presence of a Police Officer while he was in the custody of a jailor does not fall within the purview of s 25 or s 26 of the Evidence Act and is admissible in evidence *Nadu* v *Crown*, 5 P R 1914 Cr = 214 P L R 1914 = 15 Cr L J 480 = 21 Ind Cas 363 A confession made by an accused to a private person in the presence of the Police is inadmissible in evidence against him *Chanan* v *Emperor*, 20 Ind Cas 468 = 37 P W R 1913 Cr = 320 P. L R 1913 = 14 Cr L J. 596 Section 25 of the Evidence Act ... that a confession to a Police officer shall not b...
not say that such a confe...
a confession may be used...
subsequent judicial confessio...
Ind Cas 693 = 6 L. L J 54...
"a person" in this section me...
only to the proof of a confess... so it should be ...

confession as a whole is excluded, whether by reason of the section ... much of the information given by the person ... he was an accused and in custody, as ... discovered becomes admissible *Amiruddin* v *Emperor*, 41 Ind Cas 321 = 22 C W N 213 = 27 C L J 118 = 19 Cr L J ...; but see also *In the Matter of Hiran Miya*, 1 C L R 21; *Emperor* v *Hira*, 21 Bom L R 724 A confession made to a Police officer is inadmissible even if the ...

was convicted on the evidence of tw
offered them Rs 10 per ball of
large quantity of illicit opium from
had been also enrolled as Police

A confession, therefore, made to
accused of any offence is ina

only to
section 25
the use,
to Police
statement
L T. 1=
examined
this section *Empress* v *Jadabdas* 4 C W N 129 In that case the Court

Confession—Definition of *A confession is an admission made at any*
e, stating or suggesting the inference,
statements which amount to a direct
y statements which
et suggest an in
The factor deter
not the motive of
e of guilt *Mi Em*
11 Cr L J 153,
338 Confession
an accused person,
which it is proposed to prove against him to establish an offence *Queen*

Police officer, meaning of "In construing the 25th section of the Evidence Act of 1872, I consider that the term 'police officer' should be read not in any strict technical sense, but according to its more comprehensive and popular, meaning" *Per Garth C J* in *Queen* v *Hurribole*, 1 C 207 (215) A Deputy

S. 25. Commissioner of Police in Calcutta is a Police officer *Ibid* Primarily the term "Police officer" in this section means the same as it does in the Police Act but it can be extended beyond the definition in section 1 of the Police Act to cover only those persons who like Police officers coming within that definition, are o
any member of the commu
... for doing so That

Police officer whoever that officer may be
British territory or a Police officer in foreign ...
v. *Nagla*, 22 B 235, *Mabli* v *Emperor*, 87 Ind Cas. 520=26 Bom L R 706=26 C L J 984; see *Salam* v *Emperor*, 43 Ind Cas. 111; *Nadir* v *Crown* 15 Ind Cas 800 A village headman in Burma who is authorized to arrest without warrant is not a Police officer so as to make a confession made to him inadmissible *Nga Myain* v *Emperor*, 3 Bur L J 11=81 Ind Cas 540=25 Cr L J 924 The widest and most comprehensive extension of the term "Police officer" cannot make it include a Kotwar in the *Central Province* *Sukhuaria* v. *Emperor*, 25 Cr L J 147=76 Ind Cas 291=A I R 1924 Nag 29, see also *Bhaguatdin* v *Emperor*, 59 Ind Cas 88=21 Cr L J. 568 A member of a frontier constabulary is, for the purposes of sections 25 and 26 of the Evidence Act, a Police officer, and admission made to him, and not in the presence of a Magistrate by an accused person cannot be proved against the maker *Khwaja Hassan* v *Emperor*, 71 Ind Cas 360=24 Cr L J 136 In the Punjab a village Chaukidar is not a Police officer within the meaning of section 25 of the Evidence Act *Khuda Baksh* v *Emperor*, 43 Ind Cas 84=19 Cr L J 52=42 P. R. 1917 Cr See also *Dal* v *Emperor*, 17 Cr L J 62=26 Ind Cas 654. A *chaukidar*, although he is not a Police officer under Act V of 1861, is one under Reg XX of 1817 and Act I of 1872, and a confession made to him is inadmissible *Empress* v *Indra Chundra*, 2 C W N 637, *Nazu* v *R*, 9 C W N 47

Police
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21), a police Sub Inspector (*Addu Si*
19 W R Cr 51), a darogа (*R* v
police (*R.* v *Luchoo*, 5 N W P 86)
10 B. L R.
v *Babu Lal*, 6 ... and
confession mac
There is so ... other
High Courts ... In
excise peon having the power to detain, search, seize and arrest any person whom he believes to be guilty of any offence under the Opium Act or Bombay Abkari Act has powers which are very similar to those exercised by a Police officer
r the provisions of
L R 19, Nanjo
1196=51 B 75=93
n L R 674=97
But the Calcutta
is admissible in
section 25 of the
n Sao v Emperor,
J 579=A I R.
C W N 834=45
... 151, *Tura Sardar*

v *Emperor,* 52 C L J. 177; *Moti Lal* v *Emperor,* 36 C W N 163; *contra Ibrahim* v *Emperor,* 35 C W N 601; 9 Mys L J 71 following 51 B 18; *Maung san Myin* v *Emperor,* 7 R 771=121 Ind Cas 715=31 Cr L J 303=A. I R 1930 Rang 19 An excise officer is not a Police officer within the meaning of section 25 of the Evidence Act *Emperor* v *Budhu,* 99 Ind Cas 594=A I R 1927 Sind 112, *Fillibai* v *Emperor,* 83 Ind Cas 151=25 Cr L J 1223; *Meclu* v *Emperor,* 88 Ind Cas 32=26 Cr L J 1088=A I R 1925 Nag 340; *Emperor* v *Wazir Singh,* 11 Ind Cas 588=3 P R 1918 Cr =19 Cr L J 364; *Muhammad* v *Emperor,* 30 Ind Cas 977=21 C W N 694=18 Cr L J

3 Cr L J 165=15 Ind Cas 305=5 Bur L.
ot a Police officer and confession made to him
under s 25 of the Evidence Act *Queen Empress* v *Sama Papi,* 7 M 287=2 Weir 235 A confession made to *Yuathugyi* should not be admitted in evidence He is the head of the rural police and has police duties to perform He is, to all intents and purposes, a Police officer though he may not be so designated *Maung Wun* v *Queen Empress,* L B R. (1833—1900) 22

Confession made to a police officer whether admissible A confession made to a Police officer cannot be used in evidence *E* v *Thakur* A W N 1883, 138, *E* v *Pancham,* A W N 1882, 21 1 A 198 Confessions recorded

A Cr 153=106 Ind Cas 112=26 A L J 92 A confession made to another person in the presence of a Police officer, who has asked or instructed that other person to take the confession in such a way as to be his agent, where the confession takes place under such circumstances that the Police officer is in such proximity as to make his presence likely to affect the mind of the confessing person is in substance a confession to a Police officer *Emperor* v *Mt Har Piari,* 97 Ind Cas 44=44 A L J 958=A I R 1926 All 737, see also *Channan* v *Crown* 21 Ind Cas 168 Rule 195 of the Madras Councils Rules of Practice is not a rule of law but merely a rule for the guidance of village Magistrates and
ter the police investiga-
the Magistrate know
Emperor, A I R 1927

Mad 974
Where a house was searched and the
recovery list, *held* that the fact of the accus
recovery list is not admissible in evidence

8 Lah 326=28 P L R 119=100 Ind Cas 707=28 Cr L J 323 If after

out the route taken by them in going to commit the offence of dacoity and the

25. 178—23 Cr L J 197 A first information of murder was lodged at the Police station by the accused himself on the morning following the murder and it after stating the narrative of events prior to the night of occurrence he confessed that he had committed the offence
sions of section 25 of the Evidence
in its entirety, yet, in so far as it spo
it was admissible in evidence if and
62 Ind Cas 578=25 C W N 788=
Police by an accused person is admissible to prove the ownership of property in respect of which he is accused *Ganpat* v *Bani*, 35 Ind Cas 62=21 Cr L J 414. Statement made by the accused in a presence of a Police officer is admissil
R 724
fession
v *Emperor*, 48 Ind Cas 883=36 P R 1918 Cr
made by a complainant in his first report at the Police station is not admissible as proof of the facts therein mentioned and cannot be used as evidence against the accused in his trial *Dal* v *Emperor*, 16 Cr L J 62=26 Ind Cas 604. Accused went to a Police station and made the report I have killed my wife and her corpse is lying in my house," in consequence of which the Police proceeding to his house, discovered the corpse of his wife in an inner room of the house *Held*, that the provisions of ss 25 and 26 of the Evidence Act apply to the circumstances of the case *Surendra Nath* v *Emperor* 16 A L J 478—47 Ind Cas ... in an investigation made ... must be taken to be a statement ... ns were put by the Police officer himself or by somebody else in his presence But incriminating statements made by accused persons while in Police custody, in answer to questions put by a ... excluded from evidence unde... ror, 18 Cr L J 106=37 Ind ... the time of making an incri... undefended a withdrawal of the plea can be allowed if the accused wishes to withdraw it *Emperor* v *Shuldan*, 28 Ind Cas 145—44 P W R 1914 Cr

The only evidence against the first accused was that in consequence of information given by him ... of property was produced
theft before the police
conviction of the first acc
not lead directly to the recovery of the property *In re Ippari ham* 3 M L T 333=7 Cr L J 398 Where a confession was made before an inves-

under s 25 of the Evidence Act *Lee Bein* v *Queen Empress*, L B ... of 1892) 479
confession
Act, 1889
committed a
to a Police
was in a pla
was a conf
Evidence of

to a Police officer and
Act *Queen Empress* v *Ja*
made by an accomplice,
tender of a pardon by an Assistant Commissioner acting in his

337, Cr Pro Code was held to be **S.**
Empress, 10 P R 1895 Cr Section 25
. confession made to a Police officer
shall not be proved as against an accused person It does preclude an accused person from proving, on his own behalf, a confession made to a Police officer by another accused person tried jointly with him *Ibrahim* v *Emperor*, 12 Cr L J 79 = 9 Ind Cas 449 Confession to a Police officer of having given false information cannot be it and charged under s 182 and s 211 of *Nga Thet*, U B R (1897 1901) Vol I, 156 or rioting During , and, dmis / the information was not a confession under s 25 of the Evidence Act, and as against the person other than the informant, it amounted to an admission of evidence against them *Ha ir* v *King Emperor*, 11 C L J 301 = 5 Ind Cas 305 = 14 C W N 593

Where a Police officer read over to the accused the statement which he (Police officer) had taken from others and then told him 'I know the whole thing now,' and the accused, thereupon made a statement in consequence of which he was arrested and his confession was duly recorded *held* that the confession nd voluntary and was perfectly *Hanmat* 3 Bom L R 401 accused person it is illegal a or a confession which is open to grave suspicion of having been produced by ill treatment of the police *Khair Din* v *Crown*, 21 P W R 1907 Cr = 6 Cr L J 266

ting statement made to a Police officer by an accused person in custody *Queen Empress*, v *Mathews*, 10 C 1022

admis

The evidence for the prosecution consisted of certain confessions made to the Police found some stolen cloth for the Police he confession was inadmissible under s 25 mentioned did not justify his conviction under the section *Empress* v *Nanhe Beg*, A W N 1883, 126

Admissions not amounting to confessions whether admissible when made to a Police officer Every statement is not a confession *Tho* v *Emperor*, 19 S L R 6 = A I R 1925 Sind 257 An incriminating statement to a police officer, though on the face of itself exculpatory is inadmissible *Emperor* v *Inan lra*, 5 Cr R 15 = 49 B 612 89 Ind Cas 1046 The question whether a particular statement whether it be positive or negative, verbal or expressed by conduct, is or is not a confession, must be decided on the facts of each case *Umer Durang* v *Emperor* 86 Ind Cas 410 = 26 Cr L J 778 = A I R 1925 Sind 237 After a fight in which death was caused, several accused drove certain cattle belonging to the deceased to the pound Two of them made a statement to a Sub Inspector of Police that they were in the

S. 26 fight and that the deceased had attempted to interfere with the seizure of the cattle *Held* that the statement did not amount to a confession in a m h as it was only an explanatory statement of the circumstances under which the cattle had been seized and was not an admission of guilt but rather the nature of a complaint against the deceased and was not therefore inadmissible in evidence *Jodal v Emperor* 81 Ind Cas 347 = 25 Cr L J 811 A I R 1923 Lah 232 A statement by one accused to the police that certain property which he produced had been given to him by two other accused who were charged with hu
as being an admission
Act *Emperor* v *Sher*
A statement made by
confession may nevertheless be used against him and more particularly if it
statement t
it amounts t
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making the
23 Cr L J
confined to
from which

Ram Gang v *Emperor* ...
nce Act does not say that ...
it excludes only confession ...

to them, there bei
which are statem
statements which
is charged Furtl
leading to discovery whether such statements amount to confession v
Emperor v *Kanoal Mali* 6 Ind Cas 161 = 15 Cr L J 713 = 41 C 601, *E* ...
v *Buddhu* 3 N I R
person to a Police
admissible in evidenc
14 Cr L J 252 A
amount directly or indirectly to an admission of any incriminating circu...
is admissible in evidence, hence where the accused was found carrying a ...
box at night and when asked by a policeman on duty about the ownership of
the box stated that it belonged to him the statement was held admissible a ...
him
fes ...
by a
offence For such a purpose confession
other purposes would be admissible unless
(s 21), in his character of one setting up an interest in property in
in litigation, or judicial enquiry and disposal *Queen Empress* v ...
9 B 131

26 No confession made by any person whilst he is in the custody of a police-officer, unless it be made in the immediate presence of a Magistrate, shall be proved as against such person

Confession by accused while in custody of police not to be proved against him

* *Explanation* —In this section "Magistrate" does not include the head of a village discharging magisterial functions in the Presidency of Fort St. George or in Burma or elsewhere unless such headman is a Magistrate exercising the powers of a Magistrate under the Code of Criminal Procedure, 1882 †

*This *Explanation* was added to s 26 by the Indian Evidence Act (I) Amendment Act (III of 1891) s 3

† *See* now the Code of Criminal Procedure, 1898 (Act 5 of 1898).

ınsed on section 149 of the Criminal S.

III of 1891, s 3 The rules cor
in British India ... er as rules
governing the ... Procedure.
Queen v. *Babu* ... , 35 M 397

persons through any undue n
Per Garth C J in Queen
the rule seems to be that the
of coercion for extorting conf

s section deals with confessions made in the
the custody of an accused person that is,

presence of a Magistrate, in which case the confessing person has an opportunity of making a statement uncontrolled by any fear of the police *Per Ainslie J* in *In the matter of Hiran Miya,* 1 C L R. 21 *Section 26 is not to be read* as qualifying the plain meaning of s 25 *Queen* v *Hurribole,* 1 C 207, *Queen* v *Duman,* 12 W R Cr 82 Section 26, cannot be treated as an exception or proviso to s 25, there being no words to justify such an interpretation The criterion adopted in s 26 for excluding confession is the answer to ... confession made ?
If the ans ... the custody of a
police offic ... be excluded from
evidence, unless it
v *Babu Lal,* 6 A
an accused person
v. *Mathews,* 10 C
makes no distinct
substantive rule
L J 290 This section does not make admission dependent upon knowledge of

M L T 1=13 Cr L J 352=35 M 397=14 Ind Cas 896 But it may be admissible in favour of a co accused *R* v *Pitamber* 2 B 611 *The general* rules applicable to confessions made by prisoners whilst in the custody of a police officer is contained in section 26 and the proviso contained in section 27
Coomer Sahib 12 M 153,

T to a Police Superintendent on the day ne...
M was arrested but neither of the other two accused was suspected of having

S. 26.

Magistrate under s 164 of the
evidence. *Nathu* v *Emperor*, A
incriminating statement made in
person while in police custody who is not produced before the Magistrate with a view to record his confession can be proved by oral testimony of the Magistrate when it has not been reduced to writing In the absence of any provision of law making it obligatory on the part of the Magistrate to record a confession it is not a matter required by law to be reduced to the form of a document *Jograj* v *Emperor, supra*

Police custody -m
Magistrate for recording
he had been, remained
should be treated as st
Lakshmya, Rat. Un Cr
her husband was taken into the custody of the police, a friend of hers accompanying her, and the policeman in charge of the woman left her with her friend for the purpose of procuring fresh horse, any confession made to the
policeman was away, would not be adm
be regarded to have been in the custody
emporary absence of the policeman

while in police custody, was inadmissible under s 26 *Queen Empress* v ... *Singh*, 12 P R 1900 Cr = P L R 1900, 56 Cr As soon as an accused or suspected person comes into the hands of a Police officer, he is, in the absence of clear and unmistakeable evidence to the contrary, no longer at liberty and is therefore in custody within the meaning of ss 26 and 27 of the Evidence Act *Maung Lay* v *Emperor*, 25 Cr L J 381 = 77 Ind Cas 429 = A I R 1924 Rang 173 The meaning of the words ' in the custody of a Police officer" in this section, cannot be extended by implication to cases beyond what is absolutely necessary, that is, where the person is really under arrest or in strict supervision and is merely allowed to go for a few moments to converse with the person to whom the confession is made But where the accused is not arrested or under supervi
would
be m
Mahon,

as against the accused
When an accused
confession, it is
under section 164
accused has been in custody If there is no record of that fact, it is

S.

Confessions made in police
made to a Police officer, but not ii
Queen-Empress v *Ali Baksh,* S
26 M L J 352=15 Cr L J

which was made by the accused when not in Police custody is admissible in evidence *Harbans* v *King-Emperor*, 8 O C 365=2 Cr L J 811, see also *Raj Kumar* v
by an acc
his house,
back to pc

C L J 524=92 Ind
he was sent by the
which involved an
examination of the patient in private Two police men took the accused from the lock up to the dispensary At the dispensary the police men waited outside on the verandah while the accused was inside undergoing examination at the hands of the doctor, and during the few minutes that he was with the latter he made a confession *Held*, that the confession was inadmissible in evidence under section 26 of the Evidence Act, in as much as the accused remained in the

would be found in a heap of rubbish close to his house and after making the statement he took out the property from the heap in the presence of two police

27. constables *Held* that
admissible in evidence,
in the heap of rubbish
845=24 M L. J 352=15 Cr. L J 533

Where an accused person promised, while in police custody *to re tore the* stolen property, *held*, that the promise was an incriminating statement suggesting the inference that the a
'therefore' a confession
v *King-Emperor*, 20 P

A statement made
if it is an admission of
Queen Empress v *Jaicchar am*, 19 B 363; *Queen Empress* v *Nana*, 14 B 260 F B

Confession made in the presence of a Magistrate A confe sion to a Magistrate while in Police custody is not inadmissible *Nazir Singh* v *Emperor* 9 Ind Cas. 806=27 Cr L J 134=A I R 1925 Lah. 557, *Queen* v *Man iohan* 24 W R Cr 33, *Queen* v *Shahabat*, 13 W R Cr 42; *Queen* v *Nilma lhab*, 15 C 595 A confession made by an accused person before the Administrator in Portuguese territory, who is not a Magist 26 of the Indian Evidence Act It is immaterial that the
confession was made was not himself
the case *Emperor* v *Mhalil Rana*, 26 Bom L R 706=1924 Bom 480

Police officer, meaning of The word Police officer in this section
"police-officer" in Native St
C 855=Cr Reg 22 of 1896,
22 B 235, *Q E* v *Sunder Si*
257 It is doubtful whether
Nazu v *Emperor*, 9 C W N 174=2 Cr L J 255 The words "police officers" in this section are used in the same sense in which they occur in section 25, and

L J 981 A Deputy Commi
Queen v *Hornbole*, 1 C 215 A
is not a police-officer *Queen*
Anand Rao, 49 B 492=89 Ind C
Badan Singh v *King Emperor*, 2 P R 1909=7 P. W. R 1909; *Empe* *Anand Rao*, 49 B 642 A police officer in a French Territory is a police officer *R* v *R.* v *Viraraghava*, 11 M L T 407 A police patel is a police officer *R* v *Rama Biraj pa*, 3 B 12

Magistrate The word 'Magi
Native States *Queen Empress* v
Kala, 22 B 235, *Queen Empress* v
Ind Cas 257, *R* v *Bhima*, 17 B
in the district in which he has been

Crown 8 P. W. R 1914
, see also *R* v. *Vahali Jein* 7
n of the French Government is a
liate presence are admissible in
ted to the Magistrate exercising
Panch i Nath Pillai v *Emp*
Administrator is not a Magistrate
Emperor v *Mhabli*, 87 Ind Cas 20=26 Bom L R 706

Explanation Previous to the enactment of this explanation by Act III of 1891, it was held that a village Munsiff falls within the purview of this section and as such he was a magistrate *Empress* v *Ramanjiyya*, 2 M 5, see also *R* v *Ranji* 10 M 295

27. Provided that, when any fact is deposed to as discovered in consequence of information received from a person accused of any offence, in the custody of a police-officer, so much of such

How much of information received from accused may be proved.

information, whether it amounts to a confession or not, as relates S
distinctly to the fact thereby discovered, may be proved

Principle
any circumstance
to be influenced b
T

been induced to say
ch of the confession as
35 notes (a) to R v
197 This section was
intended not to let in confession generally, but only such particular part of it as set the person to whom it was made in motion, and led to his ascertaining the
Per Straight C J in Queen Empress v
Certain statements, made under certain
, because the Legislature has, in such cases, considered them unworthy of credit, but the taint is removed by the finding upon search, of articles connected with the crime or other facts *5 Mad L Jour Article at p 80* "The prisoner's statement as to his knowledge of the

the admission of the exception to the general rule The fact discovered shows that so much of the confession as immediately relates to it is true" *Queen Empress* v *Babu Lal* 6 A 509 (513, 517)

supports other testimonial exclusions) and the tests worked out are often more or less artificial, but the principle underlies the whole body of rules If now a circumstance appears which indicates that the law's fear of untrustworthiness is unfounded and counteracts the significance of the improper inducement by demonstrating that after all it exercised no sinister influence, the confession should be accepted This is the theory of confirmation by subsequent facts,
about excluding
nfess on otherwise
firm it in material
points, the possible influence which through caution had been attributed to the improper inducement is seen to have been *nil*, and the confession may be accepted without hesitation" *Wigmore* § 856

"But it should seem, that so much of the confession as relates strictly to the

L C J. states the reason for such admission thus "Because it leads to the

Origin of the rule The section 150 of Act XXV of 1861 (The Criminal Procedure Code) ran as follows. "When any fact is deposed to by a police

27. officer is discovered *by him* in consequence of information received from a person accused of any offence, so much of such information, whether it amounts to a confession or admission of guilt or not as relates distinctly to the fact discovered by it, may be received in evidence" That section was thus altered by Act VIII of 1869 'Provided that when any fact is deposed to in *evidence* as discovered in consequence of information received from a person accused of any offence or in the custody of a police officer, so much of such information, whether it amounts to a confession or *admission of guilt* or not, as relates distinctly to the fact thereby discovered may be *received in evidence*" Section 150 of Act XXV of 1861 was re-embodied in section 27 of the Indian Evidence Act *Queen Empress* v *Babu Lal*, 6 A 509

Scope of the section In *Mahmood J* held that s 27 can down in s 25, but only that c Cr 13, 9 W R Cr 16, 11 C ! 6 A 509 (F B) the question *Empress* v *Kuarpal*, A W N *J* said, at pp 520 521 'The question raised by this reference is one of interpretation of the Statute, and it may be briefly stated to be, *whether the* proviso contained in section 27 of the Evidence Act governs only the last preceding section, or also s 25 In order to arrive at a satisfactory conclusion upon this point, it seems to me advisable to trace the history of the rules contained in ss 25 26 and 27 of the Evidence Act, so as to ascertain how *these* provisions find a place in th Code of Evidence for India I have stated these facts as introductory of the observations which I am about to make that the rules contained in ss 25, 26 and 27 of the Evidence Act were not originally treated in British India as, strictly speaking rules of evidence but rather as governing the action of police officers and as matters of criminal procedure ' Then stating that s 150 of Act XXV of 1861 was repealed and re-enacted by Act VIII of 1869 he went on 'What was the exact change of language introduced by the new section? Why was it introduced? What was its effect? These are questions which must be considered

rendering the language of s 150 a mere ... immediately preceding section 149 which is expressly limited to confessions made by a person 'whilst he is in the custody of a police officer' they (sections 25, 26 and 27) are identical in the rules which they lay down, though the language has been improved by some verbal alterations which require no special mention except the omission of the word or from the clause 'a person accused of any offence *or* in the custody of a police officer' In the place of the omitted word, 'or' a comma has been substituted, officer' a parenthetical clause for confession would fall under the se remarkable and, if it has any ef proviso" But the majority of not only to section 26, but also to information given by the accus confession or not as related distinctly to the fact thereby discovered might be proved *Queen Empress* v *Babu Lal* 6 A 509 (F B), see also *Queen* v *Lagura* 19 W R 51, *Reg* v *Jora Hasji*, 11 B H C R 242, *Empress* v *Rama Lappa*, 3 B 12, *Empress* v *Panchanan*, 4 A 198 *Ihu* v *Queen*, 11 C 635 *Queen* v *Kamalia* 10 B 595, *Queen* v *Nana*, 14 B 260, *Surendra* v *Emperor*, 16 I L J 178, *Imaruddin* v *K E* 24, 22 C W N 213, *Superintendent* v *Bhajoo* C W N 106. That the view taken by *Mahmood J* in *Queen Empress* v *Babu Lal, supra* is the correct view was reiterated by *Lort Williams J* in *Superintendent* v *Bhajoo Singh, supra* at p 111 It has also been pointed out by

C. J. in a very recent case, that an anomalous position has been created by follow- **S. 2**

express mention of it is made therein, see also *Empress* v *Pancham*, 4 A 198 "The reasons given for and against the view that section 27 controls section 25 also apply with equal force to the question whether that section likewise controls

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or not, as relates distinctly to the fact thereby discovered may be proved *Per Oldfield J* in *Queen Empress* v *Babu Lal*, 6 A 509 (F B) at p 513, 514 This

police officer or by other

wn in these two sections

n of it in accordance with

nly to the extent of so

stinctly relates to the fact

Per Straight C J in

Queen Empress v *Babu Lal* 6 A 509 (F B) at p 544 But *Mahmood J* said in the same case at p 541 'I hold that the rule laid down by the Legislature in s 24 (read with s 28) of the Evidence Act, is a rule absolutely independent of the question of discovery or non discovery to which s. 27 relates, that the state of things in India has induced the Legislature to frame in section 25, an equally absolute rule in regard to confessions made to police officers which are presumed to have been made under conditions prohibited by s 24 that the

s prohibited the admission

s by the accused whilst in

rules but only the last rule

so enunciated, is made subject to the saving clause contained in section 26 rendering confession admissible, if they are not made to the police officer but to a third person, 'in the immediate presence of a Magistrate' which affords a guarantee that the confession was not extorted, that the proviso contained in section 27 is not intended to qualify the absolute rules contained in ss 24 and

26, which relates

rsons whilst the

In short, I hold

the same as the

rule laid down by *Lord Eldon* in *Harvey's Case* 2 East P C 658 and that

improperly

question of

S. 27. in so far as they do lead to such discovery are properly admissible. Wh be the nature of the fact discovered that fact must, in all cases be itself r l to the case and the connection between it and the statement made mu t been such that that statement constituted the information through which the covery was made in order to render the statement admissible. Other state connected with the one thus made evidence and thus immediately, bu necessarily or directly, connected with the fact discovered, are not a lm s That a witness says that a plan was prepared in his presence is not suff reason for admitting the plan in evidence unless the witness also says th his own knowledge the plan is correct *Rex v Jora Hasji*, 11 B H C 242. In a very recent Calcutta case *Mr Justice C C Ghose* said It is clear beyond all dispute that section 27 is one of those sections which con the three earlier sections namely, sections 24 25 ... 26 In the l... t cent police officers or whe confes ions are in d ... ave just mention d may in certain circumstances lead to the discovery of the facts, etc in co quence of the information received from the person in custody Therefore first thing that has got to be ascertain d before section 27 of the Evid ... ther or not the information, such as t other facts came from a person in cu ... tion has not come from a person in 27 would hit the admissibility of statement in evidence and under no circumstances that I can think of ... regard to the provisions of the law, is such a statement admissible in evider *Durlou v Emperor* 36 C W N 373(375)

No part ... a confession not written b... to ly is adm either against ... unless it has to the discov... ... Act, *Cro Shul ll am* 14 P W R 1914 Cr (F B), *Dwarka v Emperor*, A I R 1 Oudh 119–14 O L J 210

Section 27 of th... deal with what may ... fession ... *Iman Ali* ... J 631 Sections 24 ... the proviso made f... *Po* 2 I B R 168 *I*... *Nga Sanya v King* ... 41–4 Ind Cas 779, *Empress v Anarpala*, A W N 1882, 225, *co lit...* v *Emperor supra*

in pc... of the ... P R 1900 Cr Wher ... 00 Cr ... wh ... to the facts discovered ... was given while th... police custody *Ganga v Empress* 30 P R 185 Cr

Bald evidence introduced through the mouth of a prosecution w... to prove the confession of an accused under cover of section 27 ought to very little credence by the Court more especially when the accu d charged with grave offence as an attempt to murder and particul... more direct evidence to prove the same points are available to the ... and which they do not take car...

in the case but indeed receives corroboration in respect of many points, then the confession should be held to be true as implicating the person making it unless he can make up a story to the contrary It is not necessary that the confession of an accused should receive direct corroboration as to the fact that the accused was concerned in the offence It is sufficient that there is such corroboration of the confession as to indicate that the accused had such knowledge of the circumstances of the offence as would suggest his taking S. 2

1=68 Ind Cas 17=9 O L. J.

whether by reason of s 26 or 25

information is set the pol
Aminuddin v *Emperor,* 15 C
Cas 321 Section 27 of
also s 24 all three of which

Crown 11 P R 1915 Cr.
This section has got nothing ... fact
discovered is or is not relevant ... I R
1929 Lah 344 (F B) Recoveries alc ... *Sham*

of the accused to

admissible in evidence, the fact
force, independently of the confession, would be admissible in evidence *In re Choda Achanna,* 2 Weir 735=3 M H. C 318

peror, 36
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S. 27.

as a result of it. That is the present case. *It cannot be admitted in evi because the man was not in custody, which of course is thoroughly absurd.* T

There seems to me to be nothing in section 24 or section 25 to prevent evid being given 'In consequence of something said by the accused I went to and such a place and there found the body of the deceased'. In cases un section 27 the witness may go further and give the relevant part of confession."

Any fact. The fact discovered by a statement must be a material th and not a mental state induced in another person by that statement. *Emp*

to show how the fact that was discovered is connected with the accused so in itself to be relevant evidence against him." *Per Straight C J* in *Q Empress v Babu Lal*, ... *dar v Queen-Empr.* 11 C 635. The tes... information received fro an accused person in ... 'Was the fact discove by reason of the information, and how much of the information was the imm diate cause of the fact discovered, and as such a relevant fact?' *5 Mad L Jou* p 80 (*Article*)

Deposed to. It is necessary, in order to bring a case of discovery with section 27, that the fact discovered should be deposed to by the person to whom the statement was made. *5 Mad Law Jour* p 80 (Article).

Discovered.
meanings, firstly, tl
known before to
something, the exist
It is in the latter, and not in the former, sense that the word is employed in s. of the Evidence Act, and this will be made evident upon considering the principle underlying the section. *5 Mad L J p 80, 81.* From this definition of 'discovery' it follows that simple statements, or statements made while pointing out the scene where the crime was committed or while producing articles, and showing the connection of the place or thing with the offence, are not rendered admissible under section 27, but only statements preceding the finding, upon search or inquiry of articles or other facts connected with, or referable to the crime. *Ibid* see also *R v Jora Hasu* 11 B H C R 242, *R v*

re already known to persons other than ... *Latif*, 49 C 167=25 C W. N. 788. The word discovered is very important. The test is that the fact discovered must be discovered in the sense, that the proof of the existence of the fact no longer rests on the credibility of the accused's statement but rests on the credibility of the witnesses who depose to the existence of the fact. The rest of the

information is not admissible But if the accused wishes to challenge the veracity of the statement that it was on his information that the thing was discovered he

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words deposed to is concerned, they are still governed by the provisions of s 27 which must be construed as favourable to the accused as possible for it is a section which makes an exception against the accused contrary to the general sections, namely 25 and 26 which are in his favour *Karam Din* v. *Emperor,* A I R 1929 Lah 338

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344 (F B)
1929 Lah 338
the word 'information' cannot be used as synonymous with the word 'statement' There is no reason why the word 'information' should have been used instead of the word 'statement in the section if by information' statement alone was *intended The word information' as distinct from the word 'statement' con*notes two things namely a statement or other means employed for imparting

that information' also includes knowledge derived by the person informed from the informant'

Statements made while p
sion of murder made to a
soner's saying "that is the pla
11 B H C R 242, *Empress* v *Rama Birapa* 3 B 12

If the prisoner himself
nected with the crime and
the act of production
or delivery its
panying statem
discovery in suc
3 B 12 (17)
recorded confes
his pointing o
nected with the

Queen Empress, 11 C 635

27. In consequence of information. "Whatever be the nature of the fact discovered, that fact must in all cases, be itself relevant to the case, and the connection between it and the statement made must have been such that the statement constituted the information through which the discovery was made, in order to render the statement admissible" *Per* v. *Jora Hasji*, 11 B H. R 242 It

rged under section 411 c
property. In the cour
the police where the pro

buried the property in the fields.
property was concealed, and with I
in which the property was kept
out the spot to the effect that he had buried the property there It was contended that those statements were n
was in custody of the police
ment said "As regards s 27,
the property, it is said, was not discovered in consequence of the information given by the accused to the police, but by the act of the accused himself on the

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and was the natural consequence of the information they had received from as a
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consideration
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Courts in dealing with proximate and remote cause of damage, namely, whether what followed was the natural and reasonable result of the defendant's act It being of great importance that the law should, in a matter of such common occurrence, be distinctly settled, I am glad that my doubts have been removed, and this Court is not divided in opinion But to avoid our judgment being applied to circumstances beyond its meaning and beyond the policy of the law to statements that cannot be regarded as proximate causes, I would refer to *Lord Blackburn's* decision, where he discusses *Lord Bacon's* Maxim "It were
ulty of drawing
Q B at p 267,
ondon and South
t case I am of
his earlier sta
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Section 27 was not
cular parts of
ascertaining the
v. *Babu Lal*, 6 A
R 51, where it was held that
ct of the party, even there it was
he information But in *Empress*
a contrary view In *Empress* v
laid down a distinction between
a discovery by the act of the party, and one from his information See also *Queen Empress* v *Babu Lal*, 6 A 509, *Queen Empress* v *Kamalia*, 10 B 595

The view as expressed in *R.* v *Nana*, 14 B 260, has also been adopted by the Calcutta High Court *Legal Remembrancer* v. *Chema Nashya*, 25 C 413, *R* v *Pagree Saha*, 19 W. R Cr 57.

The fact deposed to as discovered in consequence of information received or confession made to the police by an accused person must be a fact relevant to the case in which the evidence is sought to be given if it is sought to be admitted in evidence under section 27 *Gokul Chamar* v *Emperor*, 105 Ind Cas 683=28 Cr L J 791=6 Pat 611 If arms are recovered in consequence of information supplied by the accused, the statement made by them are, admissible under section 27 of the Indian Evidence Act. *Ali Ahmed* v *Emperor*, 1923 Lah 134

From a person When a fact is discovered in consequence of information
sons charged with an offence, and when others
ould not be treated as discovered from the
ould be deposed that a particular fact has been

information as relates distinctly
v *Ram Churn*, 24 W R Cr 36 I
J observed "I
where two person
or 'they said that,'
that both the persons should speak at once, and it is the right of each of them to have the witness required to depose
individually used And I may
constable as having been made by
covered a certain fact or certain
on the witness so that there may be
In dealing with statements of this
to the discovery it is of the essen
should be precisely and separately state
this point, and the witness refused
paid no attention to it" See also *Rama Singh* v *Crown* 50 P R 1915=7 Cr L J 12 Where all the accused persons jointly pointed out the place where blood stains were found and subsequently the place where the dead body of a person was discovered buried such evidence is not admissible at all against any of the accused unless it can be shown who made the discovery first *Faquira* v *Emperor* A I R 1929 Lah 665 *Adam Khan* v *Emperor*, 101 Ind Cas 483=28 P L R 187=28 Cr L J 456, *Ditto* v *Emperor* A I R 1931 Sind 151, *Emperor* v *Shivaputiya* A I R 1930 Bom 244=32 Bom L R 574

In my opinion section 27 of the Evidence Act ought to be strictly construed

were in the custody of the police it is quite clear that the statements of the persons other than the first person who made the statement can not be used in evidence The statement made by the first individual under section 27 and in the circumstances described therein may be treated as evidence against him but it is not allowable under the provisions of the law to treat the evidence of the other persons who may have made statements of the description referred to in section 27 as evidence admissible under the provisions of that section This

persons who m

s. 27.

based on the ... police that they are untrustworthy ... rebuts that pre-supp... subsequent discovery ... is a guarantee of a ... If therefore two ... nt of both have ... subsequent to the discovery are irrelevant. *Crown* v. *Sulleman*, 10 S L R 7 = 17 Cr L J 36 = 36 Ind Cas 171.

Where a material fact, for instance, the manner in which a theft was committed, has already been discovered by some other means, an accused's subsequent statement relating to the same fact, while in police custody, is not admissible against him under s 27 of Act I of 1872. *Mannu* v *Emperor*, 9 Ind Cas 232 = 12 Cr L J 35 = 3 P W R 1911

Where the Police succeeded in discovering property in consequence of information received from an accused, it is not competent to the Police to replace the property in the place where it was discovered, and to ask the other accused to produce the property, because there is no further discovery under s. 27 Evidence Act as against the other accused *Queen Empress* v *Bishji*, 2 Bom L R 1089.

Accused in Police custody. The words used in section 150 of Act VIII of 1869, (which is re-enacted as section 27 of the Evidence Act, 1872) are "a person accused of any offence, or in the custody of a police officer." The only alteration in section 37 is the omission of the word "or" before "in custody" but this only shows that the operation of the proviso is restricted to information from an accused person in custody of the police, and does not apply to information from accused persons not in custody of the police *Per Oldfield J* in *Queen Empress* v *Babu Lal* 6 A 509 (513) The meaning of the words in the Evidence Act appears ... it is n... in custo... person ... (b) in custody but not accused besides under the circumstances mentioned ...

and is ... limits ... *Emperor* ... tion in ... "(... der the ... circums... when the ... person ... custody but not accused (c) accused but not in custody, notwithstanding any fact of discovery in consequence thereof

"(2) A confession made to a police officer by a person who is at the time (a) neither accused nor in custody (b) in custody but not accused (c) accused but not in custody, is wholly exc... in consequence thereof A con... is not in custody of the police, could not fall under the purview ... the custody of a police officer (*Queen Empress* v. *Babu Lall*, 6 A 509, ... *Mahmood J* and see per *Oldfield J* p. 513 ...

became senseless" On receipt of the information the police went to ...

and found the corpse. *Held* that the statement to the police was not admissible S. 2

tion contained in it unless the person who confesses is a person accused of any

King Emperor v *Nga Aung Ba*,

402=35 Ind Cas 962. For the

does not necessarily mean detention or confinement, but submission to custody by word or action under s 46(1) Cr Pro Code may be taken to amount to custody Where the accused, who was suspected after the first report had been made, made a statement and pointed out the dead body to the police and his name was subsequently mentioned in second report *Held* that the accused was not in any kind of custody at the time he made the statement and that it was consequently not admissible under s 27 *Jalla* v *Emperor*, 131 Ind Cas 93=32 Cr L J 650=A I R. 1931 Lah 278

So much of the information as relates distinctly to facts thereby dis

as to the extent of the informa-

he first view is in favour of

elates distinctly," so as to a limit

ectly and immediately to the

discovery of the fact

Superintendent v

'Relates to' means

distinctly' means

"clearly' or 'definitel r 'undoubtedly'

In *Queen* v *Pagaree Singh*, 19 W R Cr 51, the accused stated to the Sub-Inspecto e deceased) by the neck, and pushed a plantain tree, and broke

that the woman then and there

remove the body took from it a

concealed in the neighbouring jungle '

In consequence of this information, the accused was taken to the jungle pointed out by him, and he then produced from a concealed place, the necklace and

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and might

be proved against the accused So it is clear from this case that the Court in this case followed the first view But *West J* in *Reg* v *Jora Hasji*, 11 B H C R 42, took a

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S. 27. this would
guard prison
For instance
killed *Rama*
went to the
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prisoner has said, 'I placed a sword or knife in such a spot,' when it was found that too, though it involves an admission of a particular act on the prisoner's part, is admissible, because it is the information which has directly led to discovery, and is thus directly and independently of any other statement connected with it. But if, besides this, the prisoner has said what induced him to put the knife or sword where it has been found, that part of his statements it has not *furthered, much less caused*, the discovery, is not admissible." T

submitted that the case of *Queen* v. *Pajaree Saha*, 19 W. R. 51 is not reconcilable with the principle laid down in *Reg.* v. *Jora Hasji*, 11 B. H. C. R. 242, *Empress* v. *Rama Biraja*, 3 B. 12, *Queen Empress* v. *Babu Lal*, I. L. R. 6 A. 509; *Adu Shikdar* v. *Queen Empress*, 11 C. 635; *Queen Empress* v. *Commer Sahib* 12 M. 153, *Queen*
Adu Shikda
to the assault.
subsequent
discovery
refers to his taking the ornaments and concealing it in the jungle." 5 *Ült Law Jour Article* 19

In *R*
of views o
subject of
counsels and at the Bench at the o of very eminent Judges of the High Courts in India. *A. I. R. 1929 Journal* 101

In *Sulhan* v. *Emperor*, A. I. R. 1929 Lah. 344 (F. B.) the question of the admissibility of an incriminating statement made by an accused while he is in the custody of a police officer was considered. The prisoner in that case was tried for the murder of a boy who
his disappearance but the ornaments
recovered from a well. At the tri... Sub-Inspector of ... he said the fact that in consequence of information received from the prisoner he had recovered from one *Illah Din* silver *Laras* (bangles) which were proved to be the *Laras* which the boy was wearing when he was last seen. The witness was then asked to disclose the information communicated to him by the accused which caused the discovery of the fact deposed to by him, and he stated that the prisoner had during the investigation, made the following statement: "I had removed the *Laras*, had pushed the boy into the well and had pledged the *Laras* with *Illah Din*." The trial Ju
Tek Chand and *Aga Haidar* J. J.
referred to the Full Bench, the
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ore solving S. 2
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cludes, not only the physical fact which can be perceived by the senses, but also the *psychological fact or mental condition of which any person is conscious. It is in the former sense that the word is used in section 27* The phrase 'fact discovered' used by the legislation *refers to a material and not a mental fact* The fact discovered may be the stolen property, the instrument of the crime, the corpse of the person murdered or any other material thing, or it may be a material thing in relation to the place or the locality where it is found Taking the present case as an illustration, the fact discovered is, not the *Taras simpliciter,*
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fact. This condition follows from the phrase 'discovered in consequence of information' and also from the expression 'thereby discovered' used by the

The information

h the fact As I have pointed out, the wording of the section shows that the requirements of both the conditions specified above must be satisfied before an incriminating statement can be received in evidence These conditions when combined lead us to the
mation is provable which was the
the fact Anything which is

it does, an exception to the general rule
, must receive a strict construction but also conforms to the principle upon which the exception is founded The real difficulty arises in applying the test to the facts of a particular case To illustrate this
of a confession
be separated
by the accused
of judicial opinion, and it has been laid down in some judgments that the

S. 27. whole of the statement can be given in evidence, and that it is not competent to the Court to split up the language used by the accused in conveying the information, to strike out some words which are objectionable and to admit only those which relate strictly to the discovery. There is considerable force in this argu[illegible] brown round an accused person [illegible] dependent upon the [illegible] unity of [illegible] compo[illegible]ing the sentence which conveys the information. Suppose a prisoner on being asked about the weapon of offence says—"I buried a hatchet in my field. I killed A with it." Now, it is indisputable that the recovery of a hatchet from the field renders only [illegible]

[illegible] be let in as soon as it is amalgamated with the admissible statement. In determining the extent of the statement, which should be provable on the ground of its being the proximate cause of the discovery, the Courts must have regard not to the composition of the sentences in which the statement is concluded but to its substance.

"The information received from an accused person is usually proved by quoting the words used by him, and this is certainly desirable in order to ensure accuracy. But it is not always possible to observe this salutary rule. If the witness, to whom the statement was made, has not reduced it to writing and does not remember the exact words used by the accused, he can depose to it only in his own language. And there is no valid reason why he should not be required to do the same, if the admissible portion is so mixed up with the inadmissible one as to render it necessary to give the former in the words of the deponent." *Regina* v. *Gould*, 9 C. & P. 364; see also *Santa* v. *Emperor*, 19 Ind. Cas. 190; *Tara Singh* v. *Em*[illegible] *Empress*, 28 P. R. 1894 Cr.; *G*[illegible] P. L. R. 1918; *Gula Khan* v. *Emperor*, [illegible]

In a recent *Calcutta case*, [illegible] art is concerned the more [illegible] the section and it appears to be [illegible] to go in as [illegible] correct view of [illegible] think it can [illegible] containing a[illegible] drawn betwee[illegible]

[illegible] *Emperor* v. [illegible] r v. *Mela*, 10 Lah. L. J. 531 = 11 [illegible] A. I. R. 1931 Pat. 115 = 10 Pat. 153 [illegible] the [illegible] that case the accused said to the Police [illegible] was contended that the Sessions Judge wrongly admitted this statement in evidence and that what should have been admitted in evidence amounte[illegible] dead body will be found in the incline" [illegible] The question then what was the [illegible] police. As I said in my opinion, it was undoubtedly couched in the term of [illegible] former statement which is therefore admissible in evidence. To accept the argument of the learned advocate as well as the view expressed in *Superintendent* v. *Bhajoo*

S.

fessional portion thereof given by the prisoner which relates to the fact includes not only the concrete thing discovered by the investigating officer, but also its

its connection with the crime
of the information can be
ere is no legal justification for
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Emperor, A. I.
han v Emperor,
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the well is wholly inadmissible, as it relates to a separate matter and had no connection with the possession of the ornaments by *Alla Din* which was the only fact discovered. Nor do I think that the statement that the prisoner had removed the *karas* from the boy can be regarded as immediate cause of the discovery. A man may remove the ornaments from the boy, but he may not give them to

t the statement
is admissible
ju v *Emperor*,

(1914)

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whole confession of a prisoner
here the confession includes a
the offences charged that part
the discovery of the weapon
Sogiamuthu Padayachi, 50 M.
. *Bhai* v *Emperor*, A I R 1926

expressed by *Horle* and *Jalal JJ* in the minority judgment of *Sukhan* v.

27. I ... A I R 1929 Lah. 344 (F B) as well as in *Harnam Singh* v *Emperor*, ... So it is clear that the Full Bench case in ... English Common Law ... the section while the ... *Madras* ... *Horle* and *Jalal* JJ. ... inter ... and ... *I for* ... Act ... Eng ... useful ... effect of section 27, it must be ... where is in Eng ... a confession made to a police officer by a person in custody is admissible in evidence, provided the prosecution first sh... it has not been obtained by any improper means such as coercion, ... section 26, Evidence Act, proh... confession ... it comes within the ... on the subject pr... rarely arises In ... once it has been p... *Prof Wigmore*. "It will be observed ... confession as relates strictly to the ... words, the confirmation admits the part confirmed, and ... falls something short of the logic of the case, for a confirmation on material points produces ample persuasion of the ... the whole It can hardly be supposed that at certain part ... begun, and that by a marvellous coin... which a subsequent search (more or ... confirm Such a differentiation is purely ... mental processes, either of the confessor or of the neutr... distrusting any part, we should cease distrusting all' *Wigmore* § 857

'If the exclusion of the confession rests altogether upon the probability that the confession is untrue, as we have seen, then if the prosecution produce evidence tending to show and sufficient to warrant the jury in finding that it is true, it ought to be received, for in such cases the reason of the exclusion is done away with All the Courts recognize the propriety of this reasoning, but illogically decline to pursue it to its logical results If one, accused of larceny, being put to torture, confess the crime and produce the goods from his own possession or disclo... their concealment, and they are afterwards found in the place m... evidence the fact of the finding of the ... you may not in the sa... th... prisoner's statement that he deposited ... w... But, I assert, in the case ... f... tends to corroborate ... d... declaration ... confessed to be ... sible

A statement ... under section 27 ... only

The words ... so much of such ... distinctly to th... information received, may be ...

175 Such portion of the confession made to the ... to the discovery of any fact are admissible under section 27 of the ... *Jajanu Dhanuk* v *Emperor*, 5 Pat 63 = 93 Ind Cas. 884 = 7 Pat L T ...

S. 27

e also *Emperor*

of Police that
committed
Held that
were all parts
of one transaction and the words used by the accused were admissible in evidence *Bahadur* v *Emperor*, 88 Ind Cas 7=26 Cr L J 1063=A I. R 1925 Sind 289

A statement made by an accused may be proved under section 27 of the Indian Evidence Act, 1872, so far as it relates to any material fact discovered in consequence,
statement was made
Naina Malai
ing an information by
accused under
ion must have had the
direct effect of
y *Ramasami Boyan, In re*, 11 L W 8=54 Ind Cas. 479 The accused made a statement during

who is afterwards proved to be a dacoit is not the
aning of s 27 of the Evidence Act. The test of
of the Evidence Act, if an information received from an accused person in the custody of a police officer, is whether the fact so discovered was a direct natural and necessary consequence of the information so received *Salam* v *Emperor*, 14 N L R 192=43 Ind Cas 111=19 Cr L J 79

Under s 27 it is legitimate to record evidence that an accused person said "I will point out certain property" if such statement leads to a discovery, but it
cused said 'I will point out
are of the booty in the dacoity"
W R (1918) Cr =44 Ind Cas
The King Emperor, 105 P L R. 1908=21 P W R 1908 Cr

It is not all statements made by an accused person connected with the production or finding of property
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27. *Emperor*, A
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Sukhan v.
rulings of the ...
well as *Fforde and Jalal* JJ
only the language of the sect. ...

and very probably b ... by the consideration as observed by
Fforde J in *Hornam*
Act has been drafted,
English principles o.
useful guides to the interpretation ...
effect of section 27, it must be borne in mind that where is in Englan ...
confe ... son in custody is admissible ...
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... Prof Wigmore "It will be observed
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ned to confirm. Such a differenc ...
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cease distrusting ... altogether upon the probabl ...

"If the exclusion of ... produc ...
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ssert, in the case supposed, the
not only tends to corroborate the
and there, but also his declaration
that he stole them and concealed them at the place, if he make this statement.
... absurdity, that while ...

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information received, may be proved *Illahibux* v *Emperor*, A I R 19..
175 Such portion of the confession made to the investigating officer as lead
to the discovery of any fact are admissible under section 27 of the Evidence Act.
Jagaua Dhanuk v *Emperor*, 5 Pat 63 = 93 Ind Cas. 884 = 7 Pat L T 390 = 27

different purpose in s 27 When the Legislature wished to make an exception to the absolute rule, it did so by a separate section, namely section 28, which declares under what circumstances a confession rendered irrelevant by s. 24 may become relevant Statements that are irrelevant under one section of the Act may be relevant under some other section of the Act No confession made under inducement, threat or pr S. 24
provided for by s 28 *King E*
a confession must be taken

in the confession which it disbelieves
Cr L J 785

Did inducement come into existence at all The inducement is almost always addressed to the person in question, and thus becomes known to him as a
on It was intended to be
for him as an induce-
dressed to the person, but
mine whether it was in fact present as an inducement? This will of course be a pure question of fact for the Judge, and no ruling can serve as a precedent, the conduct and language of the person will show whether he had the inducement in mind The important
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Was the inducement brought to an end? "Here" says *Prof Wigmore* 'five questions may arise (1) Must it be shown clearly that an improper
Are there any situations
, and thus the inducement,
n? Can the same person who has offered the inducement put an end to it so as to make admissible a confession afterwards made to himself? (4) Are confessions made subsequently, but to a person different from the one offering the inducement, to be treated as not made under the inducement, or must it be shown to have been negatived by the second person? (5) What suffices, in general, to end the inducement? *Wigmore* § 855

Subsequent ending of improper inducement There must be strong and cogent evidence that the influence of the inducement really has ceased In *R* v *Sherrington*, 2 Den C C 123, *Patteson J* said 'There ought to be strong evidence to show that the impression, under which the first confession was made, was afterwards removed, before the second confession can be received I am of
lered to have made the
first, the interval of
the result of reflection
suspected of stealing
ld forgive her if she
was taken before a Magistrate and, no one

receivable in evidence, as the promise of the mistress must be considered as still operating on the prisoner's mind at the time of the statement, but that if the mistress had not been present it might have been otherwise *R* v *Hewit*, 1 Car & M. 534; *R* v *Rue*, 13 Cox Cr 209 So the general principle is universally conceded that the subsequent ending of an improper inducement

S. 28. must be shown, it is as umel to have continued until the contrary is shown *Wigmore* § 855, see al o *R* v *Cleverton*, 2 F & F 833 This inducement may be removed by sub equent caution *R* v *Hornbrook*, 1 Cox Cr 51 *R* v *Hr r* 1 Cox Cr 361, *R* v *Collier*, 3 Cox Cr 57; *Benj in's Case*, 1 Ir Cir C R 117 *R* v *Bryan*, Jebb Cr 157, *R* v *Howes*, 6 C & P. 101

Can inducement be irrevocable? The next question raised by *Pr Wigmore* is whether there is any situation in which it cannot be shown that inducement, once offered has been brought to an end? In answering the question he said ' There is nothing permanently irrevocable in an ... inducement, whether it has been brought to an end is, as all concede, alwa open to inquiry ' *Wigmore* § 855

A person who has offered inducement can put an end to it. It has n been decided specifically whether the same person may put an end to an indu ment of his own creating But there is no reason why he cannot *Wig* § 855 Where a Magistrate told a pri oner that if he did not strike the fat blow and would tell all he knew, he would u e his influence to pro ect him b afterwards communicated to the prisoner a l tter from the Secretary of Stat declining to give pardon
C & P 221 *Nort Iv*
think that this declarati
with Magistrate after
given by the Coroner mu t be taken to have completely put an end to all th hopes that had been held out '

Inducement offered by one person and confession made to another ' There is on principle no reason for as uming that a promise or a threat made by one person will be treated by the accused as equally to be attributed to some other person who had no share in the other s conduct and shows no power or inclination to corroborate his promise or threat Neverthele s, the inducement may on the facts, prove to be in effect the second person's as much as the fir t one s. It should thus be a ques ion to be determined in each ca e, no general rule can be laid down *Wigmore* § 855, see also *Carty's Trial*, (Ire) 26 How St. Tr 889 *R.* v *Bell*, McNally Ev 13 *R* v *Tyler*, 1 C & P 129, *R* v *Cleve* 4 C & P 223

What suffices in general to end an inducement If the impression produced by the promise or threat is clearly shown to have been removed—e g, by lapse of time or by an intervening caution given by some person of superior (but not of equal or inferior) authority to the person holding out the inducement—a confession subsequently made will be strictly receivable *Phip Ev*, ... due Where a pri oner confessed some r

ort *In* 107 *R* v *Bate* 11 Cox

Magistrate had told the prisoner that, if he would make a disclosure, he do all that he could for him The prisoner after he was committed made a statement to the turnkey of the gaol who had held out no inducement to him to

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caution
superior

prevent the superior from carrying his promise into effect' *Russ Cr p 2181,* **S.** see also *R* v *Gilham* 1 Mood 186, *per Littledale J* Where a collecting pan-

removed therefrom *Emperor* v *Ganesh,* 74 Ind Cas 261=50 C 127, *Queen* v *Luchoo,* 5 N W P 86, *Reg* v *Navroji,* 9 B H C R 358

In the opinion of the Court It is for the Court to decide whether the impression caused by inducement threat or promise has been fully removed So where promises or threats have been once used of such a nature as to render a confession inadmissible, all subsequent admissions of the same or like facts will be rejected, unless from the length of time intervening, from proper warning of the consequences or from other circumstances there be good reason to presume, that the delusive hope or fear which influenced the first confession has been effectually dispelled *Joy on Conf* 69, *R* v *Hewett,* C & Marsh 534, *R.* v *Cooper,* 5 C & P 534, *R.* v *Rusa*
it appears to the satisfaction
away with before the confession w
Ev § 221 So, where the prisoner had been induced, by promises of favour to make a confession, which was for that cause excluded but about five months
by two Magistrates that he
ade a full confession this
Case, 5 Halst 180 In this

the length of time intervening or from proper warning of the consequences of confession, or from other circumstances, that the delusive hopes or fears under the influence of which the original confession was obtained were entirely dispelled *Guild's Case,* 5 Halst 180, *R.* v *Cheverton* 2 F & F 833 But otherwise the evidence of a subsequent confession made on the basis of a prior one unduly obtained will be rejected *Com Harman* 4 Burr 269 In the absence of any such circumstances the influence of the motives proved to have been offered will be presumed to continue, and to have produced the confession, unless the contrary is shown by clear evidence, and the confession will therefore be rejected *State* v *Roberts* 1 Dev 259, *Greenl Ev* § 221 If there

2 Q B 12=62 L J M C 93=17 Cox Cr 641, See also *R* v *Rose* 18 Cox Cr 717=67 L J Q B 289 *R* v *Smith* (1897) *Roscoe Cr Ev* 47

Confession otherwise relevant not to become irrelevant because of promise of secrecy, etc

29 If such a confession is otherwise relevant it does not become irrelevant merely because it was made under a promise of secrecy, or in consequence of a deception practised on the accused person for the purpose of obtaining it, or

S. 29. when he was drunk, or because it was made in answer to questions which he need not have answered, whatever may have been the form of those questions, or because he was not warned that he was not bound to make such confession, and that evidence of it might be given against him.

Rule criticised 'The rule of procedure' says *Mr. Chamberlayne* "which rejects so-called 'involuntary' confessions induced by threats or promises by those in authority is based entirely upon an . . .
In reality, like other rules of procedure, it is
tive law controlling the normal exercise of the .
As at present conducted it proceeds upon . . .
and even, as has been suggested, frequently operates against him by substituting private, irresponsible investigation for responsible official inquiry The rule assumes that those in authority over legal criminal proceedings ought, in the public interest, to refrain from placing pressure upon the free will of their prisoners What injur . . . of private persons is none
. . .
actually a person in . . .
he sees fit in connection . . .
by way of hope or fear be not one as to a benefit or injury connected . . . proceedings it is not important that it be held out to the accused by one in authority Neither situation brings into operation the special work of procedure or substantive law in this connection This consists in rejection without weighing the statement itself."—*Chamberlayne's Ev* § 1538.

Scope Confession procured by deception or under promise of secrecy are not, on this account alone, rendered inadmissible This, of course applies to confessions which otherwise satisfy the conditions prescribed for admissibility . . . of obtaining a confession, . . . regard to it *R* v *Shaw* . . . confession inadmissible It . . . confession obtained by fraud or . . . to
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Promise of secrecy 'If no inducement has been held out relating to the charge," says *Mr Taylor*, "It matters not in what way the confession has been obtained" *Taylor* § 881 It is not necessary that it should have been the prisoner's own spontaneous act So it will be received, though it were induced by a solemn promise of secrecy, even co . . . *R* v *Shaw*, 6 C. & P 372; *Com* v *Knapp*, 9 Pick 496, (50 . . . the prisoner had been committed on a . . .
him, 'I wish you would tell me how you murdered the boy, pray . . . prisoner said "Will you be upon your oath not to mention what I tell you The other prisoner went upon his oath, and he hoped, if he told that he might . . . then made a statement It was . . . inadmis-

S. 2

s. 1538 (a)

Deception A free and voluntary confession is not inadmissible because it was originally obtained by an artifice practised on the accused by officers having been in charge, or by other persons, if the means employed were not calculated to cause him to make an untrue statement. *People* v *McMohan*, 15 N Y 384 So it is no ob
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Act expressly says that a confession made in consequence of deception is not *to be excluded" The question, h*
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29 always been in regard to confessions made by a person when under arrest to those in authority over him, they have not gone so far as to exclude them simply because they were procured by deception provided they were voluntarily made. They are careful, however, to leave the credibility of the witness who practised the deception and the circumstances under which the confession was made to the consideration of the jury.' In America it has been held that a confession procured by a person who by falsely representing himself to be an attorney obtained the confidence of the prisoner, was inadmissible *Cotton* v *State*, 87 Ala. *Jones* v *Commonwealth*, 77 S W 63 "A man who will deliberately says. *Underhill* "ingr
betraying the
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Cr 228

False personation A confession is none the less admissible because the
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sympathetic fellow prisoner He may
he admissibility of the confession is m
Li § 1538(b)

Confessions over heard statements made while asleep A person wh may over hear the remarks of a prisoner made to himself or to another per as his wife or an attorney or spiritual adviser, who is incompetent as a witne to privileged communications may testify to what he has heard *Rex* v *S* 6 C & P 510 see also *Queen* v *Sajina* 7 W R Cr 56, *R* v *Gardner* 11 Cr A R 265—But not to incriminating declarations made during sleep for the declarant is then unconscious of what he was saying *People* v *Tobin* 19 Cal 40 (*Am*), *R* v *Elizabeth* Kent Sum Ass 1839, *Gore* v *Gibson* 13 M & W 623, *Best Ev* 11th Ed 511 A confession constituting a part of a prayer may be proved by one who overheard it, though he may not be able to prove the whole prayer *Woodfoll* v *State* 85 Ga 69 (*Am*) A confession made to another prisoner, under the erroneous impression that one prisoner cannot testify against the other, is not for that reason inadmissible *State* v *Mitchell*, Phil (N Car) p 447 (*Am*) A confession to a fellow prisoner in jail, procured by the latter's spiri not
to be rejected
v *State*, 55 Ga
was again char
cating *H* were read by a sergeant to the three together, purposely to the admissions, though evidence of what then took place is strictly admissible the trial Judge, if satisfied of such a purpose ought to exclude it *R* v *Gardner* 11 Cr A R 265, *R* v *Grayson* 16 Cr A R 7, *R* v *Pilley* 16 Cr A R 138 *R* v *Turner*, 19 Cr A R 191

Misleading inducements Illegality Not only may deception treachery any unfair treatment' says *Mr Chamberlaine* 'be employed for the attainment iden

reliable and trustworthy, merely, because obtained by means of an violation of the prisoner's privilege against compulsory self incrimination is

entirely without support in legal analogy The confession, viewed as extorted by one act of duress, stands in a different position It is not the act of the declarant Accordingly, he is not responsible for it" *Chamberlayne's Ev* § 1539 **S. 2**

When he was drunk. Confessions made by the accused when under the influence of liquor are not thereby rendered inadmissible *R* v *Spilsbury*, 7 C & P 187 In the last named case *Coleridge J* said I am of opinion that a statement made by a prisoner while he was drunk is not therefore inadmissible, it must be obtained either by hope or fear This is matter of observation for me, upon the weight that ought to attach to this statement when it is considered by the jury" This is the rule, even where the intoxication was produced by liquor given to him by the officers having him in charge for the sole purpose of

[illegible]

cated as to be incapable of understanding what he says or does his confession should not be used against him *Com* v *Howe* 9 Gray (Mass) 110 *Eskridge* v *State*, 25 Ala 30 The question as to the mental condition of the accused at the

[illegible]

the confession the Court would not submit the confession to the jury at all *McKelvey's Ev* § 92

Some recent cases of America, however reject confessions thus obtained because of the trick practised But the general rule has been sustained even where the accused was suffering from *delirium tremens* if he was mentally and physically able to describe past events and to state his own participation in the crime The intoxication of the accused at the time of making a confession may [illegible] fession as evidence [illegible] It is by no means [illegible] for with men of a [illegible] and exaggerated state [illegible] permitted to show that [illegible] statements made with a [illegible] he has done this the [illegible] him speaking that he appear [illegible] *ll Cr Ev* § 136 [illegible] not in general binding but this is subject to some exceptions which will be found collected in the case of *Molton* v *Camroux*, 2 Exch 487, *Best Ev* § 529

Confession in answer to questions A confession is also not to be rejected merely because it has been elicited by questions put to the prisoner *Taylor* § 891 But this statement of law must be read subject to the provisions of sections [illegible] a police [illegible] [illegible] prisoner [illegible] question [illegible] form of the question is immaterial even though it assures the prisoner *R* v *Hall* 1 Moo C C 152, *R* v *Thornton* 1 Moo C C 27, *R* v *Kerr* 8 C & P 179, *per Park J* A confession, in other respects admissible is not [illegible] because it is not the spontaneous utterance of the prisoner The [illegible] confession was obtained by the employment of persistent questioning [illegible] alone exclude it, (*State* v *Penney*, 113 Iowa, 691) but the practice [illegible] confession by putting questions after questions to the accused is [illegible] conducive to the procurement of truth, and the mode in which the [illegible]

. 29 was elicited may always be considered by the jury to determine what they shall believe it. *Underhill Cr Ev* § 110 In *R* v *Ellis*, Ry & Moo 432, *Littledale J* admitted a statement of an accused on examination before a Magistrate without threat or promise but upon questioning and after refusal to allow counsel. This case was decided by following an unreported ruling of *Holroyd J* and disapproving *Wilson's Case* i e *R* v *Wilson*, Holt N P 597 where *Richards C B* in disallowing such statements said "An examination of itself imposes an obligation to speak the truth, if a prisoner will confess let him do so voluntarily." *Mr Joy* also adds his authority as to the practice in his book on confession *Joy Confe* ss i, 40 see also *R* v *Dibley*, 5 C & P 530, *R* v *Lucas* 7 C & P 177 *R* v *Wheeley* 8 C & P 250, where this practice was accepted indirectly. An answer given by the prisoner to a question put to him by a Magistrate was rejected by *Earle C J* in *R* v *Berriman*, 6 Cox Cr 388 *Queen* v *Nabadwip* 1 B L R Cr 15

The mere fact that a statement in a confession was elicited by a question put by the Magistrate recording it does not make it irrelevant as a confession But the fact may be very material to an enquiry as to whether the confession is voluntary or not. *Barindra Kumar* v *The Emperor*, 14 C W N 1114=37 C 467 In *King Emperor* v *Promotha* 30 C L J 503 the Court in rejecting a confession obtained by continued questioning observed "His confession in our opinion cannot upon the case made by the prosecution, be said to be voluntary The evidence is that he was kept at a little distance from the Post Office in charge of a head constable and was being questioned by the Sub-Inspector and that after being in that condition for 3 or 4 hours, to use the words of the learned Judge 'under the continued questioning to which he was subjected he finally broke down'" If there is reason to think that the confession was induced by the pressure of questions by one in authority or in order to escape from his custody it should be rejected *R* v *Knight* 20 Cox 711=69 J P 106.

In England the controversy on this point is now closed by *Rex* v *Best* (1909) 1 K B 692=78 L J K B 658 where *Lord Alverstone C J* said "In our opinion it is quite impossible to say that the fact that a question of this kind has been asked invalidates the trial There are many cases in which the prisoner is entitled to give an explanation as to anything found upon him, and he may be able in answering the question to say and show that the thing found was his own property In our opinion *Reg* v *Gavin* 15 Cox C C 656 was not properly decided it is commented on in a note printed at the end of the report. The decision has not been followed to its full extent as appears from *Reg* v *Brackenbury* 17 Cox C C 628 The statement of law as set out in the report is too wide and requires qualification So this case practically overruled *Reg* v *Gavin* 15 Cox C C 656 and *Reg* v *Mab* 17 Cox C C 689. In *R* v *Miller* 18 Cox Cr C 54 *Hawkins J* said that it was impossible to discover the facts of a crime without asking questions, and as he held that the questions there were properly put after due warning he admitted evidence of defendant's answers saying that every case must be decided according to the whole of the circumstances *Roscoe Cr Ev* 10, see also *R* v *Hirst* 18 Cox Cr C 374 *R* v *Histed* 19 Cox Cr C 16, *Lewis* v *Harris* 24 Cox Cr 66=110 L T 337 All these authorities were considered in *Ibrahim* v *Rex*, 83 L J P C 185=(1914) A C 599=24 Cox C C 174 A private in an Indian regiment murdered one of the officers Shortly afterwards, while he was in custody the commanding officer asked him "why have you done such a senseless act?" and he replied "Some three or four days he has been abusing me, and without doubt I killed him" The confession was admitted *Lord Sumner* in delivering the judgment of the Judicial Committee (*Lord Haldane L C Lord Atkinson, Lord Shaw Lord Moulton* and *Lord Sumner*) said "if the matter is one for the (trial) Judge's discretion depending largely on his views of the impropriety of the questioner's conduct and the general circumstances of the case" it was not improperly exercised "Then after reviewing a large number of cases, he added "The English law is still unsettled strange as it may seem since the point is one which constantly occurs in criminal trials Many Judges, in their discretion, exclude such evidence, for they fear nothing less than that the exclusion of all such statements can prevent improper questioning of prisoners by removing the inducement to resort to it Having regard to the particular position in which their Lordships stand to criminal proceedings, they do not propose to intimate what they think the rule of English Law ought to be, much as it is to be

desired, that the point should be settled by authority, so far as a general rule can be laid down where circumstances so greatly vary. S.

Want of warning A voluntary confession is evidence, to whomsoever it may have been made, [illegible] that what he might sa[illegible] was not so warned *R* v [illegible] *Long*, 6 C & P 179; *R.* [illegible] *Empress* v *Umeer*, 10 C [illegible] of the duty of a Magistrate to tell an accused person that anything he may say will go as evidence against him" See also *Queen* v *Nobodeep*, 1 B. L R. Cr 15=15 W R. Cr 71 Answers to questions under that section are admissible in evidence, even if the Magistrate has omitted to warn the accused that he need not answer *Dinoo Roy and others* 16 W R Cr 21, 5 Mad H C. App 9. But sub-section (3) of section 164 of Criminal Procedure Code enacts "*A magistrate shall, before recording any such confession, explain to the person making it that he is not bound to make a confession and that if he does so it may be used as evidence* [illegible] shall record any such confession unless, upon [illegible] he has reason to believe that it was made [illegible] Act XVIII of 1923 [illegible] C 775 Now the [illegible] *Balwa Singh* v [illegible], 6 Lah 183=26 [illegible] *Hari*, 30 C W N [illegible] *kue Sin* v *King* [illegible] Lah 325 A statement of an accused, a suspect, made at an inquest before a Coroner is clearly admissible, either as a confession under s 26 or as a statement made by a party to proceeding under ss 18 and 21 of the Evidence Act As regards the objection that such a confession is not relevant in as much as the Coroner did not warn [illegible]

[illegible] *Pendse* referred to section 164 of the Criminal Procedure Code as containing a general principle to the contrary But that is a special enactment applying only to certain statements made in particular circumstances contemplated by s 164. [illegible]

[illegible] *R* v *Ellis*, Ry & Moo 432 and *R.* v *Gilham*, 1 Mood Cr C 186, 191 are mo[illegible]

[illegible]

30. When more persons than one are being tried jointly for the same offence, and a confession made by one of such persons affecting himself and some other of such persons is proved, the Court may take into consideration such

Consideration of proved confession affecting person making it and others jointly under trial for same offence

S. 30. confession as against such other persons as well as against the person who makes such confession.

* *Explanation.*—"Offence" as used in this section, includes the abetment of, or attempt, to commit the offence.

Illustrations

(a) A and B are jointly tried for the murder of C It is proved that A said— B and I murdered C " The Court may consider the effect of this confession as against B

(b) A is on his trial for the
was murdered by A and B, and th
This statement may not be t
as B is not being jointly tried

Principle This section is entirely a
no such provision either in Act II of 1855, o
of 1861 and 1872 Before the passing of the Indian Evidence Act
of an accused person was only evidence against himself, (Queen v Kally Churn
6 W R 84 (Cr) and it could not be taken to be corroborative evidence or any
evidence at all, against any body other than himself Queen v Bi uddh 5 W
R 35 Cr So the confession of one prisoner could not be used as corroborative
evidence a
"Until the
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* This *Explanation* was inserted in s 30 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891) s. 4

another, but
confessions
guaranteed
The reason
character is
Judges are
provision, that, when more persons than one are tried for an offence, and one of them makes a confession affecting himself and any other of the accused, the

r the Indian Evidence Act, he
ion, in fact, was one of those rules
, which though well adopted to trials for Jury, are meaningless and out of place on occasions where the functions of Judge and Jury are cont
to consider whether the

prosecutors and under the present system it is better to follow the wise advice of the writer cited by Justice Cunningham, where he says 'The policy of the

dangerous innovation *Per Glover J in Queen v Jaffir Ali*, 19 W R. 57 (64) Cr; *Queen v Sadhu Mundle*, 21 W R 69 (79) per Phear J · 7 Mad L J Journal
and was a
confession
In re Lalaram, 81 Ind Cas 817

Sadhu Mund
N S. 19
section 30, Act I of 1872, be 'considered' as against other parties then on their trial with them, but such confessions, when used as evidence against others,

trial jointly for the same offence, can be used under s 30 of the Evidence Act

30. The section is not to be treated as though the words "at the trial" were inserted after "made" and the word "recorded" substituted for "proved." *Queen Empress v Tanga*, Rat. Un Cr C 510 = Cr. Rg 30 of 1890 Confessions made by an accused person may be considered against persons who are tried with him, but they cannot be accepted as evidence of any fact necessary to constitute the offence *In re Kaliyappa Goundan*, 2 Weir 711. In order that a confession of an accused person may be admissible as against the other accused tried with him, it is not necessary that the confession should have been made in the latter's presence 2 Weir 745 When this section lays down that the Judge may consider a fact in certain circumstances it plainly declares that fact to be relevant in those circumstances *Gobraya v. Emperor*, A. I. R 1930 Nag. 243 (F B) = 26 N L R 229 = 125 Ind Cas. 673

Section 30 does not refer to statements made at the trial but the statements made before and proved at the trial *Govinda v. Emperor*, A. I. R 1929 Mad. 28-; *Emperor v Mahadeo Prosad*, A I. R. 1928 All 322 = 45 A. 323, *Empress v Ashutosh Chakravarty*, 4 C 483 = 3 C L R 270, but see *In re Bali Reddi*, 33 M 302 = 22 Ind Cas 157 = 15 Cr L. J 13, where *Ayling J held* that there was no reason why confession

taken into consideration u

J. in Emperor v Mahadev

accused person is entitled

called upon for a defen

is no mere form but with certain exceptions closes the door to any further evidence against him" "If a prior confession is to be proved, he can attack it by cross examination of the witness who prov

the dock after the prosecution case has cl

Per Waller J in *Govind v Emperor, su*

Act is not limited to cases where the

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K. B 658, a c

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Magistrate w

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person to wh

trate's Court when examined as a witness in the Sessions Court. *Queen Emp v Nagu*, A. W N 1891, 184 Section 30 merely enacts a special exception to the general rule that a confession (admission) can be proved (only) against the person who made it It does not limit the operation of s. 32 Illustration (b) to section 30 cannot be construed to have this effect *Aga Po Im v King Emperor*, U B R 1906, Evidence 3 = 5 Cr L J 300 Where an accused person makes a confession, the most that could be taken into consideration on such a statement against a co-accused would be, under sections 27 and 30 of the Evidence Act, so much of the information as was the immediate cause of the discovery of

some relevant fact against him *In re Sankayya Rau*, 18 M. L. J 66 = 31 M 127 = 3 M L T. 270 = 7 Cr L J. 325. Prior to the Evidence Act the rule not

accused. *Shambhu v Emperor* A I R 1932 All 228 = 1932 A L J 162

L. W 474

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fession of one prisoner
the confession, applies
prisoner tried at the

the other accused and the confession was evidence against them all *King Emperor* v *Dep*, 37 A 347

A person escaping from custody during the trial but, before charge, who has been tried separately after re arrest, cannot be said to have been jointly tried with the person whose trial, from a stage prior to the charge, was separate owing
, first tried, was
joint *Hassan*

abetment of it
before hand and being present during its commission, were held to be jointly

S. 30. tried for the same offence within the meaning of s 30 ... 3 P R.
person;

mmitted the murder
ed upon his trial—the
used the statement of
... ne first. *Held* that
accused person's statement was not admissible against the first, either under section 327, Cr Pro Code, 1872, or ss 30 and 133, Evidence Act *Crown v Jhobu*, 13 P R 1878 Cr.

s when the confes-
. he be called still join
r this section against
co-accused. In *Reg* v *Kalu Patil* 11 B H C R 146 ... Court observed "

... which the Assistant Judge, in framing his judgment took his evidence into consideration" *Imperatrix* v *Balu Patel*, 5 B 63; *Venka Sami* v *Queen*, 7 M 10 ... *Imper...* 1895 ...

is also ... *Pachigi*, 19 ... *Pirbhu*, 1895 A ...

... trial taken with Cas ... perso... this w... evide...

the trial without convicting those of the accused who pleaded guilty, yet, it is unfair to defer convicting them merely in order that their confessions may be considered against the other accused who are being tried with them *Queen-Empress* v *Paltua*, 23 A 53 = A W N 1900, 192; *Emperor* v *Mewa*, 30 A 540.

Where the statements of two of several co-accused persons followed their plea of guilty, held they were not entitled to be considered as evidence against the other accused persons and that, in those circumstances, they ceased to be statements of persons ... that plea of guilty *Queen* v *Shuldham*, 44 P ...

v *Herumal*, 33 C 440, ...

essarily end as soon as he pleads guilty ... other

S. 30

of these courses has been expli
guilty is left in the dock merely to
him, though the Court intends
In such a case, it will not be fair to allow his confession to be considered as

taken into consideration against them under s. 30, Evidence Act, appears to

he is still an accused person and is, therefore, not a competent witness against

trial was good. *Sukdev* v. *Emperor*, 9 C. L. J. 291 = 13 C. W. N. 552.

A. I. R. 1928 Lab. 880 = 111 Ind. Cas. 387 = 29 Cr. L. J. 835; *Kanhaya* v. *Emperor*, 15 P. R. 1911 = 12 Ind. Cas. 381 = 54 P. W. R. Cr. 1911; *Fakhruddin* v. *Emper* 302;
Emperor
A a A
confessed ions
Judge subsequently conceded the charge against A into one of abetment B,
who was
new trial.
Evidence
could not be allowed in appeal since the two charges were so nearly related, and there was no such material prejudice as would under ss. 447 to 449 of the

S. 30.

is tried but of a minor offence, it does not satisfy the requirements of s ... the Evidence Act In ... confession made by a ... case but not in the pre... sion was inadmissible ... 70=61 Ind Cas 793 ... of the Cr Procedure C... co-accused, the provis... to a case like the present. *Ambirulla* v *Emperor*, 22 C W N 403.

Two persons were jointly tried, the former for criminal breach of trust and the latter for the abetment of that offence. The only evidence against the latter was the conf... such unsupp... sion made ... thug, and in ... tried alone, ... v *Jita Singh*, A W N 1881, 164.

An accused person and another co-accused were tried together for an offence The accused, though only liable for abetment of the offence, was found to have been present at the time of the commission of the offence *Held*, that under s 114 I P Code, the accused stood in the same position as if he himself had committed the offence; that his trial with the co-accused was proper, and that the confession made by the co-accused in such trial could be taken into consideration under s 30 of the Evidence Act against the accused *Thakur Singh* v ... having before it the definition ... ld in enacting s 30 Evidence Act, ... d in the latter section included the "abetment of an offence" also if the intention really was that section 30 was to be so understood But if the offence abetted is committed as the result of an abetment and the abettor is present at its commission, the abettor must be held to have committed the substantive offence. *Queen Empress* v *Kalidin*, S C 143 Oudh (but now this objection has been removed by adding of the explanation by Act 3 of 1891); but see *Teja* v *Empress*, 3 P R ...

... *pa*, Rat. Un Cr ... Cr. C 450 ... tried under s 411 I P ... 457, cannot be considered ... P. Code, are distinct offences ... within the meaning of s 30, Evidence Act *Nga Po Tok* v *K E*, U B. R 1917, 4th Qr 158=20 Ind Cas 136=14 Cr L J 376. Where two persons were ... other of an ... held that ... evidence ... that the ... , though it appeared to the Magistrate ... charged with abetment of the offence with which ... Empress v *Hira Lal*, A W N 1890, 63, see also *Maya Singh* v. *Empress*, 9 P R 1886 Cr.; *Nur Ahmed* v *Crown*, 8 P R 1914 Cr , *Badi* v. *Queen Empress*, 7 M. 579, *Empress* v *Bala Patel*, 5 B 63=5 Ind ...

S. 30

Ghena v. *Emperor*, A. I. R. 1932 Lah. 180.

Confession. This section must be strictly construed. It makes a clear distinction between an admission and a confession. It is only under this section that the confession of one of two or more accused, jointly tried for the same offence, can be taken into consideration against the rest. It must be a confession to be so admissible, that is, it must affect both the person confessing and ... must not be con- ... ort of being an ... istruction ... It is one

... is against whom it is tendered" ... A 114; see also *Empress* v *Daji* ... 9 W R ... *Queen* v. *Belat Ali*, 19 ... *Queen* v *Khukree Oara* ... *Queen* v *Nago*, 23 W ... *Choudhury*, 25 W R. ...

... for which they are being ... to the section abetments ... A I. R 1931 Mad 177

A statement by an accused person consisting of the vague accusations of a ...

... who was not charged with ... 5 Cr. The confession of a ... he does not substantially implicate himself to the same extent as the other accused, but on the contrary ...

Keshub Bhomia, 25 W R Cr 8, see also *Kasir Bap* v *Emperor*, 14 Cr L J. 586=21 Ind Cas 378. A confession must be one of guilt. The accused must inculpate himself ... 67=94 Ind Cas ... v *King Emperor*, ... Where a person ... makes a confession ... the Evidence Act. *Emperor* v *Aunaji*, 26 Bom L R 614=A I R 1924 Bom 445. Merely because a confession by one of the accused is not a complete and detailed confession up

S. 30. to him, it cannot be rejected against the co-accused *Lalhan* v *Emperor* A. I R 1924 A. 511. A statement by an accused that he and his co-accused ... the deceased in exercise of their right of private defence, is in no sense a confession and cannot be taken into consideration against the accused *Mauli* v *Emperor*, 6 ... =85 Ind. Cas. 371 Confes... recorded in ... Pro. Code, even though made

the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Upendra* v *Emperor* (1918) Pat 175=46 Ind. Cas. 842. Statements made by one set of prisoners, criminating another set of prisoners, when each individual prisoner made a case for himself in which he was free from any criminal offence ought not to be taken into consideration under s. 30 of the Evidence Act against the prisoner of the second set, when the two sets although tried together were tried upo...
Queen v. *I*...
before a ...
this sectio...
the confe...
L. R. 261=2 Bom Cr C 192=15 Cr. L J 433.

Made "The word 'proved' in s... hand" *Per*
Imperatrix v ...
section 30 is ... trial' were inserted after ... word 'made' and the word 'recorded' substituted for 'proved', that therefore ...

Cr L J 305=21 A L J 179=(1923) A I R. All. 323=45 A 323, see ... *Queen Empress* v *Pirbhu*, 17 A 524; *Queen Empress* v *Pattua*, 23 A 53 ...
seems to me that ...
evidence at the trial ...
confession, and to ...
by the section" *M*...
before a charge is ...
restricted to an unretracted confession ... once a confession is proved ...

... P. R 1911 Cr=22 P. W R 1911 Cr.=12 Cr. L. J 267, *Sri Ram* v ...
2 A. L J 100=2 Cr. L. J 59.

accused *Raj Kumar* v. *Emperor*, A. I. R 1923 Pat. 473=9 P. L ...
Ind Cas 721.

S. 3

v. *Queen Empress*, L. B. R. (1893-1900) 7. The rule that the statement of one

extent as he implicates the other co-accused and who tries to throw the entire blame on the other co accused is of very little value at least as against the other co accused. *Kunja Subudhi* v *Emperor*, A I R 1929 Pat 275 = 8 Pat 289, *Topandas* v. *Emperor*, 25 Cr L J 761 = 81 Ind Cas 249 = A I R 1925 Sind. 116 It is not the law that unless a confessing prisoner implicates himself as fully as his co-accused the statement will not be admissible, the

as the accused. *Suka Raut* v. *Emperor*, 4 Pat L T 505 A confession in order to be admissible under this section, must implicate the confessing prisoner

Bag Shah v. *Crown*, 3 P. R 1879 Cr.

S. 30. to him, it cannot be rejected against the co-accused. *Lakhan* v. *Emperor* A. I R 1921 A 511. A statement by an accused that he and his co-accused took

against the person making the statement, but it may be unsafe to use it aga a co-accused *Jasola* v. *Emperor*, 53 Ind Cas 691 It is not safe to support the conviction of persons based solely on a retracted confession of a co-accused which does not implicate the confessor to the same extent as the co-prisoner *Upendra* v *Emperor* (1918) Pat 175 = 46 Ind. Cas. 812 Statements made by one set of prisoners, criminating another set of prisoners when each individual prisoner mad[illegible] ought not to [illegible] the prisoner o[illegible] tried upon t[illegible] *Queen* v. *Khu*[illegible] before a Ma[illegible] this section [illegible] the confessio[illegible] L. R 261 = 2 Bom Cr C 192 = 15 Cr. L J 433.

Made "The word proved' in s. 30 must refer to a confession made bef[illegible] hand" *Per Ga*[illegible] *Imperatrix* v *Ta*[illegible] section 30 is no[illegible] word 'made' and [illegible] confession made [illegible] trial for the same [illegible] the other accused [illegible] The duty of the [illegible] the guilt of the ac[illegible] in existence at the time when the charge is made, and the expression 'a confession' is to my mind, inapplicable to the procedure where the Judge asks questions and an accused person gives explanations under a special [illegible] provided for that purpose" *Mahadeo Prasad* v. *Emperor*, 76 Ind. Cas 105 = 25 Cr. L. J. 305 = 21 A L. J 179 = (1923) A I R All 323 = 45 A 323, [illegible]

under section 24 of the Evidence Act cannot be taken into consideration [illegible] a co accused as well *Emperor* v *Umda*, 166 P L R 1911 = 10 Ind Cas 59[illegible] 9 P R 1911 Cr = 22 P. W R 1911 Cr. = 12 Cr L. J. 267, *Sri Ram* v *Emperor* 2 A L. J. 100 = 2 Cr. L J 59.

accused *Raj Kumar* v *Emperor*, A I. R 1928 Pat 473 = 9 P. L [illegible] Ind Cas 721.

Chunder Bhattacharyee, 24 W. R 12. The expression "proving a confession" is inapplicable to the question and answers under s 364 Cr Pro Code *Mahadeo Prosad v Emperor*, 45 A. 323=21 A L J. 179=A I R 1923 All 332 When a confession is taken in the absence of other prisoners and the latter have no opportunity of denying or even of knowing what their fellow prisoner has said, e g when it has not even been read over to them afterwards, it cannot be S. 30
proved *Empress v Chunhanath*, 7 C 65;
. 124 After proper proof, such confession can be
ess v Lakshman, 6 B 124 The word "proved'
in this section means proved before the case for the prosecution comes to an
se or proved in some
accused made from the
taken into considera-
tion by the Court and such confession cannot be made the basis of the conviction of the other accused *Maralumuthu Palayachi, In re*, 54 M 783=61 M L J 378=1931 Mad 820, *Mahadeo v Emperor*, 45 A 323 but see *Ganpat v Emperor*, 27 N. L R 163=32 Cr L J 1222=A I R 1931 Nag 169=131 Ind. Cas. 686

Court. The word "Court" in this section means and includes in a trial by jury, both Judges and Jury *Empress v Ashutosh Chuckerbutty*, 4 C 318=3 C. L R. 70 (F B)=1 Shome, L R Cr 79

every confession is of
that the word "may"
consideration if it is so
on must be exercised
iving it a decision that
scretion to exclude a
confession by an accused altogether from consideration against the co accused if it is so disposed *Gobraya v. Emperor*, A I R 1930 Nag 212 (F B)=26 N. L R. 229=125 Ind Cas 673

May take into consideration The words "take into consideration" in

partial or qualified admission of guilt on the part of the accused himself and by a limited physical facts pointing to his connection with the crime imputed to him, they are not precluded by law, any more than by reason, from finding of guilty thus sustained *Queen Empress v Bayaji*, Rat Un Cr C 311=Cr Rg 64 of 1886 The words "may take into consideration" mean may treat as evidence The weight to be attached to it as evidence against the accused,

Khanjan v
section does
confession is
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J in *Queen v Chunder Bhattacharjee*, 24 W. R Cr 42 This section does not say that the confession referred to therein is relevant but only says that the Court

S. 30. may take it into consideration against the co-accused. The Court may take into consideration such confession with or supplementary to relevant facts which may form the basis of a judgment. As a matter of judicial prudence a confession implicating others must be regarded with suspicion. *Sallu v. Emperor* A I R 1922 Nag 146=65 Ind Cas 561=23 Cr L J 129. The confession of a co-accused can be taken into consideration, but the Court requires corroboration before acting upon such a confession. *King Emperor v. Baker* th 21 C L J 192=19 C W N 584=42 C 789=28 Ind Cas 657=16 Cr L J 321, *Mst v. Crown*, 19 P W R 1916 Cr=17 Cr L J 158=33 Ind Cas 136, *Ghula ... v. Crown*, 31 Ind Cas 332; see also *Daulat v. Emperor*, A I R 1930 Nag 97 ... Cr ... 721

rated as evidence of a defective character, and that they require special scrutiny before they can be safely relied on. *Queen v. Sadhu Mandal*, 21 W R Cr 69 ... are not evidence within the definition ... *Queen* ...
Empress ...
S 384, *Queen v. Khukree*, 21 ...
Weir 3rd Ed 491. *Queen* ...
C R App 15, *R v. Dipnaram*, 37 A 247.

In *Queen Empress v. Naga*, 23 W R 24 Cr *Phear J* said: We find the Legislature avoids saying that confessions of this sort are evidence and may be used as evidence ... it says merely the Court *may take into consideration* such confession. *Jackson J* in *Queen v. Chunder Bhattacharjee*, 24 W R 42 and *Markby and Morris JJ* in *Queen v. Naram Tel*, 27th May 1875 (mentioned and overruled in 4 C 485) also took the same view. But in *Empress v. Ashootosh Chuckerbutty* 4 C 483 the Full Bench said that the Legislature has not ... calling the confession of an accused person 'evidence' against a co-prisoner has ... phraseology of the Act. So according to the F...
does ...
same ...
of evidence wh...
make them ex...
not giving his ...
liberty of cross ...
Ratthagan ...
co-accused ...
and consi...
existed or ...
circumstances of the particular case to act on the supposition that ...
existed the Court should then ...
J in *ibid*. The confession of a ...
of great weight against the oth...
means "may b...
must be treated ...
confession of o...
a joint trial for ...
th, 42 C 789 ...
and if uncorrobo...
Amir Hossein, 2 C W N 719. A confession under section 30 ... taken into consideration but cannot be treated as substantial evidence. *In the matter of Ram Mulla*, 1 I G 77 ... *Naga* 23 W R Cr 24. The words 'taken into consideration' in th... accused are not to have the ...

... fact and though a ...
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or

connection with the crime imputed to him, they are not precluded by law any more than by reason from finding of guilty thus sustained *R* v *Bayaji Kom Anlu*, 11 Ind Jur N S 381; see also *Empress* v *Sundra*, A W N 1881, 38

sions which affected the accused by connecting or tending to connect him with the crime *Scott C J* remarked (pp 469, 470).—'If the confession (of a co-accused) is corroborated by other evidence it matters not whether, in proving the case at the trial, the confession precedes the other evidence, or the

of each case' On this point *Scott C J* differed from a doctrine of *Macleod J* in *Emperor* v *Gangappa Kandeppa*, 38 B 156=21 Ind Cas 673=15 Bom L R

evidence Both decisions agree that the confession of co-accused could not

l In *Emperor* v

is nothing in s 30,

after taking the

Courts of India

had laid down a rule of practice which had all the reverence of law that a

n as leading

based on the

uttacharya v

A I R 1927

If evidence of

degree of proof referred to in section 3 of the Evidence Act has been received or not *King Emperor* v *Nga Po Tha* U B R 1913, 2nd Qr 170=21 Ind Cas 166=14 Cr. L J 566, *The Nayan* v *Queen Empress*, L B R (1893 1900) 368 No higher value can be put upon such a confession than upon the statement of an accomplice *Emperor* v *Abani*, 8 Ind Cas 770=15 C W N 25=11 Cr L J. 710=38 C 169

S. 30. although such evidence is admissible in evidence under section 30 no weight can be given to it unless it is corroborated *Queen* v *Jaffar Ali*, 19 W R Cr 57 *Queen* v *Kunjoo*, 20 W R Cr 1, *Queen* v *Sadhu Mandal*, 21 W R 69 *Queen* v *Naja*, 23 W R 21, *Queen Empress* v *Dosa Jiva*, 10 B 231 So, such a confession must be evidence before it can be acted upon *Queen I* . *Imperatrix* v *Ganapaoli* 11 Ind Jur N S 20, . Weir 3rd Ed 499 *Queen* v *Bayoo Choudhury* 25 W R 63; *Queen Empress* v *Khandu*, 15 B 66 *Empress* v *Bhawani* 1 A 664; *Empress* v *Ramchand* 1 A 675, *Keher Singh* v *Emperor*, 59 Ind Cas 913, *In re Lilaram*, 81 Ind Cas 817, *Reg* v *Itibigera* 1 M 163=2 Weir 740, *In re Kuppam*, 9 Cr L J 30=5 M L T 300 *Ma* ... *Tenant* v *Amir Hossein*, 2 C W N 711, *Rajhubir* v *Emperor*, 11 O C 3.. *In re Ramaswami Boyan* 54 Ind Cas 479, *Queen* v *Malapa* 11 B H C R 19, *Queen Empress* v *Jadab Das* 27 C 295=4 C W N 129, *Fakaruth* v *Emperor* 10 C W N XVI, *Mthunya Behari* v *Empress* 5 C W N ... *Emperor* v *Gangappa*, 38 B 156 *Nga Po Kauk* v *Emperor*, 95 Ind Cas 71 ? Cr L J 718=A I R 1926 Rang 127, *Nga Po Kya* v *Emperor* 12 Cr L J 465=11 Ind Cas 1001, *Queen* v *Durbaroo*, 13 W R Cr 14, *Kamal* v *Emperor*, A I R 1932 Lah 73 Confession is not sufficient evidence of co-accused's guilt *Manna Lal* v *Emperor*, A I R 1925 Oudh 1 The confession of a co prisoner can not *per se* sustain conviction and in order to achieve that object it must be corroborated *aliunde* by independent evidence in some material circumstance *Kher Singh* v *Emperor*, 59 Ind Cas 913=22 Cr L J 161 It must be corroborated by independent testimony and in material particulars *Ramaswami Boyan In re*, 11 L W 8=54 Ind Cas 479=21 Cr L J 79, see also *Emperor* v *Azimuddin* 57 Ind Cas 462=21 Cr L J 638 *Emperor* v *Sabit Khan* 51 Ind Cas 537=43 B 739=21 Bom L R 418 20 Cr L J 479 But there is no rule as to what constitutes sufficient independent corroboration in a particular case That must depend upon the circumst . . the st must conse tion when those confessions are retracted at the trial is very low, as pointed out Yasin v *King Emperor*, 28 C 689=5 C W N 670 and in *Lalitmohan*'s case (*Emperor* v *Lalitmohan*, 10 Ind Cas 1583=38 C 559=15 C W N 95 *Per Heaton J* in *Emperor* v *Sabit Khan supra* *Ugappa* v *Emperor* 30 L W 403=1929 M W N 272=A I R 1929 Mad 491 "Very possibly there may be material to ... [illegible] ... place is not

[illegible]

21 W R 69 *Reg* v *Bathu* 1 B 475, *R* v *Kalappa* Weir 3rd Ed 494 ... v *Dosa*, 10 B 231, *Queen Empress* v *Rama Satava*, 8 A 306, *Rame M Jaw* v *Emperor*, 89 Ind Cas 889=26 Cr L J 185 The rule as I understand it ... upon

[illegible]

S. 30

nt eye witnesses or of
sions by the co-prisoner
implicating him, but the difficulty arises in case of circumstantial evidence
ien it consists of circum-
s?
2,

support a conviction from the co
prisoners—it was sufficient corroboration A similar view seems to have been

orroborative 6 *Mad L J Article 97* But in *Empress* v *Ashutosh Chakra-utty*, 4 C

old that an
il's confes
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Emperor,
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ull, In re, 20 L W 202=25 Cr L J 1041=81
The self inculpatory confession of an accused
act upon which alone the conviction of his
. Nor can such a confession even if it be
corroborated by other evidence which is insuffic st in the
nviction
Judge is
and as
r, 26 N L
ill not be
I R 1925
orroborated
by the confession of another accused as against the accused person who has not confessed at all; but the confession of one co accused may furnish the corroboration of the confession of another co accused as against the latter and *vice versa* *Gangaram* v *Crown*, 60 Ind Cas 786=22 Cr L J 290, *Emperor* v *Gangapa*, 15 Bom L R 975=2 Bom Cr C 143=21 Ind Cas 673=14 Cr L J 625=28 B 156 *Emperor* v *Budhu*, A W N 1881 18 The conviction based on the confession of a co accused not corroborated in material particulars by independent evidence is illegal *Amir Shah* v *Empress*, 20 P. R 1880, *Empress* v *Piru*, A W N. 1885, 320, *Empress* v. *Bhawani*, 1 A 664; *In re Kappan*, 5 M. L T 305=9 Cr L. J 308=7 Ind Cas. 547.

the only evidence
evidence, which,
n Kishen v *King-*

S. 30. There is uncorroborated against him caution and cir on its truth or fa it *Aga Tun* v *Emperor*, 11 Cr L J 179=19 Ind Cas 179=6 Bur L J 41

Value of retracted confession is sufficient evidence for conviction it to be true As regards the person any corroborative evidence form 127 Ind Cas 871=A I R 1930

Ind Cas 185

Retracted confession and co accused. And retracted confession is admissible but should have no weight attached to it unless either corroborated in material particulars or unless the tribunal comes to the conclusion that the statement as a whole is a truthful statement In either of these cases retracted statement n co accused *Sheona* The Evidence Act tracted confession deration against the accused though it may be that less weight would be attached to a retracted confession *Gour Chandra* v *Emperor*, A I R 19 9 C I 11 *Mahomed* v *Emperor* 81 Ind Cas 62 A retracted confession is evidence and there is no provision in this section by which a confession is to be received one way or another The use to be made by a Court of a confession whether retracted or not is a matter of procedure rather than law, the business of the Court being to make up its mind in accordance with the dictates of common sense whether it is safe to believe the confession or not. *Mt Amina* v *Emperor* 130 Ind Cas 641=A I R 1931 Lah 196

But a mere retracted confession of a co accused cannot be sufficient to sustain the conviction of another accused *Pala Singh* v *Emperor*, A I R 19 3 Lah 329=29 Cr L J 267=107 Ind Cas 614 Because "experience and common sense show that in the absence of corroboration in material particulars it ... cum tan ... in ... rent of the ... retr ... ession not ... wit ... v *Emperor* ... 30 ... R 1911 ... but ... ted confe ... sio ... king then ... cir ... *Dale Ira* ... v *Emperor*, 8 Pat L T 566=101 Ind Cas 881=28 Cr L J 497=A I R 19 Pat 257 A retracted confession is not th ... of an accomplice within the meaning of section 133 of the Evi ... 40 C L J 551=A I R 1925 Cal 406 ... law with regard to a retracted confessi ...

... series of cases of wh ... *Emperor*, 28 C 689 and *Emperor* ... should carry ... ted confession ...

not made the maker fullest cor demanded v *Emperor*, 2 Pat L T 776=60 Ind Cas 56=22 Cr L J 200

Where a confession made by an accused person is subsequently retracted **S. 30**
by him and he does not implicate himself
one of the conspirators, *held* the confess

v. *Imperator*, 62 Ind Cas 515=22 Cr L J 529, *Emperor* v *Narain*, A. I R. 1931 Oudh 83=131 Ind Cas 72 Where the confession of a co-accused retracted before the trial, was not corroborated in a material particular *viz*, the connection of the other accused with the cause of the death, that other accused must be acquitted *In re Manicka Padayachi*, 11 L W 174.

The retracted confession of accomplices may be taken into consideration under s 30, where there is evidence tending to conviction, but they cannot form the basis of a conviction when there is no evidence whatever *Reg* v *Timaya*, Rat Un Cr C 108, *Queen Empress* v *Sahadu*, Rat Un Cr C 771, *Alya* v *Crown*, 5 P R 1911 Cr=11 P L R 1911=27 P W R 1911, *Emperor* v *Kheshri*, 29 A, 931 So the retracted confession alone of an accused is not sufficient to justify a conviction of a co accused but where such confession

reasons
s known
ised, the

evidence is admissible and is strong piece of evidence against the co-accused *Wazid* v *Emperor*, 32 Cr L J 12=A I R 1930 Oudh 412, see also *Sheo Ratan* v *Emperor*, 111 Ind Cas 771=A I R 1929 Oudh 162, *Arjan Singh* v *Emperor*, 30 P L R 616=119 Ind Cas 325, *Rihamat* v *Emperor*, 11 Lah L J. 5=113 Ind Cas 65, *Surdoia* v *Emperor*, 125 Ind Cas 638 Confessional statements of accused cannot be used in corroboration of the evidence of the approver in as much as tainted evidence is not made better by being corroborated by other tainted evidence *Daulat* v *Emperor*, A I. R 1930 Nag 97=31 Cr L. J 153

Against such other persons as well as against the person making the confession A confession by one of several prisoners which is irrelevant or is

latter *Imperatrix* v *Pitambar*, 2
admissible under ss 24 26, against
(provided it otherwise satisfies its

Jour Article 108 In the case of a
maker under s 27, it is admissible,
only when the admissible part is a
ects himself and other persons' If the
both persons, it cannot be first rejected
as against the co prisoner, on the ground that the whole confession was unduly

corroborated and the mere discovery for the
conviction of A, in the last case abo f (apart
from evidence to show that proper id prob-
ably put there by him) corroborate A in the
theft *Ibid*

Confession of
of an accused perso
considered as the s
to in section 133 of th

S. 30. be examined as a witness This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an

the wordings of the latter section that it contemplates that the accomplice ... be examined as a wit
not illegal merely
accomplice, has no a[illegible]
into consideration as against a co-accused jointly tried with ... accused under s 30 All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused *Empress* v *Karimbux*, 9 C P L R 37 Cr, *Empress* v *Govinda* 9 C P L R Cr 35 So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor* v *Lalit Mohan*, 38 C 559 = 10 Ind Cas 582 = 15 C W N. 593; *Queen* v *Chunder Bhuttacharji*, ... W R Cr 42

testim
probat
Gangappa Kardeppa, 21 Ind Cas 673 = 38 B 156 = 15 Bom L R. ... Cr C 143 = 14 Cr L J
'I think it will be a
Reading, L C J in *R* v
115 L T 473 = 25 C[illegible]

ation as lending support to other evidence in the case But if there is ... evidence in the case, it is not a proper basis for a conviction It is not strengthened by the fact that it is supported by the other confessions whether they have been made in such circumstances as to preclude the theory that there has been connivance between the persons making the confessions or not *Nga San Ngein* v *King-Emperor*, U B R (1917) 1st Qr 3 Statements of co-accused persons are not entitled to even as much consideration as the testimony of an accomplice *Queen Empress* v *Nana Raju* Rat Un Cr C 403 = Cr Reg ... of 1889, *Queen Empress* v *Uma*, Rat Un Cr C 370 – Cr Rg. 19 of 1889 *Empress* v *Ganapabhat*, Rat Un Cr C 456 The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co accused is illegal and an abuse of the process of the Court *Muhammad* v *The Emperor*, 35 C W N 490 *Queen Empress* v *Lakshmayya* 22 M 491, *Q E* v *Pirbhu* 17 A 529 *Q E* v *Paltua* 23 A 53, *Emperor* v *Kheorje*, 19 B 195, *Q E* v ... 19 B 195, *Subramaniya* v *K E*, 25 M 61, *contra Q E* v ... *Pavonola*, 23 M 151, *Suldeb* v *K E*, 13 C W N 552, *Kesho* v *Emperor* 13 Cr L J 742

Explanation —Under the explanation to section the word 'offence' always includes abetments and attempts *In re Periya swami Moopan*, 54 M 75 = 59 M L J 471 = 129 Ind Cas 645

desire to obtain
wise produce But this course is not essential *Muhammad* v ... C W N 490 = A I R 1931 Cal 341

Admissions not conclusive proof, but may estop.

31. Admissions are not conclusive proof of the matters admitted, but they may operate as estoppels under the provision hereinafter contained. **S. 3**

Admission—meaning of. The word "admission" as used in this and in the previous sections is rather misleading. "The law of Evidence" says *Prof. Wigmore*, "has suffered in its most vital parts, from an ailment almost incur-

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sions may operate as a waiver relieving the opposing party from the need of any evidence and any party may at any stage of a suit, where admissions of fact have been made, either on the pleadings, or otherwise, apply to the Court for such judgment or order as upon such admission he may be entitled to (*Vide Order XII, rule 6, Civil Procedure Code*) So judicial admission

ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, —in other words from binding *estoppels, warranties* and *representations* *Wigmore* § *1057*.

at liberty to prove that such admissions were mistaken or untrue, and is not
nduced by them
m disputing their
and that tran-
n v *Ram Sebuk*,
enath v *Bindo*
13 M I A 585;
18 W R 485,
, 21 W R 422,
d Cas 33 An

estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore* § *1059*, *Loveridge* v. *Botham*, 1 B & P. 49;

S. 30. be examined as a witness. This being so, the provision that a conviction is not illegal merely because it proceeds upon the uncorroborated testimony of an accomplice, has no application to the case of an uncorroborated confession taken into consideration as against a co-accused jointly tried with the confes...

the wordings of the latter section that it contemplates that the accomplice ... be examined as a wit...
not illegal merely
accomplice, has no a...
into consideration as against a co-accused jointly tried with the confessing accused under s 30 All the Chartered High Courts of India have held that an accused person cannot be convicted solely on such a confession made by an accused *Empress* v *Karimbux*, 9 C P. L R 37 Cr ; *Empress* v *Govinda* 9 C P L R Cr 35 So it is clear that such a statement cannot alone form the basis of a conviction but that it could only be taken into consideration along with other evidence in the case. *Emperor* v *Lalit Mohan*, 38 C ...

Gangamma Kardenpa, 21 Ind Cas 673=38 B 156=15 Bom L R ...

ened by the fact that it is supported by the other confessions, ...
have been made in such
been connivance betwe...
Ngein v *King-Emperor*,
persons are not entitle...
accomplice *Queen Empress* v *Nana Raju*, Rat Un Cr C 468=Cr ... of 1889, *Queen Empress* v *Uma*, *Rat Un Cr C* 370=*Cr*. Rg. 19 of 1889, *Empress* v. *Ganapabhat*, Rat Un Cr C 456 The practice when there is a joint trial, of refusing to accept the plea of guilty and proceeding to try the accused in order that his confession may be taken into consideration against his co-accused is illegal and an abuse of the process of the Court *Muhammad* v *The Emperor*, 35 C W N 490 *Q E* ... *Empress* v *Lakshmayya*, 22 M 491; *Q E* v *Pirbhu*, 17 A 529, *Q E* v. *Paltua*, 23 A 53; *Emperor* v *Kheorje*, 19 B 195, *Q E* v ... 19 B 195, *Subramaniya* v *K E*, 25 M 61; *contra Q E* v ... *Pavonoda*, 23 M 151; *Suldeb* v *K. E*, 13 C W N 552; *Kesho* v *Emperor* 13 Cr L J. 742

Explanation.—Under the explanation to section the word 'offence' always includes abetments and attempts *In re Periya swami Moopan*, 54 M 75=59 M L J 471=129 Ind Cas 645.

...pass a sentence completely ... joint trial to give evidence ... his evidence with a mind ... ling punishment and the desire to obtain immunity to himself at the expense of the prisoner might otherwise produce But this course is not essential *Muhammad* v *Emperor*, 35 C W. N 490=A I. R 1931 Cal 341

Admissions not conclusive proof, but may estop.

31 Admissions are not conclusive proof **S. 31** of the matters admitted, but they may operate as estoppels under the provision hereinafter contained

Admission—meaning of The word 'admission' as used in this and in the previous sections is rather misleading "The law of Evidence" says *Prof Wigmore*, "has suffered in its most vital parts, from an ailment almost incurable,—that of confusion of nomenclature The term 'admissions' exhibits this misfortune in one of its notable aspects" *Wigmore* § 1058 According to that learned author the term "admissions" as mentioned in these sections should be termed "quasi admission" "The true admissions, in the fullest sense of the term" says *Prof* . . . totally distinct principle" *Ibid* . . . a method of . . . is kind of . . . miss of . . . nsider the . . . Procedure . . . ssions as . . . h admissions may operate as a waive . . . any evidence and any party ma . . . fact have been made, either . . . for such judgment or order as upon such admission he may be entitled to (*Vide Order XII, rule 6, Civil Procedure Code*) So judicial admission, is a formal act, done in the course of judicial proceedings, which waives or . . .

. . . ment of parties which become in themselves the foundation of independent right for other persons, by virtue of some doctrine of substantive law, —in other words from binding *estoppels*, *warranties* and *representations* *Wigmore* § *1057*.

. . . redits, in greater or less . . .

. . . at liberty to prove that such "admissions" were mistaken or untrue, and is not . . . nduced by them . . . m disputing their . . . and that tran- . . . on v *Ram Sebuk*, . . . enath v *Budo*, . . . 13 M I A 565, . . . 18 W R 185, . . . a, 21 W R 423, . . . d Cas 33 An . . .

. . . estoppels of judicial admissions have no quality of conclusiveness, and on principle cannot have. *Wigmore* § *1059*, *Loveridge* v *Botham*, 1 B & P. 49;

31. *Newton* v *Belcher*, 12 Q. B D 921 924, *Newton* v *Liddiard*, 12 Q B D 9
Such an admission does

where it has been acted upon by the party to whom it is made *Jiban Choudhury* v *Doolar*, 18 W R 347, *Rojendra* v *Chairman Dacca Municipality* 20 W R 233, *Vasant* v *Puttu* 14 B 313, *Chandra Kant* v *Pearce Mohan*, 5 W R 209 Admissions resemble presumptions in th unless the party again by them or explain the the essence of an estoppel that the party who is estopped cannot bring forward any evidence to contradict his former conduct—in other words, an estoppel is a conclusive admission *Cf R.* v *Del Lem* (1896) 2 Q. B at p 270, *Powell Ev* p 4 *Dharmu* v *Gunar*, 10 B H C 311

Scope of the section Admissions by a party to the record out of Court are evidence and primary evidence, of the facts so admitted *Roscoe N P Ev* 61 The value of the admission depends on the circumstances under which it was made, wh no further p *Ev* 61 within sections 115 to 117 of the Evidence Act, they are not conclusive are open to rebuttal or expla evidence And this applies equall ance with the circums establi hed, and must held binding The party may confess its untruth, he may show that the response which formed the admission was made not in a serious but in jocular manner or that the admission was made in ignorance of the true state

Rep 220, *Thomas* v *White* 1 Tyro & G 110 Express admissions of a to the suit or admissions implied from his conduct are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mist unless anoth the claim
Abdul Karim v *Rashiuddin* 131 Ind Cas 903—A I R 1931
Admissions cannot be rebutted or explained by other statements of the declarant made at another time, for such other statements are not admissible for that purpose, unless they form part of *res gestae* *Lee* v *Hamilton* 3 Ala 5 9 *Roberts* v *Trawick* 22 Ala 490 *Burr Jones* § 296 Informal admissions may be either in writing or oral or even by conduct They may have been made in business correspondence or casual conversation long before any litigation began or was even contemplated, and with no intention of making a binding admission but if They are therefore more easily explained away than formal admissions sufficiently clear they shift the onus of proof *Powell on Evidence*, 430

This section declares that admissions are not conclusive proofs of the An admission is the the witnesses are closely ere is a certain issions may operate is an of saying that an not

The person was mistaken and untrue
When the admission is duly proved and the person against whom it is proved does not satisfy the Court that it was mistaken or untrue, there is nothing in the

S. 31

Evidence Act, and there is no general principle or rule of law, to prevent the Court from deciding the case in accordance with it *Maung Maj v. Ma Tha Yi*, U. B. R. (1897-1901) Vol. II, 377, see also *Sirajuddin v. Johur Jan*, 131 Ind Cas 555=53 C L J 222, *Abdul Kareem v. Ris'ulu...*, 131 Ind Cas 903=8 O W N 206=A I R 1931 Oudh 216 What a party himself admits to be true may reasonably be presumed to be so Where the defendant is not a party to the deeds, and there is, therefore no estoppel the party making the admission may give evidence to rebut this presumption, but unless and until this is satisfactorily done, the fact admitted must be taken to be established The express admissions of a party to the suit, or admissions implied from his conduct, are evidence and strong evidence against him, but he is at liberty to prove that such admissions were mistaken ... them unless another person ... In such a case the party ... person (and those claiming under him) and that transaction, but as to third parties he is not bound *Ram Chandra v. C... udhuri* 9 Bom L R 267=11 C W N 321=4 A L J 102=5 Cr L J 115=17 M L J 103=2 M L T 109. Those admissions which have not been acted upon, either because they were originally made without any intention of being acted upon, or because for any other reason they, in fact, remain unacted upon or have not altered the situation of the opposite party are not conclusive, though they are receivable in evidence ...

whether the person who made the admission was or was not acquainted with the incidents of the property when he made the statement *Dinabandhu v. Munnu Lal*, 52 Ind Cas 443 An admission by one defendant against another, which admission the Court finds to be collusive, cannot relieve the plaintiff from the burden of starting his case against the repudiating defendant, nor can it shift the burden of proof to the shoulders of the latter from off the plaintiff *Sheikh v. M... hur Dass* 6 W R 299 Where there is no privity of contract between the parties an admission made by one party will not bind another. *Ganesh Das v. Dularam* 1? Ind Cas 7=12 L L J 187

Admissions not conclusive proof. Under this section admissions are not conclusive evidence of the matters admitted. *Jagannath v. Kalidas*, 8 Pat. 776=10 Pat L T 191=A I R 1929 Pat 215, see also *Salt v. Jalu*, 131 Ind. Cas 128=32 P L R 245, *Secretary of State v. Vilyibali*, A. I. R 1929 Lah 748, *Darimlar v. Lachmi*, A I R 1930 Lah 985 A party is not bound by his own representations when ... If treated as admissions ... that they were not true ... sion is conclusive only ... made *Janan Chowdhury* ... where its circumstances ... *Ramsebul*, 12 W R. ...

... Where the defendant wants to make ... plaintiff is at liberty to show the real nature of the transaction *Musammat Lotufunnissa v. Gour Saran*, 18 W R 455 493 An admission not explained, though not conclusive, is strong evidence. *Hunsa Kour v. Sheo Gobind*, 24 W R. 431; *Sankaracharya v. Manali*, 51 Ind Cas. 876; *Ambar Ali v. Lutfe Ali*, 21 C. W N 996 A deliberate confession though not operating as an estoppel casts upon those making it the burden of explaining ... rately asserted was not the fact. ... 5 B L R. 529; *Sreenath v.* ... 24 W R. 431; *Vir v. Harnam*, ... 184=11 C W. N 381 P. C.

S. 32. If the defendant admits any sum to be due, that admission, irre pectiv of the proof offered by the plaintiff, is sufficient to warr int a decree for that amo t in the plaintiff's favour *Ishan Chun ler* v *Noboduecp* 6 W R 132 *Sre* *Dhur* v *Sreenath* 18 W R 331 If in a suit for specific performance of an agreement, the defendant admits the terms of the agreement and its execution, the plaintiff need not put the document in evidence nor prove its execution *Burjorji* v *Mancherji* 5 B 153, *Mc Gowan* v *Smith* 26 L J Ch. 8, see also *Alexander* v *Mir Mahomed* 5 B L R 5 9 (P C) = 14 W R P C 29-13 M I A 438

The weight to be given to such admissions depends on various circum stances If the pleading is sworn to and hence it is deliberate and sol statement of the party its admissions may afford evidence agai t l not easily rebutted When the allegations are made on information a belief they are still admissible in evidence, as this fact only detracts fr the weight of the testimony *Doe* v *Steel*, 3 Camp 115, *Pope* v *Allis* 1 U S 363

... trial Court or an appeal, where properly pr sen ed in a transcript or case made so long as they remain a part of the record I the statem nts or admissions were ma le by himself of by his counsel und r a honest mistake or misapprehension of what the facts really were, and he desires to be relieved from the effect ... Court for leave to withdraw such adm... to do so make a showing of good faith ... should be granted or denied in the f... an action is in *that action* conclusivel... expressly makes in the pleadings, or ... are formally entered into for the purpose of dispensing with proofs *Bur Jo* ... § 274

character are entitled to great weight, but they are not conclusive again t h m and do not constitute an estoppel *Doe* v *Steel*, 3 Camp 115 *Cameron* v *Lightfoot* 2 W Black 1190, *Studdy* v *Sanders*, 2 Dowl & R 345, *De Whel*... *dale* v *Milburn* 5 Price 485 ...

be... ca... *Acton* v ... The doctri... have turn... rest upon... embrace al... ein it c... purely... and...

eking the int... to the rul... *s Legal* ... *Lord Ke*... with r... truth c... private...

tying under oath is more than a wit... behalf ... n of the judicial power in his behalf which, ... *contraria non est audiendus*' ... 130, expresses in technical language ... man should not be permitted to ... the sam... transaction, or in ... at ... ng allegations according ... *Smi*... *osion Elevated Ty Co*,

STATEMENTS BY PERSONS WHO CANNOT BE CALLED AS WINESSES.

Cases in which statement of relevant fact by person who is dead or cannot be found, etc., is relevant

32. Statements, written or verbal, of relevant facts made by a person who is dead, or who cannot be found, or who has become incapable of giving evidence, or whose attendance cannot be procured without an amount of delay or expense which under the circumstances of the case appears to the Court unreasonable, are themselves relevant facts in the following cases :—

when it relates to cause of death,

(*1*) When the statement is made by a person as to the cause of his death, or as to any of the circumstances of the transaction which resulted in his death, in cases in which the cause of that person's death comes into question.

Such statements are relevant whether the person who made them was or was not, at the time when they were made, under expectation of death, and whatever may be the nature of the proceeding in which the cause of his death comes into question.

or is made in course of business;

(*2*) When the statement was made by such person in the ordinary course of business, and in particular when it consists of any entry or memorandum made by him in books kept in the ordinary course of business, or in the discharge of professional duty ; or of an acknowledgment written or signed by him of the receipt of money, goods, securities or property of any kind ; or of a document used in commerce written or signed by him ; or of the date of a letter or other document usually dated, written or signed by him.

or against interest of maker;

(*3*) When the statement is against the pecuniary or proprietary interest of the person making it, or when, if true, it would expose him or would have exposed him to a criminal prosecution or to a suit for damages.

or gives opinion as to public right or custom or matters of general interest;

(*4*) When the statement gives the opinion of any such person, as to the existence of any public right or custom or matter of public or general interest, of the existence of which, if it existed, he would have been likely to be aware, and when such statement was made before any controversy as to such right, custom or matter has arisen.

or relates to existence of relationship,

(*5*) When statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons as to whose relationship* [by blood, marriage or adoption] the person

* These words in s 32, cls (*5*) and (*6*), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

S. 32. making the statement had special means of knowledge, and when the statement was made before the question in dispute was raised

(6) When the statement relates to the existence of any relationship* [by blood, marriage or adoption] between persons deceased, and is made in any will or deed relating to the affairs of the family to which any such deceased person belonged, or in any family pedigree, or upon any tombstone, family portrait or other thing on which such statements are usually made, and when such statement was made before the question in dispute was raised

or is made in will or deed relating to family affairs,

(7) When the statement is contained in any deed, will or other document which relates to any such transaction as is mentioned in section 13, clause (*a*).

or in document relating to transaction mentioned in section 13 clause (*a*),

(8) When the statement was made by a number of persons, and expressed feelings or impressions on their part relevant to the matter in question.

or is made by several persons and expresses feelings relevant to matter in question

Illustrations

(*a*) The question is whether A was murdered by B, or

tively to the murder, the rape and the actionable wrong under consideration, — relevant facts

(*b*)

An kept in the course of

business, er and delivered her

of a son is a relevant fact

(*c*) The question is, whether A was in Calcutta on a given day

A statement in the diary of a deceased solicitor, regularly kept in the course of business, that on a given day the solicitor attended A at a place mentioned in Calcutta, for the purpose of conferring with him upon specified business is a relevant fact

(*d*) The question is, whether a ship sailed from Bombay harbour on a given day

A letter written by a deceased member of a merchant's firm, by which she was chartered, to their correspondents in London, to whom the cargo was consigned, stating that the ship sailed on a given day from Bombay harbour, is a relevant fact

(*e*) The question is, whether rent was paid to A for certain land

A letter from A's deceased agent to A saying that he had received the rent on

enc

on a certain day The fact that a letter written by him is dated on that relevant.

* These words in s 32, cls (5) and (6), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 2

S. 3

(h) The question is, what was the cause of the wreck of a ship
A protest made by the Captain, whose attendance cannot be procured, is a [illegible] fact

[illegible] The question is, whether a given road is a public way
[illegible] statement by A, a deceased headman of the village, that the road was [illegible] is a relevant fact.

[illegible] The question is, what was the price of grain on a certain day in a particular market A statement of the price, made by a deceased banya in the [illegible] course of his business, is a relevant fact

(k) The question is, whether A, who is dead, was the father of B.
A statement by A that B was his son, is a relevant fact.

(l) The question is, what was the date of the birth of A
A letter from A's deceased father to a friend, announcing the birth of A on [illegible] given day, is a relevant fact.

(m) The question is, whether, and when, A and B were married
An entry in a memorandum book by C, the deceased father of B, of his daughter's marriage with A on a given date is a relevant fact

(n) A sues B for a libel expressed in a painted caricature exposed in a shop window The question is as to the similarity of the caricature and its libellous character The remarks of a crowd of spectators on these points may be proved

[illegible] as witnesses Sections 32 and [illegible] which exclude hearsay The [illegible] desirability of getting the person, [illegible] der that he may be examined as a witness in the regular way But this is practically impossible in many cases *Markby Ev* 32 So the first principle on which these statements are admissible [illegible] *regards* [illegible] ments a[illegible] Indian [illegible] who is d[illegible] giv[illegible] of [illegible] rea[illegible] evi[illegible] such evidence is receivable, are consonant with reason and general convenience *Nort Ev* 174

Nature of Hearsay as an Extra Judicial Testimonial [illegible]

[illegible]

utterance in his hearin[illegible] qualified to testify, so th[illegible]

[illegible] stimony to it In other words,

[illegible]

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" *Book* VI, Ch IV of *Bentham's Rationale of Judicial Evidence* The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error *Wigmore* § 1361

Form of Hearsay In respect to form hearsay statements may properly be regarded in one of two ways The rule of exclusion applies indifferently to them all As distinguished from each other by the nature of their source unsworn statements in their assertive capacity may be treated as composite or individual

Composite hearsay may be defined as a compound or blended extra judicial declaration of an indeterminate number of people so mingled that the separate voices can no longer be distinguished

Individual hearsay, on the contrary, may be regarded as an extra judicial statement shown to have been made by a particular person or set of persons So far as classified by means of the which through which the utterance is presented to the tribunal they may be conveniently considered as being oral, printed or written *Chamberlayne's Ev* § 2737

Composite Hearsay Composite hearsay, as above defined, usually presents itself to the tribunal, with increasing vagueness as Reputation, Rumour or Tradition Individual expressions of opinion, though persistent, do not constitute reputation *Chamberlayne's Ev* § 2738

Hearsay Rule and its exceptions—its Historical development etc There is a great head of the law of Evidence' says *Prof James Bradley Thayer* "comprising indeed, with its exceptions much the largest part of all that truly belong there forbidding the introduction of hearsay The true historical nature of the rule is hinted by the remark of an English Court, two centuries ago and over when they checked the attempt of a woman to testify what another woman had told her The Court,' it was quietly remarked 'are of opinion that it will be proper for *Wells* [illegible] (*Elizabeth Canning's Case* 19 How St Tr 38[illegible] communication, by that time be *veyant*, a hearer a say as the witn *audivi*, selves testimo[illegible] of what they were sa else [illegible] to [illegible] fou[illegible] insi[illegible] opi[illegible] they might act on might form a judg[illegible] not do this, or re[illegible] thought, or 'believed,' or had heard from others, or had inferred [illegible] now call circumstantial evidence This contrast between the function of the [illegible] criminate and define [illegible]

When juries [illegible] by the [illegible]

[illegible] number of so-[illegible] pendent rules whose opera[illegible] [illegible] generality of this other [illegible] For

We find these used by a complaint witness as far back as [illegible] evidence to the jury in 1721 Such declarations in early times, and even in [illegible]

S. 3

times, had a pe [illegible]
say seems alwa [illegible]
loped, used t [illegible]
know what the [illegible]
stances, was [illegible]
the aspect of family reputation; and reputation was often reckoned an adequate ground for judicial action. In the thirteenth century we find a witness, in proving another person's age, giving as the basis of his testimony the fact of the mother's recording the age in the records of a Priory, which record he had seen. In matters affecting a whole parish or a large number of persons, the hearsay and reputation of those belonging in the given community was always regarded as good.

"There was another class of unsworn statements which had always been resorted to in judicial proceedings and admitted to the jury, namely, written ones, entries in registers, in a person's books, in the account books of the stewards, in a merchant's books, in contracts, deeds, wills, and other documents. Documents had always been shown to juries,—long before witnesses were received to testify to them. In the early days they did not stick, it would seem, at showing the jury any document that bore on the case, without even thinking of how the writer knew what he said, [illegible] ently authenticated were one [illegible] on. It appears, then, that [illegible] pro hibition came in under [illegible] in, or rather, so to speak, stayed in, simply because they had always been received, and no rule against hearsay had ever been formulated or interpreted as applying to them. Such things, continuing at the present day, are e. g., the admission of old entries and writings in proof of ancient matters, written declarations of deceased persons against interest, and in the course of duty or business; and, to [illegible] a thing [illegible] of 1600, [illegible] qualified [illegible] ly never [illegible]

[illegible] s in them [illegible] tion, there [illegible] deceased [illegible] rations of [illegible] has the [illegible] made; or [illegible] ed, such [illegible] same fact itself admissible, and declarations of present intention or present physical sensa [illegible] subject.

[illegible] w relating to hearsay from [illegible] and from an uncertainty whether and how far [illegible] ctly limited, [illegible] to hearsay is [illegible] In a leading [illegible] question of [illegible] 'I base my judgment upon this that no [illegible] a document could be received, and clearly, unless it is to be brought within some one of the exceptions, it would fall within the general rule that hearsay evidence is not admissible.' (Sturla v. Freccia, 5 App. Cas. 623). On the other hand, Sir George Jessel, in a very different tone, in 1876, had declared it to be the Court's duty to extend the exceptions to the hearsay rule, out of 'regard to the reasons and principles which have induced the tribunals of this country to admit exceptions in the other cases' (Sugden v. St. Leonards, 1 Pro. Div. 154). It seems a sound general principle to say that in all cases a main rule is to have extension, rather than exceptions to the rule; that exceptions should be applied only within strict bounds, and that the main rule should apply in cases not clearly within the exception. But then comes the question, what is the rule, and what the exceptions? There lies a difficulty. A true analysis would probably restate the law so as to make what we call the hearsay rule the exception, and make our main rule this, namely, that whatsoever

S. 32 been asserted on the extra judicial occasion in question by the extra judicially stating or narrating witness" *Book* VI, Ch IV of *Bentham's Rationale of Judicial Evidence* The Hearsay rule tells us that B's assertion cannot be accepted because it has not been made at a time and place where it could be subjected to certain essential tests or investigations calculated to demonstrate its real value by exposing such latent sources of error *Wigmore* § 1361

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[illegible] state it if they did, were not to say [illegible] inferred from what [illegible]

now call circumstanti [illegible] ween the function of [illegible] discriminate and d [illegible]

doctrine, *rules which* were coeval with the doctrine itself or much [illegible] example, it seems always to have been true, in cases of homicide, that the [illegible] declarations of persons killed were reported and acted on in judicial proceedings. We find these used by a complaint witness as far back as 1202, and used in evidence to the jury in 1721 Such declarations in early times, and even as late

times, had a peculiar credit allowed them . . . S. 3
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loped, us . .
know wh : . ly, if confirmed by circum-
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persons against interest were received, and, in England even oral declarations of deceased persons in the course of duty or business And not only has the scope of these old titles been enlarged, but new exceptions have been made; or perhaps they are rather old ones coming to be recognized and formulated; such
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as being mere exception

should apply in cases n
question, what is the rule,
true analysis would prol
hearsay rule the exception,

S. 32. is relevant is adm
exceptions, but
this classification
rule would have i
that it shows a sp
particular instances, while rejecting it generally. For example there is, some

to say the contrary or as part of a series of statements or a class of them wh
are usually careful and accurate and the like; credit amply enough in point o
reason to ent tle them to be rece

r tendency to p
be as parts of the
fact itself *pars rei gestae* lying under the course of hearsay, but received, by way of exception, on account of this special intimacy of connection with the admissible fact This part of the subject presents an instructive spectacle of confusion resulting from the desire on the one hand to hold to the just historical theory of our cases and on ... entire
aware of the size and complex
upon *Thayer's Prel Treat*

Theory of Hearsay Rule The principle of exclusion of hearsay evidence ... Credit being derived from attestat n ... fountain from whence it flows and ... when there was such a speech mak ... ler rat vely

to be affected by it, had no opportunity of cross examining him' *Ibid* ... *Wigmore* § *1362* "It seems agreed that what a stranger has been heard to say is in strictness no manner of evidence either for or against a prisoner not only because it is not upon oath but also because the other side, hath no oppor ... of a cross-examination' *Hawkins Pleas of the Crown C II C 46*, § ... In also the objection of *Pelham in R*
Wright v *Tatham*, 7 A & E 313, *Co*
an oath furnishes some guarantee for
of cross examination gives an opportunity of testing the foundation ... value of it' In the same case *Alderson B* said "The general rule is th ... facts are to be proved by testimony of persons on oath and subjected to cr ... examination In *Grasham Hotel* v *Manning* Ir R 1 C J 125, *O Brien J* said "The statements and declarations of opinion received in evidence in this case were made by parties not examined upon oath or subject to cross examination and would not be exempted from the general rule excluding hearsay evidence

In some of the cases great stress is put on the right of cross examination "In In *Dysart Peerage Case*, L R 6 App Cas 503, *Lord Blackburn* observed

S. 3

the evidence of a man who is not pro- not be cross examined, as a general rule sley v Earl of Anglesea, 17 How St Tr So "the general rule is that that such statements are or ascertaining their truth,—the author of the statements not being exposed to cross examination in the presence of a Court of justice, and not speaking under the penal sanction of an oath, with no opportunity to investigate his character and motives, and his deportment not subject to observations" *Marshall v R. Co*, 48 Ill 476, see also *Berkeley Peerage Case*, 4 Camp 406 *Doe v Ridgeway*, 4 B & Ald 54; *R* v. *Davlin*, Jebb Cr C 127; *Smith v Blakey* L R 2 Q B 326, *R v Jenkins*, L R. 1 C C. R 193; *Sugden v St Leonards*, L R. 1 P D 154.

'Of the two main facts' says *Mr Chamberlayne* 'which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross-examination probably the later is, at the present time regarded as being by far the more serious Indeed, the importance of the oath is more frequently regarded as an incident of cross examination, than as a valuable guarantee for truth in itself considered While, therefore, lack of sanction of an oath is spoken of by judges as being an infirmative consideration in relation to hearsay of practically co-ordinate importance with absence of cross-examination, such can scarcely be regarded as the fact The real reason for thus joining the two requirements of oath and cross examination is that cross-examination, in a juridical sense, takes place under oath An extra judicial statement give under oath, is as objectionable to the present rule, if not tested by cross examination, as an unsworn statement would be" *Chamberlayne's Ev* § 2712.

Reason for Hearsay Rule—Inherent weakness—Absence of cross examination. The absence of a cross-examination is a more serious matter Not without

withstood the probing of a well conducted cross examination A proponent whose witness is stating the truth can ask for no better help for the establishment of

regarded

break a p

is composed is sound or rotten In much the same way, in the absence of the searching test which cross-examination alone makes practically possible, the tribunal has, as a rule, no satisfactory data upon which to estimate the probative

h circumstances judicial admis-

being misled A presiding Judge

ring that such a statement was irrelevant, without probative force, or that the jury could not reasonably act upon it

On the other hand, the use of a rigid rule of procedure to the effect that however necessary the extra judicial statement may be to the proponent in prov-

S. 32. that instance, that the statement offered is free from the risk of inaccuracy and untrustworthiness, so that the test of cross-examination would be a work of

for the evidence—may be examined more closely, taking first the latter

(1) Where the test of cross examination is impossible of application by reason of the declarant's death or some other cause rendering him now unavailable as witness statements w The question the latter or th policy of ch

test of cross-examination

(2) There are many situations in which it can be easily seen that such required test would add little as a security, because its purposes had been already substantially accomplished If a statement has been made under such circumstances that even a scep ordinary instance) in on a test whose chief o exists, the statement cou from that person was the Hearsay exc

Jessel M R in Sugden w of some other countri ersons who are dead in all cases where they were made under circumstances in which such evidence ought properly to have been admitted, that is, where the person who made them had no interest to the contrary, and where they were made before the commencement of the litigation That is not, however, our law As a rule the declarations whether in ons, are not admissible in evidence at this subject, so frequently has it shut ently could it have caused a most crying and intolerable injustice, that a large number of exceptions have been made to the general rule Now I take it the principle which underlies all these exceptions is the same In the first place, the case must be one in which it is difficult to obtain other evidence, for no doubt the ground for admitting the exceptions was that very difficulty In the next place the declarant must be disinterested, that is, disinterested in the sense that the declaration was not made in favour of his interests And, thirdly, the declaration must be made before dispute or litigation, so that it is made without bias on account of the existence of a dispute or litigation which the declarant might be supposed to favour. Lastly, and this appears to me one of the strongest reasons for admitting it, the declarant must have had peculiar means of knowledge not possessed in ordinary cases" *Chamberlaynes Ev* § 2763 notes

be briefly

a greater or less necessity for recon (1) The person whose offered may now be d unavailable for the palpable reason. It seven ensuing ones out in the rules, but the general notion is clear and unmistak

acknowledged in these exceptions with more or less directness and strictness . : . hat we cannot expect, again or at this time, to . . . the same or other sources This appears more or less fully in the exception section 6), for reputation, and (as in the first case) with the entire some valuable source of evidence . . convenience, can be predicated But the . .. . 1121, *Chamberlayne's Ev* § 2761 Hearsay . . . . here is better evidence There are certain .. . their very nature, admit of the production . . ationship character, custom, prescription and . . . . R. Act X Rule. 30.

Second : second princi untested, is cross-examin accuracy and not quite equivalent to The cir-

stances presuppose. It is merely that common sense and experience have from time to time pointed them out as practically adequate substitutes for the ordinary test, at least, in view of the necessity of the situation *Wigmore* § 1422

Witness qualifications, and other Rules, also to be applied to statements admitted under these exceptions The Hearsay rule is merely an additional test or safeguard to be applied to testimonial evidence otherwise admissible T

declarations The English ruling in *R* v *P* . . . according to

ion it is relevant, though, possibly

Scope of Section 32 This section provides an exception to the general

may have spoken hastily, inaccurately or even falsely Moreover the person who is really responsible for the statement did not make it on oath ; he was not

S. 32. cro -examine l upon it, and the Court had no opportunity of ob-erving his demeanour when he made it. It is a fundamental principle of our law that evidence ...

are as follows :—Statements written or verbal, of relevant facts when made by a person (a) v ... incapable of ... an amount of ... to the Court unrea onable, are admi ible : (1) when it relates to the cause of his death or (2) when it is made in course of busine s , or (3) when it is against the interest of the maker ; or (4) when it gives opinion as to public right or cu-tom, or matters of general intere-t ; or (5) when it relates to existence of relationship , or (6) when it is made in will or deed relating to family affairs, or (7) when it is made in document relating to tran-action mentioned in section 13, clau e (a) ; or (8) when it is made by several persons and express feelings relevant to the matter in question In the ab-ence of the conditions prescribed by section 32 of the Evidence Act a plaint filed in a prior litigation is not admis ible to prove a statement by a superior landlord *Lakshan* v *Tahir*, 39 C L J 90 = 28 C W N 1033 = 80 Ind Cas 357 A recital in a document is admis ible in evidence again-t parties who are not parties to the document, only where the conditions laid down in section 32 of the Evidence Act are fulfilled. *Ram Sarup* v *Bhagwant Prosa* ... be admitted as corroborative ... of collection of rent at a certain ... re corroboration ... *Chantter Rai* v *Kailash* ... *Behari* 44 Ind Cas 422

Requisites of admissibility under section 32 Statements oral and written made by persons not parties to the suit, and not witnesses therein, are not admi- ...

... of the rule itself The first of these is that of necessity ; i e the situation in which it is no longer possible to subject the person to oath and cross-examination, so that if his statements are to be had at all, they must be had without applying these securities (i e securities guaranteed by oath and cross-examination) for trustworthiness The law on the subject is thus laid down by *Tindal* C J in *Garwood* v *Dennis*, 4 Bing 328 "It is objected that however impressive the declaration of a man of character may be, yet the law admits the word of no man in evidence without oath The general rule certainly is so, but subject to relaxation in cases of necessity or extreme inconvenience The second notion is that, even though a necessity exists for relaxing the Hearsay rule, nevertheless this is not to be done unless there is in the particular case of declarations offered, some ... shall—in some degree, at ... otherwise required *Greenl* ... Conn 507, *Loomis J* said ... oath and the test of cross-examination as a pre-requisite ... verbal testimony, unless it discovers in the nature of the ca ... or test equivalent for asc ... ing the truth" So statemen ... who are dead or other ... pacitated from being ca ... admitted in the cases me ... 32 and 33 *Steph* ... principle of necessity ... ding hearsay is relax ... under which statements ... e section guaran ... ness of the state ments ... 3. The whole

S. 3

ossible in the
17 "Section 32
y persons who
The object of
those restrictions and the reasons for them are plain The basic principle of legal evidence being that the Court must always have the best, it follows that where persons can be, they must be brought before the Court to tell what they know at first hand Their veracity can then be best tested by the art of cross-examination Where however witnesses cannot be brought before the Court
idence of a kind that a Court
The conditions which when
, are imposed upon its admis-
its truth As there is no
tement will not be
the ordinary course,
a true statement."

Per Beaman J in ibid

Written or verbal The rule as regarding hearsay is so sweeping that it excludes all written hearsay irrespective of the mode in which it is presented—very often in the form of official records, but more frequently according to the particular commercial transaction to which it relates Of course the fact that the written hearsay is in the form of letters or telegrams does not avail to make it admissible The fact that hearsay is printed no matter in what form, does not alter the application of the rule *Burr Jones* § 298 So considered as hearsay, an unsworn
consideration
of the writ
Temporary,
against hear
§ 2756 As
it is but prop
of the exceptions to that rule

"'Verbal' means by words, it is not necessary that the words should be spoken If the term used in the section were 'oral', it might be that the statement must be 'confined to words spoken by the mouth' But the meaning of the word 'verbal' is something wider the words of another person may be so adopted by a witness as to be properly treated as the words of the witness himself" *Per Petheram C J* in *Queen Empress* v *Abdulla* 7 A 385 (397) F B In the same case *Straight J* said 'I am also of opinion that the signs made by the deceased *Dulari* in response to the question put to her, may be given in evidence erial from which the inference may properly ted or negatived the matter of such questions s is established satisfactorily to the that such questions taken with her assent or titute a 'verbal statement' as to the cause 32 of the Evidence Act I am not rely technical distinction is to say that while questions adopted or negatived by a mere 'yes' or 'no' constitute a 'verbal statement' within s 32, they become inadmissible when assent or dissent is expressed by a nod or a shake of the head' But *Mahmood J* expressed a different view in the same case At page 398 he said 'I should accept the not to interpret the the meaning of word' to me 'verbal' cannot mean more than 'by means of a word or words' Nodding the head or waving the hand is not a word" As regards dying declarations *Prof Greenleaf* observes "The testimony here spoken of may be given as well by signs as by words, thus, where one, being at the point of death and conscious of her situation, but received, was asked the wounds, and, if so squeezed his hand, consideration of the jury" *Greenl Ev* § 159(*b*) In *Mockabu* v *Com.* 78 Ky.

S. 32. 382 *Hines J* said "Dying declarations are not necessarily either w spoken Any method of communication between mind and mind adopted that will develop the thought, is the pressure of the hand, a nod head or a glance of the eye" See also *R v Lowe*, 10 Br C 1, 3 9, *R* 12 Cox Cr C 168

Rejection of evidence by the lower Court When the Court ha rejected the evidence of certain witnesses on the ground that it was hear and had not conformed with section 32 of the Evidence Act, and on the the evidence it was sometimes uncertain whether the witnesses were from their own personal knowledge or from information derived from but the Court had considered it from both points of view and held it dr the Judicial Committee saw no reason to differ from the estimate which th had formed as to the credibility of the witness in the former case nor, latter case, to question the manner in which the Court had applied the pr of section 32 *Shafiq un nissa v Shaban Ali Khan*, 26 A 581=9 C 105=6 Bom L R 750

Relevant facts. This section lays down that the statement written or verbal, *Per Pither* in *Queen-Empress* v examination" says employed as hearsay, or, more properly, determinate, evidentiary value to a declaration not so tested, has led administration as is most clearly seen in connection with the exception hearsay rul vancy objecti subjective, a to be recei evidence the absence o a demonstration of overwhelming forensic necessity on the part of the pro as would warrant incurring some hazard by way of misleading the *Chamberlayne's Ev* § 2725 Facts which are objectively relevant are relevant and 5 *Bhusana* not rele "If a fa Facts n learned *i e*, rel

I cannot see that the other portions of the Ev rations is to the dec ndoubtedly the identity murderer is a fact in issue in a trial for most These would cannot have been the intention Legislature Facts in issue are facts about which there is a question in between the parties and although all relevant facts are not necessarily f issue, I cannot understand how the facts that are in issue can be other relevant to the determination of the suit, and this I think is clear from language of section 6" But see *Patel v Patel*, 15 B 565

Subjective relevancy If the objective relevancy of a hearsay is tacitly assumed as a matter of course the question of subjective relev stands in quite a different p

much nicety In connection with two conditions of subjective

Adequate Knowledge and Absence of Controlling Motive to Misrepresent, this difficulty is almost entirely confined, in case of hearsay, as of other statements, to the latter Adequate Knowledge like Objective Relevancy, raises in practice, but little difficulty in its determination It can be finally settled, once for all almost on inspection. But in the case of Absence of Controlling Motive to Misrepresent, the situation is quite different. *Chamberlayne's Ev* § 2731 S. 3

Subjective Relevancy—Adequate knowledge A qualification required in case of every witness is that he should be shown or can reasonably be assumed to possess a knowledge commensurate with, sufficient to give evidentiary value to, the evidence which he proposes to offer Should the matter be one covered by direct observation, it must
facilities and opportunities fo
Where the fact to be stated is o
appear or be justifiably assum
knowledge helpful to the jury Should it appear that the proposed testimony is not based upon adequate personal knowledge gained from observation or otherwise, it is subjectively irrelevant and should be rejected The fact may be as stated but cannot be credited The requirements is by no means restricted to the judicial use of unsworn statements But it is naturally insisted on in such a connection so far as can reasonably be done *Chamberlayne's Ev* § 2732

Subjective relevancy—Absence of controlling Motive to misrepresent "The credibility and consequent admissibility of an unsworn statement is thus seen to rest upon its subjective relevancy and this in main, upon the existence of the motive to misrepresent The question is a crucial one and of some nicety and difficulty when viewed from the stand point of Procedure To exhibit to the jury by the aid of cross examination facts out of which may be thought to arise motives tending to pervert, consciously or unconciously, the desire to truthfully narrate facts known to the declarant is a comparatively easy matter The provisions of Procedure have been greatly taxed in an attempt to formulate general rules as to what may or may not have been omitted which may to a certain extent supply the place of judicial testing *Chamberlayne's Ev* § 2733

"**Secondary evidence** In considering the use of hearsay statements at the present day under enlightened judicial administration by the use of reason it would be natural in case of a hearsay statement to adopt the rule that in order for the declaration to be subjectively relevant it must appear that the declarant was not so far under the influence of bias, self interest or other controlling motive to misrepresent as to render it irrational that the jury should credit his story *Chamberlayne's Ev* 2733

"In dealing, however, with the exceptions to the hearsay rule where the assertive unsworn statement is treated as secondary evidence, it is important to bear in mind that we are dealing, as it were with the stone age of judicial evolution The temper of the times during which the hearsay rule and its exceptions were formulated is procedural rather than administrative Pre appointed equivalences, the ability to state one fact in the terms of another take the place to which the judgment deduced by reason from legal principles might more properly lay claim Thus in relation to subjective relevancy Adequate Knowledge in case of a declaration regarding Pedigree must be shown by membership in the family Absence of controlling motive to misrepresent is established by the fact that the assertion was made before the warmth of partisanship or the beguiling of self interest had been aroused by a *Lis Mota* In other words, to secure admissibility on account of subjective relevancy the hearsay statement must have been made *ante litem motam* *Chamberlayne's Ev* § 2733

Primary Evidence
equivalences characteristic
cases in which modern ju

sufficient guarantee
In course of legal
evolution the existence of one of two forces was found to furnish a sufficient guarantee to this effect These are (1) the Force of Spontaneity and in certain cases (2) the Force of Habit In either case, experience showed that the

S. 32.

is the probative force of assertive judicial decisions ... happened to modern judicial administration that the evidence is not secondary as originally regarded by procedure but is, under modern conditions, primary there being no species of proof of a superior grade in connection with matters to which they relate" *Chamberlayne's Ev* § 2733

Person "This argument was based entirely upon the provisions of the General Clauses Act which says that 'person' shall include 'persons', it was contended that 'person' in section 32 must be read as persons' I do not think that this ingenious argument is entitled to succeed" *Per Maclean C J* in *Chandra Nath* v *Nilmudhub* 3 C W N 85(89)=26 C 236 (237) So a statement relating to the existence of a ... document signed by several persons some only ... under clause 5 of section 32 of the E... document is dead, the statement made by ... section 32, if it comes under one or other of its clauses, being thus the statement of a person who is dead *Ibid*

... dered to be sufficient to satisfy ... *an*, 10 Conn 11, *Williams J* ...

... writing by such a person filed before ... was held to be inadmissible in evidence ... *Jagat Lal* v *Jogeshar*, 25 A 149 P C Before ... adm ... *Queen* v *Gopalao* 12 W R Cr ... C 236=3 C W N 83 So also ... witness who has been fully examined and cross examin... the suit In such a case ... for the admission of the previous statement made by the witness ... *Kusum Kumari* 46 Ind Cas 929=5 Pat L J 161 Where a person making a dying declaration chances to live, his statement is not admissible *Emperor* v *Ram Sattu*, 1 Bom L R 434

Who cannot be found ... is in effect unavailable f... disappearance is shown by ... search The only objectio... the possibility of collusion between ... to be satisfied that there had bee... *bona fide*, this objection loses its forc... find a witness, then he is as if were ... may be read "so as the party make oath that he did his endeavour to ... witness, but that he could not see him nor hear of him" *Anon Godbold* ... In *Oates Trial* 10 How St Tr 1227, 1285, *Oates* "My lord, I will ... produce what he swore at another trial ; *L C J Jeffereys* "Why, where is he? Is he dead?" *Oates* "My lord, it has cost a great deal of money to search him out; but I cannot anywhere meet with him and that makes my case so much worse that I cannot, when I have done all that man can do to get my witness ... , when I thought my trial would ... ar of him' *L C J*, "Look ... use to admit of any ... we will indulge you so f... found within the juris... residence or in the country is not sufficient *Thomas* v ... 174 ; *Pope* v *State*, 1...

making a dying declaration chances to live, his statement cannot be admitted in evidence as dying declaration under s 32 of the Evidence Act, but it may be relied on, under s 157 of the Evidence Act, to corroborate the testimony of the complainant when examined in the case *Emperor v Rama Sattu*, 4 Bom L R 131

Incapable to give evidence. In a murder case one of the witnesses for the

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ments of relevant facts made by persons whose attendance could not be procured without unreasonable delay and expense, such statements having been made in the ordinary course
and written or signed
238 But the mere
is not a ground for ad
previous statement made by him on the ground that his evidence cannot be procured without unreasonable delay or expense *Kadappa v Tirupathi*, 86 Ind Cas 576=21 L W 210=A I R 1925 Mad 111 Vide also under section 33

CLAUSE I.

Dying declarations—Principle of Admission The grounds of admission of dying declarations are (1) death, (2) necessity, for the victim being generally the only eye witness to such crimes, and (3) the sense of impending death, which creats a sanction equal to the obligations of death *R v Woodcock*, 1 Leach 500 (504); *R. v Perry*, (1909) 2 K B 697, *Phip Ev* 308

The injured person being dead,
ary proof, the testimony of these
ances the charge could scarcely be
made out except by th
facts of the transactions
of the real facts The
received unless there is to be a failure or miscarriage of justice While these

S 32 is considered by the law as creating an obligation equal to that which is imposed by a positive oath administered in a Court of Justice " Per Eyre C B in R v Woodcock, 1 Leach 500 501 "Taking men as they are at present the world as the guarantees for truth telling in case of so high as early administration was inc, ument in favour of the establishment of the exception that a sense of impending death created a sanction equal to the administration of an oath may be conceded Is it quite certain however that the sanction of the oath remains the same at the present time as in early days? Changes in religious tenets and a growing disbelief in the once universally accepted doctrine of eternal them selves registered in Yet, regardless of the fact punishment is still insisted on no period of its u have the result Perjury has always been a curse of judicial administration If the Even t the pr tum it is afe therefore a species of ext under which a n oath is by truth telling th judicial service —Chamberlayne Ev § 2819

Dying declarations when admissible under English Law A declaration made by a declarant as to the cause of his death or as to any of the circumstances of the transaction which resulted in his death is deemed, to be relevant only in trials for murder and only when the declarant is shown to the sat of death and to have given ation was made *Steph Dig Ev Art 26* So declarations are upon charges other than homicide or as to homicides other than that of the declarant The deceased must be proved to the satisfaction of the Judge to be in actual danger of death *v th El 309 Sus ex Pr* 0, *R v Perry*, (1909) 2 K B de So the application of the is strictly and absolutely limited to cases in which the death of the who made the declaration is the subject of enquiry, or is part of the *transaction R v Mead 2 B & C 605 So dying declaration* is not admissible on an indictment of perjury *Ibid* So when on an indictment administering savin to a woman pregnant but not quick with child intent to procure declaration was (the woman being the declaration might were adr of enquiry L J M has been are also 337 In in a cake, and his maid servant who was present and had made the cake, not afraid of it, and thereupon ate of it, and was in consequence poison *died* Her dying declarations (made after she knew of her master's death and was conscious of her own approaching death) as to the manner in which she had made the cake, and that she put nothing bad in it and that the prisoner was present eating his breakfast at one end of the table while she was making the cake at the other end of it, were tendered in evidence, and objected to on the ground that the only person whose dying declarations could be received in evidence was the person whose death formed the subject of enquiry at the trial But *Coltman J* after consulting *Parke B* admitted the evidence on the ground

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R. v *Perry*,
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an account to his
Alderson B said
he is in the san
sanction of an oath
ed equal to an oath, but they are nevertheless open to observation For though

the evidence of such declarant inadmissible ' If the above conditions concur, it is immaterial under the English law that the declarant lingered for several days, or even weeks (*R* v *Bernadotti*, 11 Cox 316, *R* v *Craven* 1 Lew 77) or

of the name of *Edwards*, very much
been recently executed for a high way
he had
of the
consider-
Villette's knowledge upon
this subject had proceeded from the solemn declaration of a dying man, it was admissible evidence in favour of the prisoner The Court observed "It would be inconsistent with the rules of evidence which are rules of justice, to examine a witness to the declaration of a person dying under the circumstances described
received is, that the mind
, acts under a sanction
el by a solemn appeal to
ined convict, would be
carrying the rule of evidence beyond its possible extent, even if the person were alive, for as an attained convict, he could not have been admitted to give testimony upon oath, and the dying declarations of such a person cannot, consistently with the principles of justice, be considered as better evidence than his testimony on oath would have been if he had been alive. The fact, however, that a man resembling the person of a prisoner was executed, may be g
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satisfied', and
be inadmissible.
they were made
F & F 857;
owell, 1 Den 1
Danger existed
The deceased clearly thought he was dying, and had no hope of recovery,

S. 32. There is no ground for holding his declaration inadmissible' In a trial for murder a written declaration of the deceased made under the following circumstances was tendered in evidence for the prosecution; the declaration had been made on oath to a Magistrate's clerk about thirteen hours before death, the clerk asked the deceased before he took down her statement whether she felt she was likely to die; she said ' I think so from shortness of my breath", her breath was then extremely short, the clerk said, "Is it with the fear of death before you that you make these statements? Have you any present hope of your recovery " She said, None ' The clerk then wrote out her statement and added to it the above conversation in the form of a statement by the deceased, but he omitted the word "present before "hope" He then read over to the deceased what he had written, and she then added the words ' at present' after "hope and signed the declaration It was held that the statement was not admissible in evidence, as it did not appear to have been made under a settled hopeless expectation of death, inasmuch as the deceased had expressly qualified the words 'no hope' by inserting after them the words "at present" *R v Jenkins* (1869) L R 1 C C R 187 *Kelly C B* in his judgment said "The result of the decisions is that there must be an unqualified belief in the nearness of death a belief without hope that the declarant is about to die. If we can look at reported cases and at the language of learned Judges we find that one has used the expression 'every hope of this world gone' (*Per Eyre C B* in R v *Woodcock*, 1 Lea C C at p 502), another "settled hopeless expectation of death' (*Per Willes J in R v Peel*, 2 F & F at p 22), another ' any hope of recovery, however slight ' renders the evidence of such declarations inadmissible (*Per Tindal J in R. v Hayward*, 6 C & P at p 160) We as Judges must be perfectly satisfied beyond any reasonable doubt that there was no hope of avoiding death. See also *Will's Ev* 196 There must be a belief ... indeed in an instant or immediate death (as held in *R v Osman*, 15 Cox 1 ... *Lush L J* and *R. v Mitchell*, 17 Cox 503, per *Cave J*), but in an imminent ... impending, as distinguished from a deferred one (*R. v Perry*, [1909] 2 K B ... *R v Austin*, 8 Cr App R. 27), *Phip Ev* 309

History—English Law "This exception' to the rule against hearsay ... most of the others existed long before the rule itself, an example of such ... occurring in 1 ... Cr Seld Soc 11, 27; see also Plac Ab 104 Col ... and Cl. *Glam* ... ances of its admission ... the establi ... 6 How ... 1333-4. Dow ... declarations ... in the case of civi ... *Dryden* 1 M & W 615 629) *Tayl* ... Ed) 349 360, *Salmond's Essays* 52, *Wigmore Ev* ... Ed 305

Difference between English and Indian Law In England dying declarations are admissible in criminal cases in the single instance of homicide, that is, murder or manslaughter where the death of the deceased is the subject of the charge, and circumstances of the death are subject of the declarations, 2 ... *Anglo Ind Code* Vol II 32... see also 1 East P C. 353, *R v Mead*, 2 B ... 605, *R v Hind*, Bell 253 *R v Hutchison* 2 B & C 608. The observations of the Court in *Stobart v Dryden* 1 M & W 613, render it very doubtful whether dying declarations would be admissible in civil proceedings ... *Cr.* 2064, *1 Phill Ev* 290; *Taylor Ev 10th Ed* § 714. But in India they are admissible in civil suits as well as in criminal prosecutions for rape or any other offence [*Vide illustration* (a)] This illustration is probably based on ...

The earlier law admitted dying declaration in civil cases *Jackson v ... burgh*, 1 John 159 163 (1806) Thus it has been received where a subscribing witness being *in extremis* acknowledge the forgery ... will *Wright v Law* 3 Burr 1244 (1761). So the statement of a dying w... with regard to the paternity of her child "W... be have died with a ... her mouth and her ... in her hand" *Douglas* ... ise, 2 Harg Col 357, 35... 3... (17...

In that case *Parke B* ... opinion ... hich is now ... early exploded) that any ... *extremis* was a ... n the ground that the solemnity of the occasio ... t to a declar ...

Bissorumun Mookerjee, 6 W R. Cr. 75, *Lalji* v. *Emperor*, 6 P. 747, *Queen* v. *Ujrail*, 3 N. W P 212 In that case where in admitting dying declarations in a case of rape the Court consisting of *Kemp* and *Markby* JJ said. "It seems pretty certain that the law in England on the subject has been much narrowed of late years. There are instances in the older books in which dying declarations have been admitted in civil cases, and in no S. 32

rule as laid down in Neither in

the party making the statement is the
apply with equal force to its admissibility in
which dying declarations are admissible
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less likely
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put on a level with a deposition, technically so called, which is admissible in

is it the reason why this evidence is admitted, but, even if it were so, that necessity is just as likely to exist where the deceased person has been robbed, or raped or assaulted, as where he has been murdered' see also *Queen* v *Ujrail*, 3 N W. P 212 In England, to render a dying declaration admissible, the declarant must have been in actual danger of death, he must have been fully aware of this danger, and death must have ensued *Taylor Ev* § 718, *Sussex Peerage Case*, 11 Cl & F 108, *R* v *Curtis*, 21 T L R 87, *R* v *Woodcock*, 1 Leach, 500, *R* v *Osman* 15 Cox 1; *R* v *Gloster*, 16 Cox 471, *R* v *Forester*, It is not necessary

John, 1 East P C 337; *R* v *Woodcock* 1 Leach 500; *R* v *Morgan*, 14 Cox. 337 But in India the statem
was or was not at the time when
v *Digamber*, 19 W R Cr 44,
v *Premananda*, 52 C 987=29 C
dying declarations for under s
facts made by persons who are dead are themselves relevant facts when the statement is made by a person as to the cause of his death and as to the nature
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S. 32. examined in Court before the presiding Judge S 32 provides an exception to ce must be given in Court by the ne sea 1932 Lah 14 Before the passing of the Indi India was somewhat on this point to that of I t XXV of 1861, the declaration of a deceased the deceased, at the time of making such declaration, believed himself to be in danger of approaching death although he 29 of Act II shall be recei declaration, and then thought himself to be in the danger of approaching death,' etc "Both these enactments, then required that, before a dying declaration is received in evidence, it should be proved that the person making it

statement shall be received in ev Tinoo 15 W R 11 at p 13 see 76, *R* v *Syumber Singh*, 9 W point even with the English law entertain no hope of recovery (XXV of 1861) and the old Evic tained a hope of recovery By the present Act it matters not whether existed even any exception of death at the time of making the declaration *Ev* 175; *Empress* v *Blechynden*, 6 C L R 278 A dying declaration made at the time when a person is in a precarious condition does not cease to be and become inadmissible under s 32 of the Evidence Act merely because few days more *Thakur Singh* v *E* =A I R 1929 Lab 64 According declarations are admissible when on died in a hospital after being assaulted o the injuries but was caused by pneumonia s, *held* that the dying statement of such person is not admissible in evidence in a trial of the person who assaulted the deceased under s 324 *Wali Mohammed* v *Emperor*, 126 Ind Cas 311 31 Cr L J 1905 = A I R 1930 Oudh 249 So also where a woman who was alleged to have been raped and who committed suicide three days after the incident was proved to have made a statement shortly after the rape to one of her relations *Held* that the rape not being the cause of death her statement was not admissible in evidence under s 32 (1) *Kappinaiah* v *Emperor*, A. I R. 1931 Mad 1930 M W N 702.

the necessit from any i e the dec' wrong ass to the cause of

(a) Its limitations are heresies of the last century which have no sanction of antiquity They should be wholly abolished by legislation *Ev* § 1436

Subject matter of dying declaration A declaration made by a declarant **S. 3**

Pt 509 The deceased declarant must be the person whose death is subject of the charge *R* v *Meal* 2 B & C 605, *R* v *Hind*, 8 Cox 300=23 L J M C 117 In *R* v *Meal*, the dying declaration of *Law* after giving an account of the circumstances under which he was shot by *Meal*, proceeded to negative his having been present at, or having had any concern whatever in, the smuggling transaction deposed to
delivering the judgn
cannot be received
ed to a confession by the party himself of a very heinous offence he had committed The same observation applies to the case of *Wright* v *Tettler*, 3

of the charge, *and the circumstances of the death the subject of the dying declaration* ' See also *R* v *Hutchison*, 2 B & C 608 (notes) *R* v *Murton* 3 F & F 492 So the statements of a deceased person made prior to his death as to the cause of his death, or as to any of the circumstances of transaction which brought about his death are relevant as against all the accused *Mama* v *Crown* 67 P L R 1905=2 Cr L J 237; see also *Hur* v *Emperor* 81 Ind Cas 964=4 Lah 151 *Wali Mahomed* v *Emperor* 126 Ind Cas 511=A I R 1930 Oudh 749 The reason of the rule is thus stated by *Kingman, C J in State* v *Lohan*, 15 Kan 418 *Mr Pelfield* states that this evidence is not received upon any other ground than that of necessity, in order to prevent murder going unpunished Its admission can be justified only on

an extent, where the death of any one else than the declarant is the subject of the inquiry, as to justify the adoption of rule admitting such testimony ' So the declaration may not concern any and all topics It must concern facts leading up to or causing or attending the injurious act which has resulted in the
supposed necessity for the
foregoing limitations it will
as introduced by *Serjeant*
East in Pleas of the Crown Vol I p 353, where he said Besides the usual evidence of guilt in general cases of felony there is one kind of evidence more particular to the case of homicide which is the declaration of the deceased after the mortal blow as to the fact itself and the party by whom it is committed Evidence of this sort is admissible in this case on the fullest necessity, for it
present to be an eye witness to the
n of other felonies namely, the party
further and equally necessary results

(1) If the killing was not secret, or if other and adequate testimony as to the circumstances of the death is at hand nevertheless the dying declaration is admissible even though in strictness it is not needed

(2) Where the fact of the killing is conceded the dying declaration under the spurious principle is by hypothesis unnecessary, nevertheless, this result is not recognized, the declaration is admitted even where the killing is conceded *Wigmore* § 1435

Where in committing a dacoity the dacoits caused the death of a person the latter's dying declaration as to what was done by those concerned in the dacoity, in which the murder was caused was held to be not only relevant against the person who actually caused the death but also against those concerned in the dacoity *In re P Subbu Tevan*, 2 Weir 750, see also *R* v *Baker*, 2 M & R. 53

S. 32. The dying declaration must
the mouth of a witness—e g, 1
Tay Ev § 720, *R.* v *Sellers*, Carr
be, it must be complete in itself;
to qualify it by other statements, which he is prevented by any cause from making, it will be received *Taylor Ev* § 621. Section 32(1) does not cover only statement made by the person when he is dying from the result of the injury which caused his death but also covers the statement, as to the circumstances of the transaction which r
causing the death was inflicted
50 B 683=28 Bom L R 10
1924 Nag=115, *Emperor* v *Faziz*, 20 P R 1916 Cr.=35 Ind Cas 998=41 P L R 1917, but see *Autar Singh* v *The Crown*, 4 Lah 451=A I R 1924 Lah 253, where it was held that dying declarations are statements made by a dying person as to the injuries which have brought him to that condition or the circumstances under which the injuries were inflicted and as such, statements

person and that treatment is the cause though not the direct cause of the dea
the whole affair, ill treatment and subsequent suicide, forms one transaction and, therefore, statements, made by the deceased, as to the cause of his death are admissible in evidence under section 32 (1) of the Evidence Act *Emperor* v *Faiz* 35 Ind Cas 998=20 P R 1916 Cr =47 P L R 1917. The motive for a crime is of course a rele
Where the statement
reference to the motive
it cannot be deemed
of the circumstances of tl
admissible under s. 8(1)
any act of the deceased

d her make the statement *Venkatsu*
)31 Mad 689 Where the deceased, who had
having wounded him stated that another
u ed, held that such statement was not adm
... 17 P R 1901 Cr. In the proceedings

before a M
witnesses,
prosecution

42=8 C L R. 273 A statement of a witness as to what he heard from

and not by *Surendra Nath*,
574=28 C 39 necessity, i. e that the
injured perso witness and so is likely to
know more or as much about the circumstances of his death than or as any other person So this doctrine does not apply where the object of the trial is to ascertain whether certain persons are the dacoits or not—a matter which has nothing to do with the declarant's death *Nga Te* v *King Emperor*, 20 Ind. Cas 90=14 Cr L J 510

. 25 Cr. L J. 29. "The cases all **S. 3**
a case where the evidence would

observed by him, the in
by the jury so that the witnesses' inferences become superfluous Now since

Ev § 2849, see also *Haney* v *Comm*, 5 Cr Law Mag 47; *R* v *Scaife*, 1 M. & R 551.

Scope of declaration—Emotion excluded. The dying declaration must be
fore, be
cannot
for the
is free
er have
accused
Chamberlayne's Ev. § 2850.

the a
officer
ment in respect thereto is therefore admissible, where deceased was in a position to know the truth Indeed, even where a certain element or degree of inference is necessarily present, *e g*, where the assailant is masked, or in ambush the fact

absent, and the evidence as contained in the dying declaration will be rejected In the absence, however, of evidence on the point, intrinsic or extrinsic the

the statement should directly charge the accused with being the assailant Where dying declaration was as to the identity of the accused, it was held that the declarant might be impeached by showing that the deceased was in the habit of mistaking her friends for persons whom they did not resemble *Chamberlayne's Ev* § 2851

Scope of dying declaration—Inference So far as practicable, administration confines the dying
properly take were he a witne
or judgment, is to be excl
employing it Very plain c
statement by the deceased
that he had been told such was his intention The mental state of a third person is not subject to direct observations The statement of a dying declaration in regard thereto may therefore be rejected as an inference The declarant's own mental state, being a subject upon which he might properly testify as a witness, may, however, be established in this way A sufficient adminis-

S. 32. trative necessity for accepting an inference or conclusion in a dying declaration is furnished where a large number of minute phenomena, often so intangible and interblending as to forbid effective individual statement, are given by the declarant in the form of a collective fact, often the only way in which the speaker can well express himself Thus a declarant may properly state that a given shooting was an 'accident' or that he had been 'butchered' by the mal practice of a doctor, and so forth *Chamberlayne's Ev.* §§ 2852, 2853

Testimonial qualification of the are admissible only as to matters to if sworn in the case *Taylor Ev* declaration of a child of such te doctrine of a future state was rejected See also *R* v *Drummon* 1 Leach C C 338, *R* v *P* *Donnelly* v witness wou in *People* v [illegible] same footing as the testimony of a witness sworn in the case, and are governed by [illegible]

must have h he relates I *ham* are not

where a Court could: npetent was under s, 118 of the Evidence Act *Samaidin* v *King Emperor*, 5 O C 246 [illegible]

time or by conviction of crime, or by subsequent or prior inconsistent sta *Wigmore* § 1446 In *State* v *Thawley*, 4 Harringt. Del 562 general evidence of the declarant s intemperate habits and of his low state of health at the ti [illegible]

himself responsible for his own death or that the fatal result was ca accident or, as the earlier law used to say, by misadventure, may be within the proper scope of a dying declaration and even add to its probative force To be received in evidence a self-disserving statement must, however, fulfil the con tions laid down for the reception of a dying declaration *Chamberlayne's Ev* §§ 2816, 2817

Form of dying declaration The f[illegible] in making a [illegible]

S. 32

been inflicted on her, that she was at that time unable to speak, but was conscious and able to make signs. Evidence was offered by the prosecution and admitted by the Sessions Judge, to prove the questions put to the deceased, and the signs made by her in answer to such questions. *Held* by the Full Bench (*Mahmood J* dissenting) that the questions and the signs taken together might properly be be regarded as "verbal statements" made by a person as to the cause of her death within the meaning of s. 32 of the Evidence Act, and were therefore admissible in evidence under that section. *Queen Empress* v. *Abdulla*, 7 A 385 (F. B)

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questions put, it is admissible in evidence. In such cases, however, the statement should be a true record of what in point of fact occurred, and should bear on its face the questions put and the nature of the gesticulation made in response. *Butta* v *Empress*, 2 P R 1886 Cr. Where a person whose throat had been cut as a result of which death ensued later, made certain gestures in reply to questions put by the police. *Held*, the gestures were admissible in evidence. The interpretation of the gesture is for the Court alone and the opinion of witnesses as to their meaning is not evidence. *Chandrika* v *Emperor* 1 Pat 401=3 Pat L T 771=(1922) P 535=71 Ind Cas 353. Where shortly after the deceased had received the injury a Magistrate proceeded to record her dying declaration in the hospital and although she could not speak in answer to questions put to her pointed out the accused as the assailant. *Held* that questions and answers taken together might properly be regarded as verbal statements made by a person as to the cause of her death within the meaning of section 32 of the Evidence Act and were therefore admissible. *Emperor* v *Sadhu Churn*, 26 C W N 111=49 C 600=A I R 1922 Cal 109=77 Ind Cas 993; see also *Ranga* v

Ev § 152 (b), *Mocabi*

Steele, 12 Cox Cr C

Patchatt his story, then when dying and being asked what happened, he said, "Tell him, *Patchatt*" and *Dr Patchatt* reported the story in declarant's presence. In admitting

it 'himself'

declaration

a deceased

shown by the witness to have reference to the infidelity of deceased's wife. *Chamberlayne's Ev* § 2811. So it is clear that dying declarations may be communicated by any adequate method of communication whether by words or by signs or otherwise provided the indication is positive and definite, and seems to proceed from an intelligence of its meaning. *Wigmore* § 1445

nd answer is not admis

and so must the questions

seem to me to be useless

been made for another purpose as the message to the wife of the injured man. No requirement is imposed, for example that the declaration should all have

the deceased to give out names of certain accused ... unsafe to attach any weight to such a dying statement. *Bishan Singh* v *Crown*, 8 L L J 296=96 Ind Cas 215=27 P L R 181=27 Cr L J 903=A I R 1926 Lah. 196.

First Information Report. The First Information Report is admissible under this section as a dying declaration where it is the statement of a person

32. who is since ... which resulted in death *Ka* ... J 475=A I R. 1930 Lah ... ; *Gayan Singh* v *Emperor*, A. I R 1931 Lah 103=1931 Cr C 167.

... ing declaration is admissible ... admissible even when the charge is ...

of ...

of I ...

... *Evidence Act* ... R Cr 75, that ... of English ...

A dying ... charged with the offence of homicide *Dusadh* v *Emperor*, 6 Pat ... Cas 698=29 Cr L J 106=A I R. 1928 Pat 162.

Dying declarations made by an accomplice The dying declaration of an accomplice is admissible where the prisoner is charged with assisting the accomplice to commit suicide. *R* v *Smith*, (1897) 18 Cox 470, *R.* v *Bexley*, (1906) 70 J P 263, *R.* v *Stevens*, (1904) 4 N S W State Rep 727; Russ Cr ... *R.* v *Tinckler*, 1 East P C 353 In *R.* v *Jessop*, 16 Cox. 204, on an indictment charging with murder the survivor of two persons who had agreed to commit suicide together, *Field J* admitted statements by the deceased, made when purchasing poison in the absence of the prisoner, on the ground that the acts and words of the deceased in carrying out a pre arranged plan were evidence against the prisoner Dying declarations in favour of the party charged with ... an influence on the ... 2 Lew 150, *Archbold's* ... accomplice, as in an ... v *Sadler*, (1911) ... cumplice incriminat... admissible under the ... clause but is admissible under clause (3) *Sheik Shafi* v *Emperor*, A. I R 1930 Nag 259=124 Ind Cas 459=31 Cr L J 661; see also *Umra v. Emperor*, A I R 1925 P C 52=6 Lah 45=52 I A 121 P. C.

Proof of dying declaration A dying declaration may be either verbal or written A verbal dying declaration recorded by a Magistrate cannot be accepted in evidence, when it has not been proved by taking the statement of the Magistrate *Sha* ... v *Crown*, 17 P R 1911 C ... P. R 1912=14 Cr L J 131 ... 18 Ind Cas 883 When what purpo... person is not taken down by the com...

... *Haider Ali*, S C 29 ... the dying declaration of a deceased ... is admissible in evidence ... is to put in the document itself and ... not to allow him to give evidence orally as to ... C P L R Cr 14. So a dying declaration ... certified in Court that he had recorded it ... proof of its own contents, and it is unnecessary that the person who recorded it should repeat exactly what was said *Partap Singh* v *Emperor*, 7 Lah 91=92 Ind Cas 167=27 Cr L J 215=A I R. 1926 Lah 310, *Emperor* v. *Balaram Das*, 49 C 358=A I R. 1922 Cal 332

Wh... may arise whether it is his narration ... ed or otherwise approved it after ... may be offered as his dying declaration ... the written statement of the pers... The dying statement of a deceased ... accused; if not so taken,

S. 3

the writing cannot be admitted to prove the statement made The statement may be proved in the ordinary way by a person who heard it, and the writing may be used for the purpose of refreshing the witness's memory *Empress v Samiruddin* 8 C 211, *Sarat Chandra v. Emperor*, 52 C 116=88 Ind Cas 860=26 Cr L J 1211=A. I R. 1925 Cal 821 A declaration made by a person in expectation of

relevant fact to be proved was the statement made by the deceased person admissible under section 32 of the Evidence Act That statement is not the document

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section 512
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g at liberty

to refresh his memory by referring to the note made by him or read over by him at or about the time the statement was made I would lay stress upon this because in many cases irregularities of this nature have led to a miscarriage of justice or to great delay in the trial of cases I may note that the record by the Magistrate is in English It clearly does not contain the exact words used by the accused which alone would detract considerably from its value as a true

v. *Emperor*, 67 Ind Cas 577=23 Cr L J 417=1 U P L R (L) 43 *Gowindas* v *Emperor*, 2 Ind Cas 841=36 C 659=13 C W N 680=10 Cr L J 186 A dying declaration was recorded in the presence of a witness, read over to the deceased in the presence of the witness and admitted by the deceased to be correct If the witness, who heard that statement swears that the written statement correctly reproduces the words used by the deceased, that is sufficient to prove that the deceased did use the words contained in that statement *Emperor* v *Balaram* 49 C 358—(1922) A I R 387 A dying declaration recorded, in the absence of the accused, by a Magistrate, who held the enquiry preliminary

289 P L R 1912=18 Ind Cas 883 The proper method of proving the oral
stat ... heard it
that ... otes he
mac ... r L J
243 ... 1129
In ... should
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S. 32. the presence of the witness, the witness would be entitled to refresh his memory if he so wanted, by referring to such writing; otherwise the writing itself is not relevant unless it is in the nature of a deposition taken in the presence of the accused Where the deceased dictated his statement and it was taken down and he then signed the statement after being satisfied as to its accuracy such writing may be regarded as a statement of the deceased in writing admissible under s 32 of the Evidence Act But even if what was stated was taken down by some one in writing a
witness who heard the
And ordinarily it would
to reproduce from memory what he heard the deceased stated in addition to

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with the questions have been held to be verbal statements If written precise statements made should be proved either by the person who recorded or by some one
mere signature
there must be
dying declarat
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deceased also
and the dying
person who re
there can be no
was not read
inadmissible
M L J 404 Although a dying declaration is not recorded in writing evidence of what the deceased said is receivable *In re Hanumadu* 2 Weir 753,
Weir 753, A statement made by the deceased t cannot be used in evidence
ed as a witness *Lachmi v Emperor*, 3 ... A statement of a deceased person as to ... in case of his not having a ... *Raj Kumari v Sita Prosad*, 12 C L J ...
95 Ind Cas 385 Dying declaration of one dacoit about circumstances of dacoity is not admissible against other dacoits *Dannu Singh v Emperor*, 87 Ind Cas 613 = 26 Cr L J 517 = A I R 1925 All 227

Section 164 of the Criminal Procedure The deceased made a full statement, about an assault which resulted in his death, before a Third Class Magistrate The statement was not taken into consideration by the Session ... not competent to ... *Jijhi v Emperor* ... statements made by ... where the case ... Magistrate who

recorded the statements was empowered under s. 164 is immaterial *Rahman* v. **S.** *Emperor*, 131 Ind. Cas. 117 = 32 Cr L J 1118.

Rule of Preferring Written Testimony. "The principles which determine whether a written report of another person's statement is to be preferred to oral

examination; for such a person has no duty or authority by law to report dying declarations, and it would be solely by virtue of an express duty that a Magistrate's report could be preferred to other witnesses (b) When a written memorandum or report thus made is read over to the declarant and signed or assented to by him, the writing thus becomes a second distinct declaration by him. The first oral statement is not merged in the latter written one, because,

(c) Where the declarant makes one oral statement, and afterwards at another time a second statement, the latter being in writing or reduced to writing, there are here two distinct statements, and either one may be offered without testifying to the other; for the principle of completeness requires only that the whole of a single utterance should be offered together, and in the present instance the

theless making

It is thus clear

written one has

been proved; (2) that, even before or without proving the written one, the separate oral ones are admissible —though on the latter point the Courts are not always explicit' *Wigmore* § 1450, see also *R* v *Reason and Tranter* 16 How St Tr 83 In that case *Pratt L C J* said 'You know in the Court of Chancery when the party is examined on his oath, he gives in a first answer

the same person that enquired of him before, and all this is done in order to perfect and consummate the examination whether you will not take them both together as one entire account given by the deceased?' In the same case *Fortescue J* observed "I think we should allow what was said at other times to be given in evidence, because the first is no examination, because no Justice of the Peace was then present, so that the examination stands distinctly by itself' The opinion of *Fortescue J* prevailed *Wigmore* § 1450

Evidence Act, to corroborate his evidence *Emperor* v. *Ram Sattu*, 1 Bom L R 431

. 32. Stage at which dying declaration should be made The necessity of recording a dying declaration arises only when the hopes of life of the man are given up. *Upendra* v *Emperor,* 129 Ind. Cas. 676=32 C L J 425

nglish and American following (1) The all deceit'. There be furthered (2) If a belief . Higher Power upon human ill doing, the fear of this punishment will outweigh any possible motive for the p tion, and will even counter balance the inclination to gratify a possible spirit of revenge (3) Even without such a belief there is a natural and instinctive awe

to be shown (profane language) was important in another point of view It sits at the very foundation of the reasons upon which dying declarations are admitted at all There are certain guarantees of the truth of dying declarations, growing out of the solemnity of the time and circumstances under which they are made

. It was clearly the right of the accused to show . . that the deceased in making the statement was not in that frame of mind which the law presupposes and requires in such cases that the deceased was in a reckless irreverent state of mind and entertained feelings of ill will . . towards the accused"

Secon

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child

in her mind could have had that idea of a future state which is necessary

was received Here heaven if he told the truth"

under English and American law *Vide Woodcock's Case,* Leach Cr

Nicholas "When I

rule of the Jury I

think I ought not . . . fully convinced that the deceased was in suc appears from the recover, as he was kind who have no conviction that their death is near approaching, and that the deceased . . . felt that his end was drawing very near, and that of his

I think there is no sufficient proof that he was without any hope and that I, therefore, ought to reject the evidence." But even in cases where the guarantees of the trustworthiness of dying declarations are present, we

must receive it with certain degree of caution It may be seldom that a dying **S. 3**
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generally given by relatives and friends of the deceased who had watched by his bed side, and bias in his favour is to be expected And even if given by police officers it should be carefully scanned The declarations are liable to be misunderstood, and to be reported by an unfaithful memory, especially if much time has elapsed since they were made, and the evidence goes to the jury with
mind emotions of deep sympathy
against the accused There is
credulous of the entire integrity of
clarant is apt to make his own
...se and to be rid of the importunity
and annoyance of those around him, he may say whatever they choose to suggest So, too, as respects the declarant's statements, it is to be remarked that many persons, even in serious conversation, assert as facts those things of which they have only strong convictions and not knowledge derived from senses If the declarant related his opportunities for observing the facts stated and they appear to be ample, this would add to the
repeated his statements rationally and
speech" *Moore's Weight and Value o,*
After a dying declaration, or any other e
to be given to it is a matter exclusiv
not believe it, '
by rules of law
to have been c
though they do suppose him to have been thus conscious they may still not believe the statement to be true In other words, their cannons of ultimate belief are not necessarily the same as the preliminary legal conditions of admissibility whose purpose is an entirely different one *Wigmore* § 1451 In deciding as to its credibility the jury should consider all the evidence in the case, including any which may have come to their attention during the preliminary hearing on *voir dire* The credit which the jury may be disposed to give may
one of fact, on the
So, as to whether a
duress is a question
for them The jury may reasonably find that the probative force of the dying declaration is increased by the fact that the speaker is not possessed in favour of his own side of the contention The facts stated in a dying declaration thus seem to be not conclusive upon the jury *Chamberlayne's Ev* 2838

Weight for the Jury—Impeachment When the statement of a witness previously made is used as evidence under the provisions of this section then any other statement made by that witness can be used by virtue of s 158 for the purpose of contradicting that witness as if such witness had appeared in Court

S. 32 is clearly within the rights of the accused. The effect, however, of the most conclusive demonstration of the falsity of the dying statement in some particular as where the declarant enumerates among his assailants one who could not have been present, does not affect the adi . . . only its weight The accused may . . . declaration by showing that the . . . other times *Niamat v Emperor*, A. I R 1930 Lah 409=31 P. L. R. . . . *Indeed, it is his right to establi h that fact if it is within his power to do so* The existence of such inconsistent statements, even that of a contradictory dying declaration does not warrant the rejection of a . . . in evidence or require that it be striken out, . . . probative efficiency of the latter Should it . . . may, relies upon a dying declaration of the d . . . to impeach the latter in any way appropriate to a witness *For this purpose* . . . may show, if it can that the declarant has made inconsistent or contradictory statements

The accused may at all times introduce evidence tending to show that the deceased was without a proper sense of moral accountability, or that a sense of impending death would fail to clear his mind of bitterness or falsehood leaving a controlling desire to tell the truth That he was in the habit of using profane or indecent language or suffered from other moral *obliquities e g*, the habit of drinking intoxicants to excess, may be shown Conviction of crime may be a relevant fact in such a connection Similarly, while evidence is not admissible to establish the general bad character of the deceased, the accused may prove as he *might in case of a witness, that th* . . . believed and that this reputation for truth . . . where he resided That the actual state of mind . . . accused at the time of making his statement was one of great animosity, recklessness and thirst for revenge is also a relevant fact Lack of belief in a future state of rewards and punishments naturally affects, as has been noticed the . . . arant and *the fact* may be . . . the credibility of his state . . . *Disbelief of such a nature* will not be assumed but must be affirmatively shown. *Chamberlayne's Ev* §§ 2864, 2865, 2866.

Mental state of the declarant. To enable the jury properly to judge of the probative force of a dying declaration, the jury are entitled to be fully informed of the circumstances under which it was made Prominent among these is the mental condition of the declarant. This they are entitled to view from all angles, reaching a conviction of their own as to an actual sense of impending death experienced by the declarant at the time of making his statement and as . . .

[illegible]

. . . declaration to be admissible, must have been the utterance of a s . . . *Chamberlayne's Ev* § 2867.

Value of . . . value of dying declarations in . . . *nanda*, 29 C . . . important · 'In the case of a dying declaration which by the law of . . . assumes a character very widely different from what it is under the English Law, which is relevant under the Evidence Act, whether the person who made it was or was not at the time when it was made under expectation of death, and the weight to . . . expectation of death which is a guarant . . . which it w . . . made of it, . . .

be relied upon or not" So statements made by a dying man relating to the cause of his death are admissible in evidence against person causing his death, but too much reliance cannot be placed upon the details of such statements as they are hearsay *Emperor* v. *Sadhu Bena*, 76 Ind Cas 389 It is not safe to base a conviction on the uncorroborated dying declaration of a deceased person, for it is well known that the inhabitants of the *Punjab* will often in a dying declaration not only accuse the actual offenders but will also include the names of other enemies. *Bakhshish Singh* v *Emperor*, 86 Ind Cas 826 = A I R 1925 Lah 519, see also *Stephen's History of Cr Law* Mr Justice Stephen also said **S.**

known in the *Peshawar* division that a dying declaration as to the cause of the declarant's death is admitted in proof of the matter stated The effect of this was that whenever a man was mortally wounded, and found himself dying (

This is very far indeed from the way in which a dying Punjabee looks at the subject His ... of doing ... uss it' ... When ... alue of his dying dec ... as 322 'Dying declar ... rule in England Very often the murdered man himself, before his death implicates every male member of his su

... *n Madappa Kone*, ... trustworthy dying ... of the faculties and proved by the clearest and most reliable evidence to be the exact words of the person making it, and corroborated by the surrounding circumstances, is sufficient to support a conviction for murder under s 302 I P Code *Karim Khan* v *Crown*, 4 P W R 1909 Cr = 9 Cr L J 156 = 1 Ind Cas 100 But a Court sh... violence ... confusion ... deceased

Crown, 117 P R 1866, *Sher Ali* v *Crown*, 8

202 N Y 494 (500) Much weight must be given to the dying declaration recorded by the Magistrate where it is supported by the consistent evidence led on behalf of the prosecution *Sawan Singh* v *Emperor* 10 Lah L J 281 It ... cts itself in its various ... for the sake of argument ... such declaration is for all practical purposes negligible *Inayat Ali* v *Emperor*, 108 Ind Cas 526 =

32.

dent corroboration of facts and circumstances to prove that offence *Ballu Singh* v *Emperor*, A I R 1929 Pat 249 In England questions of admissibility arise chiefly with respect to the mental condition of the declarant. To make such declaration admissible in England there must be a "settled hopeless expectation of death not qualified by any prospect of recovery, however slight. In India they are n . [illegible]
under the section ; [illegible]

[illegible] h, that statement is relevant [illegible] not entitled to particular [illegible] after the occurrence it may [illegible] for his friend to suggest falsehood But if the man is in bed in hospital for four days after the event and a month before he dies and makes a statement, that statement carries no more weight than if he made it in the witness box, and rather less, because he has never been cross examined Under these circumstances it is incumbent on the [illegible] corroborated

[illegible]

Dying [illegible] regarded as [illegible] to questions, [illegible] & P 238, [illegible] 711, *R.* v *Bottomley*, 118 L T 88; *R* v *Fitzpatrick*, 46 Ir L T 173 [illegible] But in *R* v *Mitchell*, 17 Cox C C 503, *Cave J* said "Where a statement is not the *ipssima verba* of the person making it but is composed of a mixture of questions and answers, there are several objections open to its reception in evidence, which [illegible] in cases in which the person has no oppor [illegible] may be leading q[illegible] declaration there is [illegible] without their force and effect being freely comprehended In such circum[illegible] what the form of the declaration should be such [illegible] was the question and what was the answ[illegible] suggested by the examining Magistrate and how much was [illegible] person making it ' See also *R.* v [illegible] *Smith*, [illegible] 17 T L R 552 On the other ha[illegible] *L J.* [illegible] 311 = 115 L T J 88, *Lawrence* [illegible] the form of question and answer was admissible, although the answers only and not the questions had been taken down In *R* v *Corbit*, (1903) Queensland St. Rep [illegible] *Griffith C J* said, that *R* v *Mitchell*, unsettled what had before been the law and followed *R* v. *Smith* saying further that it is not essential that a dying declaration should be proved by [illegible] Pleadings 24th Ed [illegible]

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Ind [illegible]
is [illegible]
to c [illegible]
the exact [illegible] statement when
W. N 72 [illegible] d contains a note
[illegible] ed told the police *Emperor* v *Sikandar*, [illegible]
[illegible] *patric* (1910) 16 Ir L T R 173, it was [illegible]
[illegible]
the weight [illegible]
the examinat[illegible]
gating a wit[illegible]

the value and credibility of the declarations. Therefore, it is no objection to their admissibility that they were made in answer to leading questions, or obtained by pressing and earnest solicitation *Russ Cr.* 2092; *R* v *Reason*, 1 Str. 499; *R.* v *Woodcock*, 2 Leach. 51; *R* v *Welburn*, 1 East P. C. 358; *R.* v. *Smith*, L & C. 607, *R.* v. *Steele*, 12 Cox. 168, *R* v *Whitmarsh*, 62 J. P. 683, 711. S.

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expressed by the declarant; it must be complete as far as it goes. But it is immaterial how much of the whole affair of the death is related, provided the

§ *1448* Administration by no means requires that the extra judicial statement

to appear, the dying declaration will be rejected as incomplete *Chamberlayne's*

26 Cr L J 1256 = 52 C 987 It must be taken as a whole and a portion of it cannot be allowed *Rafiz* v *Emperor*, A I R 1930 Cal 211 = 50 C L J 584; 22 M. L J 435

prisoner there seems no reason to doubt the propriety of admitting a dying declaration which is in favour of the prisoner Indeed, almost every case of man-slaughter, in which such declarations have been admitted, is an authority

him, but rath
"Owing to
for homicide
it has sometimes been argued that the declaration cannot be used by the accused But the argument has no foundation whatever, and has been generally repudiated' *Wigmore Ev* § *1452*, see also *Mattox* v *U S*, 146 U S 151, *Moore* v. *State*, 12 Ala 767; *People* v *Southern* 120 Cal 645, *Com* v *Bednorcik*, 264 Pa 124

Nature of dying declarations " Where statements are made by the deceased at different times, all may be proved as his dying declarations if all are

administrative precedence over the remainder. And one among several written statements may be proved without producing the others Naturally, there is no

S. 32 preference between oral statements made under similar condition at different times' *Chamberlayne's Ev* § 2847

Dying d
captured in
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the circumstances causing his de ...
admissible to prove his own participation in the dacoity but was not admissible against the other accused *Damun Singh* v *Emperor*, L R 5 A 201 Cr When the declaration of a person wounded by the accused in committing dacoity was made on the 13th August 1899, and he died on the 20th of that month and there was no other evidence
wounds received at
his death, the High C
in evidence *Imperatrix* v ... In a case of murder the staten
presence of a head
1872, that section
who made the stater
tion of death *Qu*
certain statements relating to the cause of the
the investigation of a criminal case, *held*, th
Bahawala v *Empress*, 17 P R 1886 Cr A
was dying at the time he made it is a dying
term and is admissible under this section, the
lingered for six days afterwards and then died *Thakar Singh* v E... A I R 1929 Lab 64 = 10 L L J 163 The statement of a deceased person was recorded in the absence of the accused Subsequently in the presence of the accused, the statement was read over and the accused were allowed to cross-examine the dying person *Held* that the statement was not a dying deposition ... under s. 33 of the Evidence Act, and was not admissible under section 32 (1) unless it was proved by examining the Magistrate who recorded it or some one who heard it made *Nga Po* v *Emperor*, 14 Cr L J 396 = 20 Ind Cas 2... Bur L T 68 The statement of a deceased person that she was confined in the house of an accused, that H was keeping watch over her and that another accused had raped her on account of which she had become pregnant and that they were getting ready to give her medicine to miscarry and so to put an end to her life is admissible under s 32 (1), as a statement made by a person as to the circumstances of a transaction which resulted in her death in a case in which the cause of death comes into question *Wahid Bux* v *Emperor* A I R 19... Sind 250

CLAUSE II

facts asserted oral declarations ... C 277 ... here ... Engl...

namely (i) the necessity th ... a person having personal knowledge, (ii) that it should
entry of any collateral fact
person entering it to record
the Legislature, so that Co
any evidence which falls within the terms of the present section ...
Ev 163

Principle. ... with clause (a) each
evidence is admi ... ely, (1) the ...
principle, and (2) ... *of Trust* ...

Necessity principle On the principle of Necessity this exception ... the use of statements by persons whose testimony, though not necessarily the sole evidence available on the subject, is yet the only testimony now available

S. 3

affords the greatest security for truth Their declarations verbal or written, must, however, sometime

in order to prevent a f

absconded and can no longer be traced, his extra judicial declaration made in the course of business or official duty will be received in evidence *Chamberlayne's Ev* § 2879 Section 32 provides that written or verbal statements made by a person who is dead or cannot be found are relevant facts in certain cases *Rama Swami* v *Rama Nandan*, 22 Ind Cas 627=(1914) M W N 240=1 L W 136.

ments fairly trustworthy

(1) The habit and system of making such a record with regularity calls for he influence of racies and to *Dicas*, 1 Bing what is false, ly incurred

accuracy

(3) If, in addition to this, the entrant makes the record under a duty to an employer or other superior, there is the additional risk of censure and disgrace from the superi powerful and *Tindal C J.* sai

ould be likely hich the entry false would 'or Ev § 697, layne's Ev. §§

2888, 2892

32. Section 32 imposes restrictions upon the admissibility of statements made by persons who cannot be brought before the Court to give their own evidence The object of those restrictions an
principle of legal evidence being
follows that where persons can be
what they know at first hand
of cross-examination Where however witnesses cannot be brought before the Court, their previous statements are at best indirect evidence, of a kind that
The conditions which
, are imposed upon
s truth As there is
to be no chance of testing a man by cross examination his statement will not be admitted unless it has been made under conditions which, looking to the ordinary course of human affairs raise pretty strong presumptions that it was a true statement Thus the whole scope and object of section 32 centre upon securing the highest degree of truth possible in the circumstances for the statement.' Per *Beaman J in Sethna* v *Mirza* 2 Bom L R. 1017 at p 1048

Statement made in ordinary course of business This clause provides that a written statement of a relevant fact made by a person who is dead is itself a relevant fact
ordinary course of bu
the exact meaning
more than one place
the existence of any course

4 Camp 193 The course
plaintiff s counting house
methodical cannot carry the
So too by section 114 the
it thinks likel
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transaction or trade Again in the explanation to section 47 it is said
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none of
or (as in banks) from hour to hour as transactions take place These
said) are, I think regularly kept in the course of business '

Having regard, then, to the above considerations there can, I think, be no doubt that the expression 'in the ordinary course of business' in section 32(2) must be read in the same sense It may in one sense be true that it is in the ordinary course of business, for a mortgaged deed to contain recitals of the boundaries of the land mortgaged But that would not make the recitals evidence The question is, whether the mortgage deed itself is a statement made in the ordinary course of business Looking at the particulars set out in clause (2) of section 32 the nature of the statements 'made in the course of business

looking at the sense in which the expression is apparently used in other sections **S. 3**
ed deed executed by an
fession, trade, or business'
Act) of an agriculturist
a v *Bharmappa*, 23 B 63
at pp. 65-67. In the same case *Fulton J* at p 70 observed 'It can hardly be said that the execution of a mortgage deed is an act done in the ordinary course of business. Doubtless when a person has determined to mortgage his land, the

v. *Jeonandan*, 13 C. W. N. 71) The phrase was apparently used to indicate the current routine of business, which was usually followed by the person

W. N 71.

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Mass 481, *State* v *Phair*, 48 Vt 378; *Due* v *Sayer*, 29 Me 119 So also in America and Englar
"This may be defined
performed in one's
mode of obtaining a l
of doings kept merely for one's personal satisfaction, but it would not exclude

admitted Similarly in *R* v *Cope*, 7 C & P 726, an endorsement of service on an order of the aldermen, the writer s duty being to serve orders and endorse

C L J 155 Where account books are admitted in evidence before the Commissioner under section 32 of the Evidence Act, as having been kept in the ordinary course of business by persons deceased, it is in the discretion of the Court to hold that they are sufficient evidence of the transaction to which the entries *and* 10 Bom
L R. 81 unately die l
before 1 32 (2) of the
Evidence Act as being statement made by a dead person in the ordinary course of business and in the discharge of his professional duty *Mohan Singh* v.

S. 32. *Emperor*, I L R 6 All 49=55 Ind Cas 647=26 Cr L J 551—A I R 19.. All 413 *Jama wasil baki*, and *Jamabandi* papers can be admitted in evidence under this clause but it must be clear that the persons who made them are dead and that the papers were made in the ordinary course of business An entry as to the rate of rent cannot be distingui hed from other entries therein as are not made

... one, nor even that it should be a secular one, it follows that a register ... marriages or the ... , is admissible *Kennedy* ... *Doyle*, 10 All Ma ... "An entry made in performance of a ... aluable than one made by clerk, or messenger or notary or attorney or solicitor, or a physician in the course of his secular occupation "

A deed of conveyance was tendered in evidence which purported to b... the mark of G, as vendor, and which was duly attested by four witnesses ... however, denied that she had ever executed the deed, and said that the mark w... not hers All the attesting witnesses were dead A witness was called who kn...

... B 690 In a suit to recover loss sustained on the sale by plaintiffs, of goods consigned to them by the defendant for sale by their London firm account ... are good *prima facie* evi... sub tantive evidence put fo...

... 26 Bom 253 Entries in ... *jajman* cannot be admitted un... this section as the register is not of such a character as to enable the Court ... pronounce affirmatively ... the ordinary course of business *Ma*... C)=16 M L J 511 ... mark is that of the executant is admissible in evidence under this clause ... the writer is dead and it is proved that the document is written by him. *Lab*...

... v *Rangayan*, A I R 1923 P 111=67 Ind Cas 57 Where a family pe... was sought to be proved by books kept by a family chronicler, *held* that und... section 32 (2) they would be admissible as books kept in the ordinary course of business by a professional ... such a book *Mohan Singh* v ... Ind. Cas 235; see also ... *Gobind*, 48 Ind Cas 375 But entries in the diary of a deceased ... relating to birth and death are not admissible under this clause ... *Gobordhan*, (1919) Pat 352=37 Ind Cas 421=2 Pat L J 42

Statement includes verbal statement The statement may be written or verbal (vide s 32) The general prevailing doctrine in America requires the declarations to be in writing; the exception relates to entries strictly speaking and does not extend to oral statements *Wigmore* § 1523 In England, however, it seems settled that an oral statement is equally admissible ... *Sussex Peerage Case*, 11 Clark & F. 85, *Lord Campbell* says at p 113 "By the law of England the declarations of deceased persons are not generally admissible unless they are against the pecuniary interest of the party making them. There are two exceptions First, where a declaration, by word of mouth or by

writing, is made in the course of business of the individual making it, there it may be received in evidence, though it is not against his interest" See also *Stapleton* v. *Clough* 2 El & Bl 933, 937; *Eddie* v *Kingsford*, 14 C B 759 (763) In *Reg* v *Buckley*, 13 Cox Cr Cas 293, which was a trial for murder, the prosecution offered to show the verbal report of the deceased, who was a constable, to his superior officer as to where he was going on the night of the murder. It seems he had reported that he was going to watch the accused, who on a previous occasion had been convicted of larceny, chiefly on the evidence of the deceased It was held admissible But in a recent case it has been held by one English Court, that a declaration made by a physician

. ssible, and it

. . *uson*, 22 T

. . . . *Review* 301

. Since in that

jurisdiction the third motive of trustworthiness (vide *supra* under the head circumstantial guarantee of trustworthiness) is regarded as most important, and the statement must be made under a duty to a third person, it may be conceded that an oral statement would be scarcely inferior to a written one in trustworthiness In this country, however, where that limitation does not obtain, the trustworthiness of an oral statement would seem to be far inferior to that of a written one, especially as affected by the second reason for the rule (*vide supra under the head circumstantial guarantee of Trustworthiness*) Nevertheless, in the actual conduct of business by subordinates in mercantile or industrial houses (practically the only class of persons by whom oral reports are regularly made), the elemer where it

does exist . English

, there is

written statements and of the

. . made in most of the other

exceptions" The words 'and in particular" in s 32 (2) seem to point to the superior force of written over verbal statements *Nort Ev.* 177

Section 32 (2) and section 34 In *Rampyaribai* v *Balaji*, 28 B 294=6 Bom L R 50, the plaintiff relied on entries in the hand writing of her deceased husband kept in the ordinary course of business The lower Court rejected certain items for want

the judgment observed

support of her claim

The accounts are relevant both under section 34 and under section 32(2) of the Indian Evidence Act, 1872 The learned Judge has considered that corroboration

the accounts without corroboration the only point being that the law does not require corroboration ' See also *Musst Rani* v *Firm Bahadur*, 62 Ind Cas 946 So also where entries in *Jama bandi* papers began over 70 years before the action was tried, the presumption was that the person who made them was dead and could not be called and as they were made in the ordinary course of business by the land-lord's agents, they were relevant without any corroboration, as evidence against the tenant under sub section (2) of section 32 of the Indian Evidence Act which does not require corroboration as under section 34 *Dhukha Mandal* v.

. 32.

persons who [illegible] Chantar v Kailash, 44 Ind [illegible] ers may be evidence u [illegible] they can be admitted, a [illegible] is dead and the entrie [illegible] med th v *Nawab Khaja Habibulla*, 31 C L J 68=47 C. 266=56 Ind Cas. 38, *Dulu v Jogadish*, 90 Ind Cas 564=A I R 1926 Cal 359 *Jonah Biswas* v *Sita Kumari* A I R 1927 Cal 855 But in *Gopesuar* [illegible] Cal 854, *Mr Justice Mookerji* said "The [illegible] entry relevant under s 34 and one relevant under s 32 cl (2) [illegible] former case the person who made the entry may be available as a witness while in the latter case he is not I find it very difficult to appreciate on what ground the legislature could intend to exempt entries relevant under s 32 cl (2) from the disability that it imposed on entries relevant under s 34 by the second part of that section, and personally I have always felt inclined to take the view that such entries, no matter whether they are relevant under the one section or under the other, are not to be considered as alone sufficient to charge any person with liability"

English Law A declaration is deemed to be relevant when it was made by the declarant [illegible] the discharge of professional duty [illegible] 3 B & Ad 82 [illegible] irrelevant ex[illegible] the ordinary [illegible] by a person duly authorised to make them *Steph art* 27 The leading [illegible] this rule is the case of *Price* v *Earl of Torrington*, 1 Salk 285=2 Smith L C 320 The short report of it in *Salked* is as follows "The plaintiff being [illegible] the *Earl of Torrington* for beer sold and [illegible] to charge the defendant was, that the usual [illegible], that the draymen came every night to the clerk of the warehouse and gave an account of the beer they had delivered out which he set down in a book kept for the purpose, to which the draymen [illegible] their names, that the drayman was dead but this was his hand set to the book, [illegible] and this was held good evidence of [illegible] singly, without more' That cas[illegible] Previous to that in *Pitman* v *Maddox*, 1 Lord Raym, [illegible] Judge the plaintiff produced [illegible] shop book written by one of [illegible]

to be good evidence within the year alone *Thayer Cas. Ev* 511

Origin In England, formerly a party to an action was not permitted to testify in his own behalf An apparent exception to this rule, however ex[illegible] in the application of the so called "shop-book rule" In early times in England parties were permitted to show, by entries made in their books, the sale of goods or performance of labour, [illegible] doctrine that a Statute of 7 Jac 1, C 12 was pas[illegible] The relevant portion of the [illegible]

before the same action brought, except he or they, their executors or [illegible]

tors, shall
said debt,
or admini
year next after the same wares delivered, money due for wares delivered, or work done" Later developments narrowed the rule to the cases where the entries
less, seemed to
be a witness
ntries made by
he entries was
required by the clerk who made them, if living and within reach; if he was not, proof of his handwriting was considered sufficient *Pitam* v. *Maddox*, 1 Ld. Raym 732; *Price* v. *Earl of Torrington* 2 Ld Raym 873 The rule with respect
as evidence through no absolute necessity, but by reason of a presumption of necessity only, inferred from the nature of commerce' See also *Woodnath* v *Lord Cobham*, Bomb 180, *Ford* v. *Hopkins*,
continued to go in, when the entries were the
dead. There is reason to think that the
when made in a stranger's books grew out of the practice in the case of a party's own "shop books' *Thayer Cas Ev 509*

jected on the ground that
he is responsible *R* v
558, *Trotter* v *Maclean*,
on v *Walmesley*, (1904) 2
d surveyor, employed by

en a duty to do the very thing
recorded *Smith* v *Blakey* L R 2 Q B 332 See also *Iolens* v *Gray*, L R. 12 Ch D 411 *Lyell* v *Kennedy* 35 W R. 725, *Sturla* v *Freccia*, 5 App Cas 623 In *Chambers* v *Bernasconi* 1 C & J 451, the Court rejected the

which the person is employ
the entry relates, and then

S. 32. the duty must be proved by other independent evidence *Bright* v *Lefroy* Deg F & J at p 614 *The Henry Coxon* 3 P D 156, *Doe* v *Turford* L R Q. B at p 332, *Pete*
R 347 Personal c
towards any person
of costs delivered by him are not admissible on the ground that it was his duty to keep proper books, or that they were made out in the course of duty *Poe Ev* 321 see also *Bright* v *Lefroy* 2 Deg F & J at p 617, *Hope* v *H* (1893) W N 21, *Ecroyd* v *Coulthard* (1897) W N 25, *contra Rawlins* v *Richard* 28 Beav 370 The acts must have been done by the declarant and not by third person *Smith* v *Blakey*, supra, *Ryan* v *Ring* 25 L R Ir In *Polini* v *Gray* supra, *James* L J held that entry must not be to some thing said learned or ascertained by the declarant, but something done by, or to him and in *Lyell* v *Kennedy* supra *Brown* L J approved the statement *Phip Ev* 7th Ed 270 The office or employment to which the duty is attached may be private, as in the case of ordinary clerk or public as in that of a Sheriff (*Chambers* v *Bernasconi* 1 C M & R 347) of a notary public (*Poole* v *Dicas* 1 Bing N C 649), or of a Magistrate (*Ha* v *Little and another*, 29 L J Ex 267) *Wills Ev* 2nd Ed 150 The duty must have been to record or otherwise report it at the time *Smith* v *Blakey* Supra, *Polini* v *Gray* supra, *Doe* v *Turford*, 3 B & A 890, *Ryan* v *Ring* 25 L R Ir 184 *The Henry Coxon*, 3 P D 159, *Poole* v *Denne* (1903) 2 Ch 538, *Sturla* v *Freccia* (1880) 5 App Cas 623 (640) 'This limitation says *Prof Wigmore* 'is a reminiscence of the early history, and is needlessly strict.'

Duty to a third person—Necessity under this section Under the Indian Evidence Act, the report or record need not be made in the course of a duty to a third person "The stat
Act must relate to a
so far as the question of
with the performance c
Whether this fact naturally finds a place in the narrative what is the nature of duty and its connection with the fact the statement of which was a matter of duty and whether this connection was such as to
information or observation must however
ting the weight due to such evidence when
Field Ev 7th Ed p 98 So in India the following observation of Denham in *Chambers* v *Bernasconi* 3 L J Ex 373=1 C M & R 347 has no application 'We are all of opinion that, whatever effect may be due to an entry made in the course of business any officer reporting facts necessary to the performance of a duty the statement of other circumstances however naturally they might be thought to find place in the narration, is no proof of those circumstances' A register of marriages kept by Istahad since deceased who celebrated a marriage, and in which register was entered the amount of the dower, was held to be admissible and relevant as evidence of the sum fixed, being an entry in a book kept in the discharge of duty within section 32, cl (2) *Zakeria* v *S*
19 C 689=19 I A 159

Indian Evidence Act
made at or near the
in order to
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the tr

declarations in the course of
at the time it purp
Similarly in *Poole* v *I*
any doubts whether
ought to go down to tr
Ryan v *Ring* 25 L
v *Peck* 1 Stark 3-6,

not made until two days after the event it was held not contemporaneous *The Henry Coxon*, 3 P. D 156 But in *Price* v. *Torrington*, 1 Salk 285 a record in the evening of an act done in the morning was admitted in evidence. The provisions of the Indian Evidence Act contain no similar restriction as to the admissibility of this kind of evidence; but in determining the weight to be allowed to it in particular cases, it will always be important to consider how far the statement or entry was contemporaneous with the fact it relates *Field Ev. 7th Ed* 98; *Cun Ev Tenth Ed.* 163 S. 32

Personal knowledge The declarations are only evidence of the precise

of which consequently he had

In *Brain* v *Preece*, 11 M & W

£4 15s for coals alleged to have

been sold by the plaintiff's testator to the defendant At the trial it appeared

person of the name of *Baldwin* to make entries in the books from what he, *Yem*, told him Both *Harvey* and *Yem* were dead, but in order to prove the delivery of the coals, *Baldwin* was called as a witness who produced the book, and stated that he made it out from *Yem's* directions and that every evening he read over

ness for the

There was

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dictation by another man who is dead, is widely different As regards the case of *Price* v *Lord Torrington*, it is better to adhere to that case as it stands, and

a deceased

at the entries

relate to an act or acts done by the deceased person and not by third parties" There can be no doubt that the general principle of testimonial evidence should

person who had no personal knowledge of the supposed facts recorded *Avery's Executors* v *Avery*, 19 Ala 195, *Walling* v *Morgan Co*, 126 Ala 326 In the

regular course of business, of a transaction lying in the personal knowledge of the latter, there is no objection to receiving that entry under the present exception respecting

S. 32. Court, *Melville J.* said at p 616 "But the Indian rule of evidence (Evidence Act, section 32 clause 2 and section 34) simply requires that entries in accounts should, in order to be relevant, be regularly kept in the course of business and although it may be no doubt important to show that the person making or dictating the entries had, or had not a personal knowledge of the facts stated, this is a question which, according to the Indian rule of evidence, affects the value not the admissibility, of the entries" But in *Jagat Pal Singh* v *Jogeshwar Baksh Singh*, 25 A 143 P C a geneological table purporting to have been made by a person since dead, but which was shown to be merely an exhibit binding on him for th

judgment *Lord Robertson* at p
different position Its alleged a
But the exhibit in question is
Gurdat in a claim made by him
proceeding was to make himself
this admittedly was untrue I

ut His relation to the document is
from the personal knowledge and belief
statement of a deceased per on which
is admissible in evidence For aught that appears, the geneological table in
question might never h
been entirely the worl
this observation of the
of which require "speci
To reject a declaration
would cause great incon

sale of this produce? Are
not the entries thus made in the usual course of business of this extensive
trading establishment, and as a part of tl
who prove them not only the best,
practicable to secure? We have no hesi
and convenience require them to be admitted The weighers, wharfingers a
numerous subordinates who handled this cotton kept no books They report to
the clerks who keep the books of the concern, and their functions are performed
remember the multitude of trans
npose a different rule upon th
commerce and amount to a denial of
justice"

Extrinsic proof Extrinsic proof must be given of the death or other disability of the declarant *Duki* v *Jagadish*, 90 Ind Cas 551, *Chander* v *Kailas*, 44 Ind Cas 422=4 Pat L W 213
be properly
C & P
ere, how
uced from proper custody, the hand
ate one, be presumed (vide
been acted on in the ca e of declara

we have nothing to do in this c : must **S. 32**
also be proved by extrinsic .. proof
of acting therein is sufficient , .. , *Phip. Ev.* 279

. : . it is made in writing, there
Any mark or sign that is
. *North Bank* v. *Abbot*, 13
Pick. 417 ; *Wigmore* § 1531.

Cases under clause (2). A mortgage bond purported to be executed by three persons who were all dead at the time of the suit The signature of each of
an
it
ese
statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of business The two attesting witnesses are also dead and the signature each of them was satisfactorily proved to be in his handwriting *Held* that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s 32(2) of the Evidence Act *Haria* v. *Manak Chand*, 11 N L R 9=27 Ind Cas 866 In order to prove that a certain reply to notice had been signed and sent by the 1st defendant, plaintiff's *Karyasthan* was called, who deposed that he was told by the writer of the notice in question that he wrote it at the request of the 1st defendant The writer was
made the statement to the plaintiff's
the writer's business *Held*, that the
the Evidence Act *Kolongorath* v
33.

On a trial of a
lading for the purpose
sent from Delhi to C
in Calcutta, advising the despatch of the goods, was tendered in evidence under section 32 cl 2 of Act I of 1872, but the Court refused to receive it, and intimated a doubt whether it fell within the instances specified in the section *Queen* v *Tarinee Charun Dey*, 9 B L R App 42 In a suit on a bond, the defendant,

though admissible under section 32 (2) of the Evidence Act, have very little probative value when they are not signed by the transferors and are not supported by the evidence of persons who purport to sign them as witnesses *My Po Nyein* v. *Maung My*, 27 Ind Cas 777=8 Bur L T 85 A statement made in a deed of conveyance or mortgage deed is not made in the course of business within the meaning of cl (2) of s 32 *Abdulla* v *Kuni Behary*, 14 C L J 467 In a
regis
adjoi
in a
was
Evid
statn
executed by a deceased person in the ordinary course of business and consisting of an acknowledgment written or signed by him of the receipt of money, is admissible in evidence under s. 32, and not under s 13 *Ahmad Shaj* v *Jamat Ahmad*, A I R 1928 Oudh 218; but see *Abdul Ali* v *Rejan Ali*, 19 C W N 468=21 Ind Cas 618; *Soraj Kumar* v *Umed Ali*, A I R. 1922 Cal 251 Where

ordinary course of business and they are admissible under s 32, sub-section (2). *Abinas* v. *Pratul*, 55 C. 1070=32 C. W. N. 759=108 Ind. Cas 585=A. I. R.

S. 32 1928 Cal 448 The entries in *Jama Wasil baki*, *Jama bandi*, *Sheya* and *Karcha* papers ... *Nath* 47 ... lands in ... recited t ... v *Kumu* ... ficate of ... *Melapi* v *Walayot*, A I R 1930 Oudh 97 An endorsement on the cover of a registered letter that the ... and had been refused by ... would be admissible either under s ... requirements of those sections are fulfilled *Gobinda* v *Dwarkanath*, 20 C L J 455 Where it is proved that a village watchman has been sending weekly reports of deaths in the village, an entry in the report as to the death of a person on a particular date can be presumed to be correct and can be used as a proof of the fact of death at that time ... 1927 Nag 13=103 Ind Cas 883 A statement of a ... not be admissible under s 11 ...

Account Books In a suit by a landlord under section 105, Bengal Tenancy Act for settlement of fair and equitable rent the tenants produced dakhilas to prove that certain holdings had been held ... rate of rent for more than 20 years In order to rebut a ... landlord tendered in evidence certain ac... lower Court admitted them under s ... were prepared ...

office in the absence of the tenants and they were uncorroborated ... sufficient ground for refusing to attach any value to the entries in those books as evidence *Mon Mohan Roy* v *Hari Nath*, A I R 1928 Cal 408 see also *Rampyarabai* v *Balaji Sridhar*, 28 B 294=6 Bom L R 50; *Dulha Mandal* v *W N Grant* 16 C L J 24=16 Ind Cas 467, *Alttauli* v *Tarak Nath* 16 C L J 328=17 Ind Cas 266=17 C W N 774, *Umed Ali* v *Khaja Habibulla*, 47 C 266=56 Ind Cas 38=31 C L J 68 The fact that collection papers may be admissible under section 34 of the Evidence Act does not prevent them also being admissible under section 32 of the Act if the conditions prescribed by section 32 are establ... Ind Cas ...
Though an entry in ...
tion, no corroborati...
Maniel Chand v *Parakujo* 9 Mys L J. 337

Dakhilas Receipts of rent purporting to have been given by the former landlord ...

as genuine is not to be legally presu... as long as they are ... disputed by the landlord *Kirtibas* ... be expected that a *ryot* should in... landlord who granted the receipts ... that they ... owner or ... genuine, ... *Ram Jadu* v *Laksmi* ... 241 ... *Mohiuddin*, 9 W. R 211 ... *Upendra*, 82 Ind Cas 974, *Lal* ... *Banoo*, 12 W R 31, ... 12 W R. 30; *Indra* v *Golak*, 12 W ... shown to be authentic, are prima *facie* evidence of payment of rent, but not conclusive evidence. *Amir Baksh* v ... 9 W R 189

v. *Kali Prasanna,* 26 C 832 (838) But section 95 of the Bengal Road cess Act (IX of 1880) is not exhaustive. It was intended to restrict the operation of s 21 of the Evidence Act, and a road cess return may be admissible in evidence is
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is made the return *Chalho Singh* v. *Gouree Sankur,* 22 W R 192, *Hem* A. 177. The road cess return filed
by a person in his capa
sible in evidence in favo
be regarded as a perso
v *Ajodha,* 39 C 1005
Swarnamoyi v *Sourendra,* 12 C L J 14=89 Ind Cas 717=A I R 1925 Cal 1189

Deposition of Patwari. A deposition made by a *Patwari* of a village in
ent under the Bengal
32 of the Evidence Act
yan v *Dwarka Prosad,*
9 Pat. L T 679=109 Ind Cas 136=A I R 1928 Pat 129

clause See
e illustration
rtion of the

CLAUSE III

Scope of clause (3) This clause makes declarations against interest admissible in evidence Illustrations (e) and (f) apply to this clause This section makes three classes of declarations against interest admissible in evidence namely, 1st, where they affect the declarant's pecuniary interest, 2ndly his propri
chargi
179.

sible against the interest of the person through whom he claims *Rani* v *Khagendra,* 31 C 871 P C =9 C W N 71 Under this clause the tests of admissibility of statements against interest made by deceased persons are that (1) the deceased must have had personal knowledge of the facts he was stating, (2) the facts stated should have been to the immediate prejudice of the deceased (3) the statements must have been, to the knowledge of the deceased contrary to his interest, and (4) the interest must be either pecuniary or proprietary *Ramanathan* v *Murugappa,* 33 Ind Cas 969=3 L W 216=(1916) 1 M W N. 208

English law According to English law declarations against interest are statements made by deceased persons adverse to their pecuniary or proprietary interest; and the guarantee of their credibility consists in the fact that they are
iterest, since it is the general experience of
de are likely to be true *Middleton* v *Melton,*
Atkin, (1833) 1 C & M 410 (425), *R* v
I C 63, 67, *Brealy* v *Atkinson,* (1879) 13 Ch
interest in other sense as for instance an

32. v *Exeter*, (1869) 4 Q B 311, *Hayes J* observed: "Having regard to the gr changes that have in recent times, been made in admitting the evidence of interested witnesses, when alive, it would be most objectionable to lay down any narrow restrictions upon the reception of declarations in any way against inter which have been made by persons since deceased, and which are frequently the only evidence that can be obtained on the subjects to which they refer and where the Courts are frequently obliged to supply the want of evidence by presumptions"

In *Taylor* v *Witham*, 3 Ch D is no doubt an established rule i agai st the interest of the man who i death for all purposes What is I adopt the view of *Baron Parke* in t C 333, that it must be *prima facie*

speaker is admi ible even if when the fact are f rther examined, it m y

making it and "not an admission which may or may not turn out at some quent time to have been against his interest" See also *Smith* v *Blakey*, L R 2 Q B 326, *Massey* In *Tucker* v *Ol* 608, *Lord Justi* that the stateme In this state Court of Appe *Company*, (191 sought to be put related to an acknowledgment of paternity and a promise by the deceased to marry the mother of the child, who claimed compen at ca under the "Workman's Compensation Act," as a dependant on the deceased *Lord Justice Hamilton*, after making an incidental ob ervation that as between the *dicta* of *Blackburn J*, in *Smith* v *Blackey*, 2 Q B 326=36 L J Q B 1 6, that the statement must be one which never could be made available for the person himself, and that of *Jessel M R* that it is sufficient that the statement is *prima facie* against the interest of the person making it, he is inclined to the former view, "if there is any real difference between them", proceeds to lay down categorically the tests of admissibility of statements against interest According to the learned *Lord Justice*, (a) the deceased must have had personal knowledge of the facts he was stating, (b) the fact should have been to the deceased s immediate prejudice, (c) the statement mu t have been to the knowledge of the dec ased, contrary to his interest, and (d), the inte must be either pecuniary or proprietary The ca e went up to the House of Lords *Lords Loreburn* and *Moulton* ... accepted the statement ... the la to agr A C this p groun

time when she was not of sound mind, memory or understanding Unde which had been destroyed her husband took a life interest in her estate after under an ante nuptial settlement he was, in the events that had happened

S.

entitled absolutely to her estate. A statement by the husband, who had died before the suit was broug sound mind when she destroyed ing in disparagement of his own iles, 27 T. L R 202.

departure from English h would subject the decla- le. This seems to be a Case, 11 C & F 108 In that case the question was whether A was lawfully married to B A statement

injuriously affect the interest of the party making them Nor it is true, that s to certain These are , in that case l be liable to prosecution, that, therefore, the instant the grave closes over him, all that was said by him is to be taken as evidence in every action and prosecution against another person, is one of the most monstrous and untenable propositions that can be advanced." *Nort Ev 184* So "the interest involved must, according to the English Law, be one of a pecuniary or proprietary nature, no other interest will suffice But the Indian Law, as laid down in sub section (3) of section 32 of the Evidence Act, extends the scope of this exception and put a penal interest on the same footing as a pecuniary or proprietary interest." *Per Shadi Lal C J* in *Mahomed* v *Emperor*, A I R 1926 Lah 54 = 89 Ind Cas 252 (258) So a statement which would have exposed the declarant to a criminal prosecution or to a suit for damages, would be admissible as a piece of evidence in any proceeding in which such evidence is relevant to the issue or issues being tried in such proceeding *Per Fforde J* in *Mohammad* v *Emperor*, 89 Ind Cas 252 (254)

Principle The exception presupposes, like most of the others, first a neces-

ely to have been stated untruthfully. *Wigmore* § 1455

, as here applied, signifies the impo the same source, the declarant being ver the witness is practically unavailable, his statement sho his case being regarded as must show that a particular fac

Manley v *Curtis*, 1 Price 229, *Phillips* v *Cole*, 10 A & E 106, *Barrows* v *White* 4 B & C 328, *Spargo* v *Brown*, 9 B & C 936 In *Fitch* v *Chapman*, 10 Conn 11, *Williams J* said The cases where such evidence is admitted seem to proceed generally upon the principle that, by th principle insanity from juri evidence incapacity,

S. 32 v *Blades*, 3 Camp 458, the declarant had suffered from an apoplectic fit and was declared by his physician to be in extremis The question was whether the declaration of such a perso[n] ... *Ellenborough L C J* said ... and I am afraid to establ[i]... patient is past all ... of evidence ... permitted there ... cover ... this section of the ... admissible whe[n] the declarant is ... [atte]ndance could not b[e] procured without an amount of delay or expense, which under the circum[stances] appears to be unreasonable *Asiatic Steam N Co* v *Bengal Coal*, 35 C 751

Subjective relevancy—Adequate knowledge In connection with the s... with the other exceptions to the hearsay rule, judicial attention is concentrat[ed] upon the subjective relevancy shown by the declarant Here as elsewhere th[e] elements of such subjective relevancy are two, Adequate knowledge and Absence of controlling Motive to Misreprese[nt]

Adequate knowledge may ap... surate with the inference or state ... sufficient, in the opinion of the pres... men, in acting in accordance with ... extent on the part of the declarant must be shown in order to warrant reception of a declaration against interest as secondary evidence of the facts asserted It is not regarded as sufficient, for example, to show that such an extra judicial statement was found, after his decease, among the papers of the person purporting to be the declarant He must be affirmatively shown to have made the statement and it must also appear that he knew what he was talking about *Chamberlayne's Ev* § 2772

Circumstancial Guarantee or Absence of controlling Motive to Misrepresent The basis of this exception is the principle of experience that a statement asserting a fact distinctly against one's interest is entirely unlikely to be deliberately false or heedlessly incorrect, and is thus sufficiently sanct[ioned] though oath and cross-examination are wanting In *Smith* v *Blakey* L R Q B 326, *Blackburn J* said " When the entries are against the pecuniary interest of the person mak[ing] the[m] ... never could be made available for the pers[on] himself there is suc[h] ... admitted after the ... *Taylor* 4 L R Ire, (... statement appears ... which after the deat[h] ... *Mercer's Admr* v ... taught us that when one makes a declaration in disparagement of ... or interests it is generally true, and because it is so the law has deemed it ... the exception to ... likely to make a false ... posed to be the ... , when a person, wh... making a declaration prejudicial to his own interest says something wh[ich] ... cessat ipsa lex *Per* ... Lah 54=89 Ind Cas ... 446=57 I A 14 (P C)=34 C W ... (1919) ... K B ...

Origin of the rule In *Anon* Bunbury 46 (1719) rentals or ... wed at Winchester and Dor... v *Brock*, 3 Woodeson's Lectures ... o it is said "On a similar prin[ciple] ... idence, because the habit or ... *Roe d Brune* v *Rawlings*, 7 East ... 'The contents of the p... possession of it, it dimin[ished] his interest in the fine on renewal, in the same proportion as it raised the rent to be

reserved The paper was written by a confidential agent at least, though it does not appear that he was the immediate steward of the estate at the time but S. 3

in evidence the following entries from the day book and ledger of a man midwife who had attended the mother of William Fowden junior at his birth, and was since deceased —

Day Book Entries

'22nd April, 1768.

38* Richard Fallows's wife Bramhall Filius circa hor 9 mututin cum forcipe, etc

paid '

Then followed in the same page the entry in question without any intervening date —

'Wm Fowden junr's † wife, 79 ‡

Filius circa hor 3 post merid nat etc

Ledger Entry

'Wm Fowden junr, 1768

		£	s	d
Aprilis 22	Filius natus, etc			
	Wife	1	6	1
	26th Haustus purg	0	15	0
		2	1	1
	Pd 25th Oct, 1768"			

These entries were tendered in evidence to show the precise day of the birth of Wm Fowden, jun The evidence was objected to But the jury found on this evidence that Wm Fowden, jun was not born on the 2nd but on the 22nd April
should
would
been established for the security of life, liberty and property but in declaring our opinion upon inadmissibility of the evidence in question we shall lay down
ie limits
Warren
ks of a
making
ve been
entries ?

I think the evidence here was properly admitted, upon the broad principle on which receiver's books have been admitted namely that the entry

* The figure 38 referred to the ledger

† This was the designation at the time of the father of Wm Fowden jun in question

‡ These figures referred to the ledger the entry in which follows

. 32.

in his own handwriting repels the claim which he would otherwise have had against the father from the rest of the evidence as it now appears Therefor the entry made by the party was to his own immediate prejudice when he had not only no interest to make it if it were not true, but he had an interest the other way, not to discharge a claim which it appears from the other evidence that he had

beginning with *Warren* v
279, is that if a persoı
declaration of that fact, w
his death, if he *could l*
Ibid But in *Gleadown* v
expression reported to h
is "if he could have been c
not introduced in any
any such qualification and I have great doubts whether I ever used the expr sion If I did, *Scorle* v. *Lord Barrington* and *Bosworth* v *Cotchett*, decided in the House of Lords, are against it" *Thayer Cas Ev* 485

Statements against pecuniary interest 'Statement of a fact agai pecuniary interest when its tendency is to take away or lessen the pecu

: position is worse

may include both verbal or written ones,
documentary evidence, and particularly in books of account Where the books of collectors of taxes, stewards, bailiffs, or receivers subject to the pe tion of others, and in which the first entry is generally of money receiv
, within the principle of this ru
llington 3 Brod & Bing 13
Iceaton, 4 T R 669; *Short* v *Le*
556, *Dean* v *Caldecott* 7 Bing
133; *Marks* v *Lahee*, 3 Bing N C 408; *Wynne* v *Tyrwhitt*, 7 B & Ald 5
De Rutzen v *Farr*, 4 Al & El 53, *Plaxton* v. *Dare*, 10 B & C 17 But it has been extended still further, to include entries in private books also, though retained

this exception *Greenl Ev* § 150, S. 3
Ridgway, 10 East. 109; *Middleton* v
a mere memorandum of an agreement
is not sufficient.
attempted to be pro
of his deceased m
them, and of subsequent payments of
for the entries were not made against the
ble unless the service were performed,
nor were they made in the course of his duty or employment *R* v. *Worth*, 4 Q B 132 In general, the interest or burden involved in the fact stated must be a positive one and
of the declarant (
A given fact may
circumstances; for example, that one is a partner may or may not be against his interest according to the state of the firm's assets *Ramies* v *Ramies*, 30 Ala 428, *Humes* v. *O'Bryan*, 74 Ala 428 In the last named case A brought a suit against X and Y as partners Y having died, the suit was pressed against X alone X denied his partnership with Y and to prove his case offered declarations *made by Y to the effect that he (X) was not a partner It appeared that the*
Y made these
ie declarations
t be noticed,
the absence of
that Humes
st his interest
This is so because, if true, it would entitle, Humes to a half interest in the partnership assets . The assertion, therefore, that Humes was not a partner, having been made at a time when the partnership business had failed, it was a declaration exonerating him from a pecuniary liability for the partnership debts, and, if true, to this extent doubled the ultimate amount of Glover's (Y's) liability " So it is clear that whether a statement is against interest or not depends upon circumstances A statement by Y that X is not a partner is not against the interest of Y when the firm is solvent, but it is so when the firm is insolvent.

of money received by him on behalf of his *cestui que trust*, and for which he was liable, held admissible against the *cestui que trust* *Bright* v *Legerton*, 29 L J Ch 852. In an action by a
statement by the testator
debt is admissible *Watson*
testator are evidence again
trator *Smith* v *Smith*, 7 Car & P 401 In an action of trover to recover a watch, the defendant pleaded that it was not the property of the plaintiff It appeared that the watch had formerly been the property of the father of the plain-

S 32. made it is not sufficient that it might possibly turn out afterwards to have be against his interest *Edwards Ex parte*, 14 Q B D 415

Against Proprietary interest An equal guarantee of trustworthine s furnished when the extra judicial statement is opposed to the propr etary int of the declarant 'By declaration against proprietary interest we mean s a

in the property The principle on which these declarations are rece ved in the presumption of absolute ownership arising from pos ess on Wh n party in possession of land a lmits that he holds a less estate th an a fee s mp as for instance, that he is tenant in tail for life for a term of years, or at w l he manifestly cuts down his own interest ir title, and it is not likely that a man intere t than he claimed or stated *Nort* 192, *Peaceable* v *Watson* 4 Taunt 16 *R* v *Exeter* (1869) L R 4 B 341 *Taule* v *Miles* 27 L K *R* v *Birmingham Blackburn J* said 'It is now well settled that a tatem n against interest by a decease l per on is with certain limitations adn evidence in proceedings betw show that where a person *prima facie* evidence of a tena down that interest is admissil against his interest ' Simil declaration of the deceased father of the claimant who had been in the po of the property that he only occupied and managed it for his son was held admissible as being against the interest of the person making it A declara on terest in the land whatever ey v *Redman* 1 Q B D 11 that a person in posse on of the owner thereof *Ibid*, see *Wills Ev* 193 *Welb* v *Winwood* 7 T R 397 The rule therefore

to treating declarations

a question of public way was in issue, the declaration of a deceased land made whilst planting a tree stating that he planted it to show the boundary of road is not evidence of public right, for it is not a statement of gen al reputation but of a particular fact. *R* v *Bliss* 7 Add & E 550 *Cf Sch* *Chadwick* 2 Moo & Rob 507 Assertions that one s estate is a leasehold not a freehold or that one s possess on is merely as agent or as trustee another are admissible *Walker* v *Broadstock*, 1 Esp 458 *Doe* v 5 Esp 4 *Doe* v *Jones* 1 Camp 367, *Peacable* v *Watson* 1 Taunt 16 *Nicoll* 1 Bing N C 430, *Doe* v *Longfield*, 16 M & W 513 A declara by the person in possession, that his interest was less than a fee his own life only, would be primary evidence that it ceased to exi t at his death *Doe d Welsh* v *Longfield*, 16 M. & W 497 To make a declaration proprietary interest in lands evidence after the death of the declaran have been at the time in actual possession *La Touche* v *Hutton*, Ir 166 A declaration or a written entry by a deceased person when house that he was tenant at so much rent and had paid it, admis declaration against proprietary interest to prove the fact of the payment of the tenancy *Rex* v *Exeter Guardians*, 10 B & S 133 Declarat

deceased person, claiming a limited interest under a particular Will of property of which he was in possession, are admissible to prove the fact that the Will had a legal existence, and certain persons were named executors therein *Sly* v *Dedge*, 49 L J. P. 63 On an issue as to the right of L to a fishery, entries of a deceased receiver charging himself with the receipt of rent from a sub receiver, due from

he fishery, are
L J. Ex 1.
admissible in
ons were made
mdas v. *Ayu-*

a pecuniary penalty, by wa
mprisonment *Cockle Cas*
ecided, in 1844, was neither
recedents, so a backward

thout bans was received
1476 So it is plain

of procuring fabricated
testimony to such an admission of oral This is the ancient rusty weapon that

a very strong tendency to make any one outside of a Court of Justice believe

S. 32.

the admissibility of such a confession; the
of the two countries do not bind us;
case of declarations against interest is well
against interest as a confession of murder·
than dying declarations, which would

ore that there is no

which declarations
ts not being against
the declarant to a

against his pecuniary or proprietary interest. *Nort Lv 184* But in order to make such statement admissible in evidence, the fact stated in the statement must expose him, to a criminal prosecution or to a suit for damages, at the time it was made *Stoke's Anglo. Ind. Code Vol II. 874*; see also *Nicholas* v *A Pler*

the Evidence
firmed by th
P. L R 1
forgery one
trate died before the commencement of the trial The
by the Sessions *Held* that
statement was
to criminal pro
L R 248
Daolat and to
She then died
before the committing Magistrate and t
statements of the deceased were relevant un
she having witnessed an offence and no
officer or Magistrate exposed herself to
Emperor, 16 N. L R 30=56 Ind Cas 582=21 Cr L J. 486

Statements of sundry facts against interest. There are many facts which in their ultimate effect be against the proprietary or pecuniary interest, though in their immediate and narrow aspect there may be no such clear character These facts, however, may never the less be facts so decidedly against interest that no one would be inclined falsely to concede their existence *If so*, on the general principle they should therefore be admitted No more precise

state the terms of the contract with B, was rejected *Blackburn J* is no more than an admission that he has the care of the three chests which arrived at the office and the possibility that this statement might make him liable

show the existence of the Will. In *Flood* v *Russel*, 29 L R. Ire.

hich she profited S.
Tiyn, (1914) A
i claimant was a
, the deceased's
ul Loreborn
ng a legal
Wigmore

§ 1461. In *R.* v *Worth*, 4 Q B 134 an entry of a hiring at a certain wages in the deceased master's private book with a memorandum of payment, was held

to pay conditionally is none the ract is
subject to some conditions imposed of a
contract liability of any sort is on gmore
§ 1461

ot merely the
is because the
likely to be
eate a liability

Preponderance of interest—Credit and debit side—No motive to misrepresent In some cases it has been stated on the analogy of other Hearsay exceptions that there must be no motive to misrepresent and this has been put as an additional requirement *Gleadow* v *Atkins*, 3 Tyrw 301; *Marks* v *Lahee*, 3 Bing N C 408 "But" says *Prof Wigmore* 'there is no such additional requirement The real ol
a not uncommon situation,
interest, there is also a

meaning of the entry standing alone must be against the interest of the man who made it Of course, if you can prove *ali unde* that the man had a particular reason for making it, and that it was for his interest, you may destroy the value of the evidence altogether, but the question of admissibility is not a question of value The entry may be utterly worthless when you get it, if you show any reason to believe that he had a motive for making it, and that though apparently against his interest, yet it was for

account in which the receipts creating liability are on the whole equal or exceeded by the payments or credits in his favour When, in the future,

S. 32 the entry of payment rece
is sought to be used, t'
of the account together, tl
appears to have a claim
interest This argument,
261, has since been repu

'66, by Mr Brougham But Lutlds e I
is not likely to charge hims lf for the
so accounts are evidence though th
Per Coleridge J in *R* v *Worth*, 4 Q B 1

see also *Williams* v *Greaves*, 8 C & P 592

the pr
the d
the correctness of whatever he may say while under that influence
words, the statement may be accepted not merely as to the specific fact
interest, but also as to every fact contained in the same statement.
1465 The leading case on this subject is *Higham* v *Ridgway* 10 East
(Vide supra) As for the limits which it thus becomes necessary to set, the
must be the phrasing of a
general Judges In *Percival*
Nanson, try is limited
against it the whole statement
In *R* v principle that a declara-
tion against interest was evidence as to all that formed an essential part of it
was long since settled' See also *Stead* v *Heaton*, 4 T R 690, *Doe* v *C*
wright Ry & M 62, *Davies* v *Humphreys* 6 M & W 153, *R* v *Birmingham*
1 B & S 763 In *Smith* v *Blakey* L R
down by *Blackburn J* where he said
of the precise fact which is against interes
up with the statement' In *Doe* v *Beviss*
contained on one side items charging
on the other side items discharging him by showing how the moneys
had been disbursed The discharging entries were not admitted
said "T
himself,
ing part
ing part, it may be necessary to read the whole So where the
anything explanatory of the former that may render the whole account admis-
sible But that is not the case here' In the same case *Maule J*, said It may
which is intelligible
case recourse
charge in the account
him, the items of

necessarily resorted to for the purpose of explaining the charge
may be evidence" See also *Marks* v *Lahee*, 3 Bing N C 408,
Heaton 4 T R 669, *Knight* v *Waterford*, 4 Y & C Ex R
gate v *Emmerson*, 10 Q B 326, *Per Lord Lyndhurst in Rudd* v *S*
cited 1 Ph Ev 314, 315 *Whaley* v *Carlisle*, 17 Ir L R N S
Taylor v *Witham*, 3 Ch D 605, *The Swiftsure*, 32 L J
Fitzgerald, 11 L R Ir 106, *Sita* v *Khub* 5 Pat. 163, *Knight* v
Waterford 4 Y & C Ex R 283, 291, 295; *Leelanund* v *Lalji*
W R 231. The following test is suggested by *Prof Wigmore*
back to the living principle, a more useful test appears to be this
parts of the speech or entry may be admitted which appear to have
made while the declarant was in the trustworthy condition of mind
permitted him to state what was against his interest. This being the fund

principle, any reference to collateral records which amounts to a repetition or an incorporation of them would make them a part of the admissible statement" Entries made at a subsequent occasion, when the original entries are complete, are clearly excluded *Doe* v *Tyler*, 4 Moo & P 381, *Knight* v *Waterford* 4 Y & C Ex R. 283 (294) S. 3

In *Reg* v *Overseers of Birmingham*, 1 B & S 763-31 L J M C 63, *Cockburn J* observed "I should be prepared to say, that as soon as it is established, which it now is on the authority of *Higham* v *Ridgway, supra,* and the other cases, that you may receive the declaration of the deceased person as showing, not only something adverse to his interest, but all incidental facts contained in that declaration, so far as they are not foreign to it, it follows as a consequence that those collateral facts may be proved by the declaration' In *Davies* v *Humphreys*, 6 M & W 153 *Parke J* (afterwards *Baron Parke*) said "The entry of a payment against the interest of the party making it, has been held to have the effect of proving the truth of other statements contained in the

rred to therein provided that the

a variety of circumstances If the statement happens to be recorded in a docu

it came to be
making it or an
mplicity in the

It is now, however, well settled that declarations of deceased persons against their interest
so much contained in the
facts stated in them, at
to the declarations, and may be taken to have formed a substantial part of them
see *per Cockburn*
parol declaration
tion of a tenem
pauper s st
Smith's Le

A sta
a property
sradh and

mortgagee had
Held the whole
ormer part alone
admissible *Sitaram* v *Khublal* 5 Pat 168=94 Ind Cas 13=7 Pat L T 573=A I R 1926 Pat. 255 But disconnected facts though contained in the same document or statement are inadmissible *Doe* v *Beviss supra Knight* v *Waterford*, 4 Y & Cole 293, *Ningana* v *Bharmappa*, 23 B 63

When the statement must be against interest The fact stated must of

early engrafted upon the rule, *viz* that an admission of a fact made by a deceased person which is against the interest of a party making it *at the time*, is evidence of that fact as between third persons. See also *Percival* v *Nanson*,

S. 32. 7 Ex 1, *per Parke B*; *Lalor* v *Lalor*, 4 L R Ire 681; *Ex parte Edwards in re Tollemache*, 14 Q B D 415; 416, *Smith* v *Blakey*, L R 2 Q B 326, *M* [illegible] *Allen*, 13 Ch D 326 The chief application of this rule was to the creditor endorsement of payment on bonds or notes before the claim was time-barred. The creditor's receipt of payment, in part or in whole, was a fact against [illegible] interest, hence his memorandum endorsing upon the instrument the fact of his receipt of payment would be a statement of fact against interest, the fact of payment thus evidenced, would be by implication an acknowledgment (or a promise) by the debtor, and thus would at common law suffice to give a new beginning to the period of the statute of limitations *Wigmore* § 1466, *Stark* [illegible]
Lord Barringt
C J in *Addan*
a motive for
unimpaired

made after the Statute had run was not evidence, and that the note was barred by the Statute See also *Turner* v *Crisp*, 2 Str 827; *Glyn* v *Bank of Engl*[illegible] 2 Ves 43; *Short* v *Lee*, 2 Jak & W. 488, *Gleadow* v. *Atkins*, 3 Tyrwh [illegible] *Newbold* v *Smith*, 29 Ch D 877

When the declarant
to be prosecuted, and so th
sub section (3) were not
clause 3 of section 32 *Nga Po* v *King Emperor*, 7 L B R 33=20 [illegible]
90=14 Cr L J 510

Sta
statemen
began
gation n
stated
be judge
Jur N
stances t
admissibility of evidence *Phip Ev* 271

Spontaniety not required No administrative necessity has been [illegible] for requiring another general safeguard against mistake in or manufacture of evidence, i e, guarantee of spontaniety should also be present, if a [illegible] against interest is to be received *Doe* v *Turford*, 3 B & Ad 890, *Chamberlayne* *Ev* § 2773

31 L J M C 63 *Fenley* v *Wilmson*, 13 Ch D 283, *Farmingham* [illegible]

in the cases" See also *Jagnut* v *Haj*

Exeter v *Warren*, [1844] [illegible]
in whosoever han[d]writing [illegible] to call
in latter case it is not necessary to call
190-191.

S. 3

Contemporaneousness of entry Declarations against interest are admissible even when they are not made contemporaneously with the facts *Doe* v *Turford*, 3 B & Ad 890, *Smith* v *Blakey*, L R 2 Q B 326, *Whaley* v *Masserene* 8 Ir Jur N S 281

Personal Knowledge The qualifications of the declarant with reference to
be as those of the ordinary witness
v *Nanson* 7 Ex 1, *Tay* § 669,
was held that it was not necessary
knowledge of the fact stated —that
if the entry charged himself, the whole of it became admissible against all
weight, and not
manta, 1 B 610
is applicable to
are by no means
uniform Vide *Doe* v *Robson*, 15 East 31, *Short* v *Lee* 2 Jac & W 488, *Barker* v *Ray*, 2 Russ 76, *Middleton* v *Melton* 10 B & C 317 *Lloyd* v *Powell* (1913) 2 K B 133, 137 C A *Gleadow* v *Atkin* 3 Tyrw 302, *Marks* v *Lahee* 3 Bing N C 420, *Percival* v *Nanson* 7 Ex 1 In the above cases it was held that the declarant must be shown to have had a competent if not a peculiar
ect matter of the declaration *Tay* §

of what the chest, contained Similarly in *Doe* v *Longfield* 16 M & W 514 the assertion of an estate by life interest only was regarded as ambiguous and inadmissible See also *Plaxton* v *Dare*, 10 B & C 19, *Doe* v *Beiton* 9 C & P 254

Extrinsic Proof Extrinsic proof must be given of the declarant's death (unless it is presun
necessitate the adm
be shown to have
Short v *Lee*, 2 Jac & W 467, *Plumer M R* said In all these cases (of books by bailiffs etc) the first
wrote them, if you fail in t
Phip Ev 7th Ed 272, s
Curtis 1 Price 228, *Bullen* v
B 56, *Doe* v *Beviss* 7 C
hould
Barry
hand
were
Where
t was
authorised or adopted by the deceased *Lancum* v *Lovell* 6 C & P 437 *Bradley* v *James*, 13 C B 822, *Doe* v *Hawkins* 2 Q B 812, *Re Fountaine* (1909) 2 Ch 382, *Phip Ev 7th Ed* 272 Where, however, the document is thirty years old

or receiver of another, it is necessary, in addition to give some proof that he really occupied an alleged position, except (i) where the agency is a public one, or (ii) perhaps where the entries are ancient produced from proper custody and bear strong internal evidence of genuineness *Tay* § 653 *Phip Ev* 211

Declarations against interest and Admissions, distinguished. Declarations against
received
and conf
trary, are
of the deceased declarant, admitted as an exception to the hearsay rule *Mackelvey's Ev* 316 Such declarations are made, being compelled by truth, and as such they are as trustworthy as if made on the stand under oath and cross-examination *Wigmore* § 1475 The points of essential difference in main are

32. four (1) The admission is a creature of procedure, the declaration against interest is entirely a matter of evidence, i e of reasoning (2) Admissions are primary evidence of the facts stated, the declaration against interest is a secondary grade of proof, received only when shown to be necessary to the case of the proponent, the primary evidence being unavailable (3) The admission is receivable in evidence only when the declarant or some one identified with him in legal interest is a party to the suit and the admission is offered against him, the declaration against interest may be made by any one, and is receivable in between third persons and though made in favour of the present proponent or one in privity with the declarant. (4) The admission is received although it was ... , as being off ... to ... nt must have been ... at it was directly opp... ... failure to observe the ... to his pec... distinction ... cause confu...

Declarations held admissible under this clause At the trial of an ac... for an injunction for stopping up ancient lights it was proved that there was ... year for the use of light and that ... agent of the owner of the alleged d... ient tenement the sum of six pence a ... made a verbal statement that it was for the lights of the house The agent was now dead *Held*, that this was evidence of payment of the rent by the owner of the alleged dominant tenement *Beeley* v *Atkinson*, 49 L J Ch 153 13 Ch D 283 Where there is a right of entry given for an assigning or under ... if a pe... agains... fact ... favour... the entries in the account from being admissible as entries ... *Whaley* v *Carlisle* 17 Ir C L R 792 An entry by deceased person who has knowledge of a fact whereby he charges himself or discharges another upon whom he would otherwise have a claim, is admissible in evidence, even though the party could not have been examined as to the fact in his life time *Sard* v *Lee*, 2 Jac & Walk 489 In an action by executors against a son of the testator to recover money received by him from his father, the debtor's side of ... account book containing the receipt of interest from the son, was held to be admissible in support of the plaintiff's contention that the money had been lent and not given although the right of the plaintiff without consent to put in the other side, which contained no entries opposed to the advantage of the writer was doubtful *Peck* v *Peck* 21 L T 670 E now dead, was a clerk to the plaintiff. A book containing entries in the handwriting of E which charged E with the receipt of interest on a sum owing by R and W to the plaintiff was offered in evidence —*Held*, that evidence could be given of E's so doing, as of parol representation made by him against his interest. *Kettlewell* v *Watson*, 30 W R 402 Entries of charges made by an attorney in his books showing the ... when a certain lease prepared for a client of his was executed which ... were shown to have been paid are evidence, after the attorney's death to show ... the lease was executed under a power to lease in possession, and not in ... *Doe* v *Robson* 15 East 29 A deceased solicitor's books are evidence ... charges himself therein with receipts on his client's behalf as being ... against his interests whether or not the entries were made in the ordinary ... To prove that ... though on a full investigation of all the facts the dec... ... not to have been detrimental to interest The declaration of a d... to the effect that he had destroyed a Will which gave him a life intere... free hold pr... arising from ... examination ...

to his advantage, because apart from the existence of a Will, he in fact took no interest in the property. *Re Adams, Benton* v *Powell*, (1922) P 240 = 127 L T. S.

within the meaning of s 32, Evidence Act and are hence inadmissible *Jagadish* v *Harihar*, 78 Ind Cas 219 = 10 C L J 39 On the death of a member of a joint Hindu family the other members sued the widow of the deceased for possession of certain properties on the ground that she had no right to them, her husband having died an undivided member The widow set up a division and relied *inter alia*, on a mortgage executed by her deceased husband and attested by the plaintiffs containing
possession of the properties
acknowledgment that they ha
admissible in evidence as a statement against interest under s 32 of the Evidence Act *Gnanamuthu* v *Veilu Kanda*, 19 L W 494 = 79 Ind Cas 2 = A I R 1924
the circumstances
ith the adoption is
under s 32 (3)
of the Evidence Act *Danapati* v *Balsundara*, 36 M 19 = 18 Ind Cas 989 The *varaspatra* in this case was admissible not only under section 32, clause (3) of the Indian Evidence Act as a declaration made by the widow against her proprietary interest, but also by reason of s 90 of the Act *Hari Chintaman* v *Moro Lakshman*, 11 B 89 Recitals in deeds in favour of one party to suit showing nature of some lands are admissible not only under this clause but also under s 13 (b) *Tikaram* v *Motilal*, A I R 1930 All 290 In a suit for account by the representatives of A, deceased, evidence was adduced of a document

his interest *Zaynub* v *Hadjee*, 2 Ind Jur N S 54 Where the question, whether there was partition between the ancestors of the parties or not, is in issue, the statements made by the deceased ancestors of the parties that there was partition are admissible in evidence as they are statements against proprietary interest of the persons making them *Jairam* v *Narottam*, A I R 1929 Nag 131

gift in a case covered by s 32. *Appasami* v *Rama Tevar* 31 L. W. 776 = 61 M. I E. A — 72

32. L J 881. A statement of a convicted person made about the time of his being hanged that the approver in the case was not involved in the crime may be admissible *Shafi* v. *Emperor*, A. I R. 1930 Nag 259=124 Ind Cas 4[illegible] Statement in adoption deed that adopter's sons were suffering from leprosy is admissible to decide validity of adoption and attestation by sons being against their interest is admissible *Nangmmal* v *Sankarappa*, A. I R. 1931 Mad [illegible]

[illegible] ...sive vendors in sale deeds

[illegible] belong to them, but was

[illegible] land *Tila Ram* v [illegible],

A. I. R 1930 All. 299; but see *Aligiri Nayahars* v. *Perumal*, 39 L W 472

Declarations held not admissible under this clause An admission made by a bankrupt in his statement of affairs that a debt is due from his, is not after his death, admis[illegible] existence of the [illegible] after paying the [illegible] 13 Q B D 720 [illegible] ...tement by a [illegible] a deceased [illegible] but *not* by [illegible] missible in evidence, either on the general ground of pecuniary interest, or on the general ground of the audit having been made in the ordinary course of business [illegible] v *Moat*, 45 L T [illegible] business done by [illegible] creditor account, [illegible] merely becau[illegible]e the [illegible] *Whaley* v [illegible] by a firm [illegible] of the tr[illegible] acknowled[illegible] on the n[illegible] [illegible] person [illegible]

The dec[illegible] himself [illegible]

427=103 Ind Cas. 145=A I R 1927 Bom 133 Statements of [illegible] persons under s 32, Evidence Act, [illegible] conditions specified therein are fi[illegible] a certain person a statement in the [illegible] more than 20 years before is not admissible under s. 32 [illegible] Hindu w[illegible] sible in [illegible] interest, [illegible] long enjoyment of her husband's property *Dalbahadur* v *Bijoy* [illegible] C W N 369=A I R 1930 P C 79=33 Bom L R 487=51 C. L. J [illegible]

Held, that neither the [illegible]

as the statements in the Will made by the deceased that he had spent a particular S.

plaintiff, a statemen

The evidence of
Act would be ad

rietary interest of the deponent, even in a
of title *Shyamanand* v *Rama Kanta,* 32

Will of the purchaser of the title
title *Held* that the recital of *brahmatter* title in the Will was not admissible *Satindra* v *Krishna Kumari* 36 Ind Cas 882 A statement by a plaintiff as a witness to the effect that her father told her that he had mortgaged the land in suit to the defendant is inadmissible under this section *Mi Nga Ma* v *Nga Talak,* 29 Ind Cas 607 = U B R (1915) 1st Qr 56 A recital in a conveyance

not admissible in evidence under this clause. *Harihar* v *Gurugranth,* 128 Ind Cas 791 = A I R 1930 P C. 610

Statement as regards boundray In *Rajah Leelanund* v *Mt Lakhaputee,* 22 W
propriet
mortgag
ment adi
founded
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case wa
interest

Under t
the prop

prietary interest *Karuppanna* v *Kanja Swami,* 107 Ind Cas 293 = A I R 1928

S. 32. It is unnecessary to cite any ... v. *Ridgway*, 2 Sm L C 307 under the ... cases the ... This case ... discussed and followed in the case ... *Lal lputee*, 22 ... *na* v *Bhaimappa*, 23 B 63, which again was followed in the High Court in case of *Haji Bibi* v. *H H Sir Sultan Mahal* 11 Bom L R 409 = 2 Ind Cas 847, and in our Court ... *Kunj Behary Lal*, 16 C W N ... in *Allahabad* in th ... and all these cases ... *Sudhari Pandey*, 1 ... case of *Ambar Ali* ... 116 = 25 C L J 610 ...

... followed in the case of ... A I R 1923 Cal 251, which is purported to ... Cal 681 and in the case of *Radha Krishna* v *Sarbeswar Nag*, A I R ... the question of admissibility of such a document under s 32 of the Evidence ... has not at all been considered" See also ... 44 C L J 587 = 99 Ind Cas 910 = A I R ... 53 Ind Cas 863, *Trimbak* v *Ganesh*, 68 Ir ... Cas 329

In R ...

... on b... ... durir ... by the then zemindar ... The zemindar relied upon a statem... in the mehal, in which there ... many years prev... ... question that the original re... *Mr Justice Markby* held that ... cannot ...

... does not appear to me to be a stat... ... it, of course, it would be his ... interest On the contrary so far as regard... possible." It is clear that the view ... consonant with the principle underlyi... guarantee to the trustworthiness of ... *Couch C J* and *Ainslie J* said "We c... Judge that this statement was not ad... which the interest in the mehal ... it is against ... cut down the p...

... mount of the original ra... ... a document of this kind ... ... rts, and the part which is ... interest of the proprietor, ... either, taking the doc... ... which is against his inter...

favour. In the circumstances there was nothing to impeach the judgment of *Mr.* S. 3
63 and
sion on
Calcutta
even in
Kunj
ing the
trans-
s either extin-

and Cas 752,
g any reason
7, it was held
in evidence

land then conveyed was limited by certain boundaries, was an admission that their proprietary interest did not extend over any land outside the boundaries mentioned The entire statement was consequently admissible (*Higham* v *Ridguay*, 10 East 109, *Connar* v *Fi*
Nanson, L R 2 Q B 326, and *R* v *Exe*
is that the statement is accepted, not

interest of the person
purpose boundaries may
how a statement of
that nature can be said to be against the proprietary interest of the person making it, is some what difficult to ascertain ' This view is supported by the following observation of *Sir Richard Garth* in *Brojesuari* v *Budhanudhi*, 6 C 268, where the learned *Chief Justice* observed ' A recital in a deed or other instruments is in some cases conclusive, and in all cases evidence as against the parties who make it But it is no more evidence as against third persons than any other statement would be " See also *Brojomohan* v *Gaya Prosad*, 30 C W N 761, *Chooni* v *Nilmadhab*, 41 C L J 374, *Radha* v *Sorbesuar*, 29 C W N 469

death as a statement against his proprietary interest. *Wills Ev 192* And *a fortiori* if it shows that he has no interest in the land whatever *Ibid* This is based on the well known rule of law, that a person in possession of land is presumed, until the contrary appears, to be the owner thereof in fee simple *Grey* v *Redman*, 1
therefore is not
the land occupied
against his interest to deny his possession of one close than it is to assert his

the subject matter of the document cannot be regarded as having been against the pecuniary or proprietary interest of the person making it within the meaning

S. 32 of section 32(3) of the Evidence Act and is consequently inadmissible in ev. *Kumud Kumari* v *Dilsool Roy* 101 Ind Cas 512–45 C L J 53 *Dandajam In re* 8 Ind Cas 268, *contra Lalu Singh* v *Sahadeo Singh* 36 Cas 610

CLAUSE IV

exposing them to constant contradiction *Phip Ev 7th Ev 285*

declarations are admissible in ev in ca *he Berkeley Peerage Case,* 4 Cam *Mansj* deceased persons who are sup to have had a personal knowledge of the facts, and to have stood quite ... ed are received in evidence In case of general rights, which depend

intervals of time, direct proof of their existence therefore ... required

Administrative requirements Necessity Before secondary evidence unsworn statements can be received as proof of the fact asserted it is essential here as in other instances of the use of secondary evidence that the pr proof of the oral testimony of the declarant should be shown to be unavail and that in consequence, a sufficient administrative necessity to procure dary evidence has been placed on the proponent A declaration of this ... is said to be admissible, 'where no better evidence can be had" *Chamberlayne Ev* § 2791

tions
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prove
answ
being rightly ascertain
conceive the exception
reputation c
investigate t
existence of
be given'

sanction or test deemed equivalent for ascertaining the ...

in a manner the purpose of cross examination *After* ... an ordeal it is reasonably safe to accept the result as an estab... *Wigmore* § 1083 So the guarantee of its credibility consists in the co...

of a large number of persons, all interested in and therefore likely to ascertain the truth of an opinion which if untrue, would be surely challenged *Wills' Ev 2nd Ed 222*; *Wright* v *Doe*, 7 A & E 313 in H L 4 Bing N C 489; *R* v *Bedfordshire*, 4 E & B 535.

Origin of the Rule "At the time of the definite immergence of the Hearsay rule—that is, by the end of the 1600 S there remained in existence a practice more or less loose, of receiving the repute of the community ... rs ... of ... ood ... jury could in any case have considered, had they otherwise known of it, would be unnatural and improbable But with the final shaping of the Hearsay rule's limits, and the conscious statement of specific exceptions, in the first half of 1700 S and with the progress and final s ... doctrine that the jury could consider ... evidence in Court, the use of common ...

... by the ...

Subjective Relevancy—Adequate knowledge Unless the situation presented to a presiding judge is such that knowledge on the part of a given declarant as ... of general ... Barnet, C M ... L R Ir ... ien, 75 L J ... with respect ... Ev. ... imu- ... the ... ving that from their situation they probably were conversant with the matter of which they were speaking" *Bow* v *Allenstown*, 34 N H, 351, 366 When however, the circumstances show that the declaration is made otherwise than upon the declarant's own knowledge it will, even when relating to a public right, be inadmissible (*Devonshire* v *Neill supra*) *Phip Ev 286*

Scope of the Section 'Evidence is to be admitted from old persons .. of what they have heard other persons ...

... affecting classes of the community cannot be excluded, or ... relaxation the

S. 32. rule against the admission

If the question were
have a right to use and the
that evidence of reputation
for follo
individu
m but t
C J in
excludin
tion, or c
interest,
in whic

J in Hall v *Mayo* 97 Mass 416, *Green* v *Chelsea*, 24 Pick 80; *Dunrav*
Llewellyn, 15 Q B 791, *Queen* v *Bedfordshire*, 4 E & B 535 But the d
tion must relate to the general right, and not to particular facts which
or negative it *R* v *Bliss*, 7 A & E, 550; *Crease* v *Barrel*, 1 C. M & R
R v *Berger* (1894) 1 Q B 823, *Mercer* v. *Denne* (1905) 2 Ch
Radcliffe v *Marsdon* 72 J P 475, *Fowke* v *Berington*, (1914) 2 Ch 308,
13, Tay § 617 *Phip Ev 7th Ed* 287

The best way to
as far back as livin
regard to the precedin
is not however essen
any evidence of moder
admissibility of such evidence *Crease* v *Barrel*, 1 C M & R 919, 930,
raven v *Llewellyn* 1 Q B 791 (804); *Wills Ev* 229 Facts in issue are relev
facts within the meaning of section 32 of the Evidence Act, and statements ma
by deceased persons about facts in issue are admissible under the sectio
Raghubhusana v *Vidiavarudhu*; 34 Ind Cas 875, disapproving *Patel* v
15 B 565

This clause permits proof to be given of a statement of a deceased pers
that in his family or in the ... of the caste to which he belonged
and such
been likely
statement b
Parbati v C
to give his
grounds of that opinion, information derived from deceased persons
must be the expression of an independent opinion based on hearsay, and

2 L R Ir 159 60, *Phip Ed 7th Ev* 286

Staten ... of individual

was always regarded
such is always receival
R 14 So also maps
are also receivable *R* v *Milton*, 1 C. & K. 62; *Wigmore*
Alcock v *Cook*, cited, 1 Ph Ev 251
The same rule is applicable in
Dow 297; *Smith* v *Earl Brownlow*
2 Ch 308. Maps prepared by o
matter may also be received. *Hammond* v *Bradstreet*, 10
Fulcher 1 E & E, 111. Copies of Court rolls can also be a
section *Plaxton* v *Dare*, 10 B. & C 17; *Att. Gen* v. *Emerson*,
649, *Roe* v *Parker*, 5 T. R 26. So also deeds and leases, between parties

S.

In *Brisco* v .
it is as goo
certainly dif
reputation, for a jury are summoned from the country at large, and are not themselves likely to know of the matter Yet where the matter has been before

went by default *Neil* v *Devonshire, supra* Similarly judgments, decrees, and orders of Courts and of similar bodies, if final, are admissible as evidence of reputation *Step Dig Ev Art 30* But here also the persons acting as Judges had no knowledge of the
ing *Rogers* v *Wood*
v. *Villebois*, 13 M
8 A & E 198; but s
this section a statem
tion i e the fact that no one in the region had ever heard of the right, custom, or boundary being as alleged should be admissible as a negative reputation *Drinkwater* v *Porter*, 2 C & K 182; *Anglesey* v *Hatherton*, 10 M & W 239; *Wigmore* § 1595

Declarations as to public or general interest In proof of public or general rights or customs or matters of public or general interest, statements

S. 32. *Hickie*, 15 Q B ... General rights are those ... which some class of ... interest, as for example those which are based on the customs of manors (... *esston*, 12 East, 62, *Crease v Barrett*, 1 ... R 919), parishes (*Berry* v *Banner*, Peu 156, *Evans* v *Merthyr*, (1 ... v *Crisp*, 4 M & W 320) or which are connected ... (*Evans* v *Rees*, 10 A & E 151), hamlets (*Thomas Jenkins*, ...) and manors and ancient division of manors (*Barnes Mawson* 1 M & S 77), *Wills Ev* 2nd Ev 222 For the purpose o... rule, the test what is public is as to whether the subject in question i... general sustained, and, as it were, spirited discus... of a correct opinion Where ... although ... So the ... ts of priv... forms the ... subject matter of the ...

The question next arises, about what ... reputation be received as trustworthy The principle already examined ... the answer —that the ... in its nature one about which a trustworthy community reputation ... an active, constant and intelligent discussion ... residuum of fairly trustworthy conclusions As a ... say that the matter should be one of public, or general or public ... interest, and this is the common phrasing though it varies loosely But this is still only a rule of thumb To decide difficult cases it is necessary still to seek the living principle and ask anew whether the matter is of such general interest to the community that by the thorough sifting of active, constant and intelligent discussion a fairly trustworthy reputation is likely to arise *Wigmore* 1586 see also *R* v *Antrobus* 2 A & E 793 *R* v *Bedfordshire*, 4 E & B 535 Declarations made ante litem motam by persons who are now dead in respect of a question relating to a matter of general or public interest even if they be no more than evidence of reputation or hearsay evidence, are admissible *Busoid* v *Aenaj*, A I. R 1929 Cal 533=... C W N 439

Interest " The term 'interest' here *does not* mean that which is interesting from gratifying curiosity or a love of information or amusement, but that in which a class of the community have a pecuniary interest or some interest by which their legal rights or liabilities are affected " *Per Lord Campbell, C J* in *Queen* v *Bedfordshire*, 4 E & B 535 *The interest* spoken of in the rule is that of ownership or some lesser prope... in the chattels land or franchises to which an individual may prope... being a member of the public more or less extended ... from ownership is no ground for ... assertions regarding it *Cham*... *Ev* § ...

Boundaries An extra ... the position ... boundary, being on a matter of ... to have been made by one posse... an assumption may be made in favour of any ... resident in the community affected by the position of a public ... of actual knowledge may at any time be demanded by the presum... *Chamberlayne's Ev* § 2793

Public custom Where a house in a village is privately sold, proof of a custom in ... the remainder of the village gets one-fourth of the purchase ... of a similar custom with regard to sales ... 47 (48) F R ... a let... of the ... infor... to a ... *Swanatha*, 17 ... customs ... heads of districts are often accepted as co... 139, *Lay*... *Ev* 190, see also *Paul Rai* v *Ram Hit*, 1 N W ... *Mahomed*, 3 N W P. 204

Opinion What is offered must be in effect a reputation, not the ... assertion of an individual. But reputation includes and is often learned ...

S.

witness was "What have you heard old men, now deceased, say as to the reputation on this subject?" Thus, though in form the information may be merely what deceased persons have been heard to say about a custom, yet in effect it comes or ought putation. *Wigmore* § 1581, see also .. *Porter*, 2 C. & K 182, *Earl of* *lebank* v *Thompson*, (1903) 2 Ch 3; putation from deceased persons" But "reputation is no other than the hearsay of those who may be supposed to have been acquainted with the fact, handed down from ase it is heard E 679.

In *Mercer* v *Denne* (1904) 2 Ch 534, the suit was for enforcing fishing rights. 1639, under an information by the Attorney- ich the sea extended was excluded In rejecting at p 543 "I am of opinion that these deposi-

tions are not admi

right which the Crow

the depositions of

on the question to

witnesses in other actions are admissible against strangers amongst other cases, if they relate to a custom where reputation would be evidence, but then those eputation and not of matters of iorities .. that reputation as also *Ireland* v *Powell*, cited in *Reg* v *Bliss*, 7 Ad & E 555 In *Ireland* v *Powell, supra*, the question was whether a turnpike stood within limits of a town, and though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people since dead that those houses formerly stood he ground that those *Denne*, (1905) 2 Ch

(1914) 2 Ch 308 So the reputation

"I know the right and custom to

understand the general acceptance of the custom by the community to be such and such" is admissible The deceased individual declarant is merely the mouthpiece of the reputation Whenever, therefore, individual declarations are

: *Birell*, 1 C M & R 925, *Drinkwater* v *Porter*, 7 C & P 181 But in *Barraclough* v *Johnson*, 8 A & E 99 *Lord Denman C J* said 'I do not agree that it is necessary for persons giving an opinion as to the publicity of a way to state that they found them from reputation although ' ... reputation The st ... some extent ' In *I* ... establish that altho ... matters of public ... an inference of fact ... allows evidence of opinion in respect of any matter of public or general interest, the test being whether the deceased person expressing the opinion was likely to have had knowledge In the case of Mohants, even if they may have had knowledge by means of oral tradition handed down from Mohant to Chela, the opinion would be relevant but not particular facts. *Ram Prasad* v *Shiv* ... 12 Lah 497 = A I R 1931 Lah 16

Opinion must be of competent person. The reputation to be admissible must obviously have been formed among a class of persons who were in a position to have sound sources of information and to constitute intelligently to the formation of the reputation *Wigmore* § 1591 In *Weeks* v *Sparks* 1 M & S 698, *Le Blanc J* said "And the only evidence of reputation which was received was that from persons connected with the district . The rule generally adopted upon qu ... that after a foundation is one ... the evidence of reputation ... what old persons who were in a situation to know what these rights are have been heard to say concerning them ' "Evidence of reputation upon general points is receivable, because all mankind being interested therein, it is natural that they would discourse together about t ... of information *Per Lord Kenyon* in *More* ... is thus laid down by *Parke B* in *Crease* v ...

hood ... But where the right is really public—a claim of highway ... ted, it seems difficult to ... which all are concerned ... but of course it would ... are shown to have some ... frequently using the road in dispute See also *Duke of Beaufort* v *Smith*, 4 Exch 467 (469), *Daniel* ...

... influence of bias or of the partisan warmth of feeling develope...

statement untrust- S. 3
to the admissibi-
, before the dispute
has
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resp
have had a personal knowledge of the facts, and to have stood quite disinterested are received in evidence In cases of general rights, which depend upon immemorial usage, living witnesses can only speak of their own knowledge to what has passed in their own time, and to supply the deficiency, the law receives the declarations of persons who are dead Therefore, however, the witness is

them would lead to the most dangerous consequences Accordingly, I know no rule better established in practice than this, that such declarations shall be excluded With respect to questions of prescription, I have known many

be made before even the existence of any actual controversy, concerning the subject matter of the declaration *Davies* v *Lowndes*, 6 M & G 473 (518) So
a dispute was
. *G*, 30 L J P
eclarations, has
otton 3 Camp at
... ceased persons (are admitted) upon public rights, made *ante litem motam*, when there was no existing dispute respecting them, is that these declarations are considered as disinterested, dispassionate and made without any intention to serve a cause or mislead posterity, but the case is entirely altered *post litem motam*, when a con-

has arisen, ...
might tend to support the declarant's own title will not of itself be sufficient to exclude them *Doe* v *Davies*, 10 Q. B 314 *Halsbury Vol* 13 p 469 So "there must be, not merely facts which lead to a dispute, but a *lis mota*, or suit,

S. 32. or controversy preparatory to a suit, actually commenced, or dispute arisen, ar that upon the very same pedigree or subject in litigation." *Per Lord Denman* in *Davies* v. also *Slaney* v. *Wade*, 1 Myl. & Cr. 338, 643; *Frederick* v. *Att. Ge* *motam* may, however, versy on the subject aros

Statement admissible signature of the settlement prepared on the information of the village, it was held clause (1) as well as under section 35 of the Evidence Act. *Braj Nath* v. *Singh*, 12 O. L. J 571 = 2 O. W. N. 872 = I. R. 6 O. 101. Neither clause (4) nor clause (5) of section 32 of the Evidence Act justifies the admission of Hearsay

proved under that section. *Musammat Parbati* v. *Ram Chandrapal*.

CLAUSES V AND VI.

Ev. p. by a much greater latitude persons from whom the S. T. 1166, 1179, ist. 327n; *R.* v. *Eriswell*, [1790] 3 T. R. 707], 1808, little difficulty was made about accepting Soon however, this use of reputation became limited to matters of pedigree and geneology. In *King* v. *The Inhabitants of Erith*, 8 East 539 (1807) ... that such statement was admissible only declaration were held in restricted in *Johnson* v. "But evidence of that kind would namely, family, of relations admissibility of such evidence could before the testimony be admitted, have to enter upon a long inquiry as to the degree of intimacy or confidence that s It we look into to the declarations *Berkeley Peerage Case*, 4 Camp. 401 (1811) that the declaration *litem motam*. *Phip. Ev.* p. 298.

S. 32

Shamlal v *Radha*, 4 C. L R. 173; *Anadi* v *Nandlal*, 46 A 665 So also where

Act *Sangram Singh* v *Rajan Bhai*, 12 C 219=12 I A 183 (P C) But this clause does not cover statements of facts made by interested parties in denial, in the course of litigation, of pedigrees set up by the opposite parties *Narain* v. *Chandi*, 9 A 467=A W N 1887, 118 "The statement declared to be relevant by the 5th clause is a statement relating to the existence of any relationship between persons alive or dead (the language imposes no restriction),

is special means of
by the Calcutta and
corresponding rule
n which the question
een certain persons

Ram Chandra v *Jogesua*
Oriental G S Company v
Oudh Select Case 265
admission of what for the
whether a particular person survived another, and it is obvious that this clause does not justify the
man was at the time
his family' *Parbati* v
of relationship, the statements of the deceased relations, servants and dependants

every instance, it must be a question of fact as to whether the person who made the statement had special means of knowledge *Rama Krishna* v *Tirunarayana*, A. I R 1932 Mad 198=62 M L J 116 The effect of the section is to make a

I. P Code *Wahid Bux* v. *Emperor*, A. I. R 1929 Sind 250.

S. 32. Scope of Clause (6).

evidence on questions of rel .

Held, that

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entries
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ledge
the hor
have to decide is not
Similarly in a suit
tendered in
mother an
of his marri
ment on it,
that the horoscope was not admissible under s 32, cl 6 of the Evidence A
Ramnarain Kallia v Monu Bibee, 9 C 613 In delivering the judgment
J said "The document tendered is not a statement relating to the ex ten
of any relationship by blood, marriage, or adoption, between persons decea
It only purports on the face of it to be a statement of relationship betwe
a deceased person and a livi
such a case It is not su
to the affairs of the family
age of a person who is al
of a family pedigree But I am of opinion that it does not come wit
words in the sub-section But there is another objection to the admi ibili
of the document which is fatal Section 32 says that 'statement written
verbal unreasonable' may be admitted in certain cases On the plaintiff's
evidence it appears that he does who wrote the horoscope, or the
endorsement on it, and therefo
cannot be found, or become inca
opinion that the document is
Lal, supra, *Petharam C J* observ
of relationship,

which any n a family pedig are usual
tombstone, such statements
made" *Fa*

Pedig t family records handed down
from gener. ew member of the family died
or was born, but were drawn upon a particular occasion for a specific purpose
made by the were

Mathura Prashad, 13 C W N 1=10 Bom L R. 1038=8 C
Cas. 175 (P C) The point of view with which the decision of the ques
as to proof of a certain pedigree should be approached is that if the docu
mentary evidence on which the plaintiff relies is found to be reasonable, expli
and reliable the oral evidence which consists mainly of the depositions of
the members of the family should also be accepted as trustworthy, being
consistent with the documentary evidence On the other hand if the docu
mentory evidence is not of the character mentioned above the oral evidence

S. 3

Ind Cas
an Evidence
lawful by
Sadik Ali, 2
O. C 115

English Law. Declarations relating to pedigrees are allowed where they were made, before the commencement of the suit, by a deceased person provided the person making them was related by blood to the person to whom they refer, or was the husband or wife of such person *McKelvey's Ev* 271, see also *Shrewsbury Peerage Case*, 7 H L Cas at p 26 Under the term "Pedigree" are eml
but when
forr
, marriage,
and
others or
son
v 447 In
R.
even on a
stri
words the
declarations of deceased persons respecting the places where their relatives were born, and where they were married resided, went to, or died, cannot be received But in *Shields* v *Boucher*, 1 De G & S 40, *Sir J L Knight Bruce V C* said . 'If the place of birth in *Rex* v *Erith*, had been a geneological fact as it was not,—had been material namely for any geneological purpose, which it was
's Bench might possibly have
v *Beauchamp*, Hubl Ev of
Monkton v *Att Gen*, 1 Deg
98 So 'declarations of the

affinity only, when the pa
in short, which is strictly speaking, matter of pedigree, may be proved as matter relating to the condition of the family by the declarations of deceased
ously
Per
such
rected
with, the question of pedigree, or when they are not required for some geneological purpose (*Haines* v *Guthrie*, 13 Q B D 818) they will be rejected *Phip Ev 7th Ed* 298

(2) like statement in a deed or will relating to the affairs of the family or in any family pedigree etc when made before the question in dispute was raised Section 50 provides that when the Court has to form an opinion as to relationship of one person to another the opinion expressed by conduct as to the existence of such relationship of any person who, as a member of the family or otherwise, has special means of knowledge on the subject is relevant *Per Mullick J* in *Bibi Fatma* v *Abdul Kasim*, A I R 1928 Pat 539 = 110 Ind Cas 428 In India it is difficult to prove such facts as the date of birth after the lapse of many years, and it would be unreasonable to demand such a class of evidence as would justly be demanded in England But the evidence must be such as to carry conviction to the mind *Nawal Sha iba Begam* v *Nanhi Begam* 11 C W N 130 (P C) = 1 M L T 429

(by) requiring the facts from the mouth of the witness who has the knowledge

S. 32. of them In cases of pedigree, therefore, recourse is had to a secondary sort of evidence,—the best the nature of the subject will admit, establishing the descent from
Peerage Case, 4 Camp
being impossible to prov
the declarations of de
the reputation must proceed on particular facts, such as marriages, births and the like, from the necessity of the thing, the hearsay of the family as to these particular facts is not excluded" In the same case *Lawrence J* observed
the family is
of which) would
In *Stuls* v
pose the ground
is that they were matters relating to long time past, and that it was necessary to relax the strict rules of evidence for the purpose of doing justice" So declarations under clauses 5 and 6 are admissible when his evidence is not procurable. Vide *Ram Narayan* v *Monee*, 9 C. 613; *Surjan* v *Sardar*, 5 C W N 19 P. C.

Circumstantial guarantee
ness of such a statement is thus
Ves 511 "It was not the op
tradition, generally, is evidence
persons having such a connection
natural and likely, from their
speaking the truth, and they could
that: declarations in the family, descriptions upon monuments, descriptions in Bibles and registry books,—all are admitted upon principle that they are the natural effusions of a party who must know the truth, and who speaks upon an occasion when his mind stands in an even position, without any temptation to exceed or fall short of the truth" In *R* v *Erisuell*, 3 T R 720, *Ashhurst J* said "It is natural for persons to talk of their own situations and of their families The evidence is in its nature of an unsuspicious kind, it is generally ... or even thought

them are proved to be dead or incapable of giving evidence ... 63, see also ... *Mahomed*, 81 Ind Cas 927=6 Lah L J 299=A I. R 1925 *Lah*
Prohlad v *Ramsaran*, 38 C. L J 213.

... two points to be
Illustration
ut differs from
of a person
vidence is that
of things, such as geneological trees, tomb stones etc. Clause (5) refers to relationship between any persons (living or dead) whereas clause (6) refers to

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not necessary that it should have been made by a person who had special means of knowledge, but it must be contained in a will or deed relating to the affairs of the family to which any such deceased person belonged, or in a family pedigree, or upon tombstone, family portrait or other thing on which statements are usually made" *Field's Evidence 6th Ed.* p 139, *Norton Ev* 188

the te
consi
or by
whether the statement offered be an individual's assertion or the family repute. *Wigmore* § *1195*; see also *Colbet's Estate*, 51 Mont 455, *Young* v *State*, 36 Or. 417.

Tr 1166, 1179, 1181,
ion in the neighbour-
Wood, 14 East p
remember the case of

plaintiff to J F In delivering his judgment *Best C J* said "Consanguinity, or affinity by blood, therefore, is not necessary, and for this obvious reason, that
be informed of the state of the family of
relation who is distantly connected by

deceased persons
to have been made
made *post litem m*

Moo & Rob. 28) Similarly in *Crispin* v *Daglions*, 3 Sw & Tr 44, *Sir Cress-*

. 32. *uell Cresuell* observed "I can well understan l that where a m tter is l kely to be discus ed and well l nown in a family, a member of the fam ly may b allowed to give evidence of it, but in this case the plaintiff according to hi own:
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But
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the adopt
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and also of persons who though not related by blood or marriage to the were intimately acquainted with its members and state, shall be admis- ble in evidence after the death of th declarant
extent as those of decease l members of t

The law presumes against vice an l strongly in favour of marriage It will ceremony is inv iriably insisted upon ye irs iner it too place to the class to which the parties belong The law therefore rel ixes the rules evidence and in the ab presume marriage on p statements of persons r behaviour of the cou their general repute 50 of the Evidence Act

Statement mu during the course of of trustworthine s must have been made *ante litem motam* *Wigmore* § 148 In *Berk* Case, 4 Camp 401, *Mansfield C J* said 'In the *Inglesca Cause* m ny declarations of deceased persons were given in evidence, but after an attentive exam nation I can not find that any of these had been made after the dispute had occurred

I am not aware of any other authority upon the subject in our law, but the distinction of declarations *ante litem motam* and *post litem motam* is clearly taken in a foreign treatise of great learning, entitled *De Probationib s* I have now only to notice the observation that to exclude declarations you must show that the *lis mota* was known to the person who made them There is no such rule The line of distinction is the origin of controversy and not the commencement of the suit After the controversy has originated all declarations are to be excluded, whether it was or was not known to the witness If a enquiry were to be instituted in e of the controversy was or was not kno would be wasted and great confusi conceive that the deposition now c same case the reason for the exclusion, is thus stated by *Heath* their m n contest has or g nated onl tel part n ne s le or the other een by

& M 160 *Brougham L C* observed "If there be *lis mota* or a has precisely the same effect upon a person's mind with *litis contestatio* person's declaration ceases to be adm ssible n evi len e It is no longer what *Lord Eldon* calls a natural eff a strong If he be because

Wigmore § *1483* So where declarations are made *post litem*

not admissible, . . erest, S. 3
and not to have . *C J*
in *Doe* v *Ran la* .. . . ct of
adoption of th . which
the question of adoption was directly in issue, such statements should not be admitted in evidence in the present suit under subsection 5 section 32, as they are not made before the question is dispute was raised *Ramkrishna* v *Tiru-*
. M L J 116 Declararations as to the
inadmissible in evidence if made *post*
ore the commencement of legal proceed
ings, but before even the existence of any actual contoversy concerning the
. is made in the obvious interest of the
Mahomed *Ilam* v *Saiyid Mahomed,*
. . . .

ie Roman law, but the term *lis mota*
cement of the action, and was not
t in our law the term *lis* is taken
controversy, and by this *lis mota* is
oversy, and not the commencement
of the suit *Tay* § *692*, see also *Berkeley Peerage Case,* 4 Camp 417 *Moulton* v *Att Gen* 2 Russ & My 161 *Gee* v *Ward,* 7 E & B 509 The ground on which evidence of this description is excluded is the supposition that, when a
ly to range themselves
or to have imbibed their
would become tainted
at its very source *Goodere* Camp 417,
Mr Justice Laurence said "W and even
good will, tempt many who , to deviate
from the truth in the laxity of conversation Can it be presumed that a man stands perfectly indifferent, upon an existing dispute respecting his kindred? His declarations *post litem motam*—not merely after the commencement of the law suit, but after the dispute has arisen, for that is the primary meaning of the word *lis*—are evidently more likely to mislead the jury than to direct them to a

by a man who has an interest

It was once said by *Baron Alderson* in *Wallor* v *Beauchamp* 6 C & P 561 *that it was sufficient if at the time of the declaration the state of facts existed* (for example the birth of a child) as to which the controversy afterwards arose
is to the controversy and to
Although the *dictum* of *Baron*
Scott N R
Att Gen 30
.. *L C* said
nce is not the
xistence of a
v *Lowndes,*
facts which
may lead to a dispute, but a *lis mota* or suit, or controversy preparatory to a suit actually commenced, or dispute arisen and that upon the very same pedigree or subject matter which constitutes the question in litigation See also *Slaney* v *Wade,* 1 Myl & Cr 338 (356), *Butler* v *Mountgarret,* 7 H L Cas 633, *Fredrick* v *Att Gen* 44 L J P & M 1 In *Bahadur Singh* v *Mohar Singh,* 24 A 94 (107) P C the principal oral evidence consisted of statements made by the plaintiff as to their descent the information as to which they had received from their ancestors Objection was taken that such of these statements as were made since 1847 were inadmissible in

S. 32. evidence under clauses 5 and 6 of section 32 of the Evidence Act (I of 1872)

d that they were admissible,

dispute

exclusion would not apply

to what was done in prevention of dispute, even were it in support of the title of the declarant; and although in the belief that his title would be affected by the same circumstances as the party seeking to avail himself of the declaration Thus in *Goodright* v *Moss*, Cowper. 591, *Lord Mansfield* in receiving such evidence said 'I have known advice given to a father and mother to make attested declarations in writing under their hand of the prec e time of the truth

in *Moncton* v *Att Gen.* 2 Russ & My. 161, *Lord Brougham* ascribed *L Mansfield's* view of admissibility to the principle that the declaration was— made with a view to their own interest, but to preserve a *constat* as it were, record of facts peculiarly within their knowledge (which is one of the m grounds of admitting such hearsay evidence); see *Lovat Peerage Case*, L R App Cas

ham in *Sa*

v *Wade*,

Mcgerald, 6

Eq R 335

by interest

parties in

their opponen

Naraini Kuar v *Chandi Din*, 9 A 467. So also depositions made for th purpose of another suit are inadmissible if the same point was in issue, b otherwise

Wills Tr

(lis mota)

Per Lord

Freeman

Devonshir

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entitled in

the time

admissible for a party claiming through her *Doe* v *Tra…er* Ry. & M

But he admits that this principle must not be pushed too far Accor section 32, clauses (5) and (6) such evidence is admissible although the question

some feeling of interest, which will often cast suspicion on the declarat has never been held to render them inadmissible."

Again, any controversy to exclude must be on the particular subject in issue, controversy in a merely analogous one, but not the issue itself, not necessarily carrying with it the elements of mistrust Thus in a case respecting copy

S.

where the point in controversy is foreign to that which was before controverted, there never has been, a *lis mota*, and consequently the objection does not apply."

law, that
knowledge
Russ & M.
pressed, that
it is given
in evidence as hearsay must only

respecting the
such distinction.
the party knew
of his own personal knowledge, or as is much more frequently the case, to what he heard from others to whom he gave credit; for they are only adduced as evidence of reputation in the family, and that is the only mode in which the tradition in a family can be proved, and the subject matter of that tradition can

511 (514); *Shedden* v. *Att. Gen.*, 30 L J. P. M. 217. But if instead of being

matters within their personal knowledge *Tay.* § 639, see also *Doe* v *Randall*, 2 M. & P. 20, *Slaney* v *Wade*, 7 Sim 611, *Robson* v *Att Gen* 10 Cl. & Fin. 500. So also proof by one of a family, that many years before, a younger brother of the person last seised had gone abroad, that the reputation in the family was that he had died there, and that the witness had never heard in the family of his having been married, is presumptive evidence of his death without issue. *Doe* v. *Griffin*, 15 East. 293.

not therefore necessary. *Monkton* v. *Att. Gen.* 2 Russ. & M. 160; *Berkeley*

S. 32. *Peerage Case*, 1 Camp 416. The difficulties, then that arise are concerned with the line between declarants that may fairly be supposed to be thus qualified

like? Secondly, shall any ...
for example, according as the ...
consanguinity or by affinity? ...
be supposed to be present whenever there are found persons ...
facts' 'having an opportunity to know the facts, or holding a relation rendering it very probable that he would learn them truly' If it is so the line need not be drawn strictly at relatives But in the language of *Lord Erskine* the interest of the person in knowing the connections of the family (*Vowles* v *Young*, 13 Ves 140) does require the line to be drawn there, excluding non-relatives" *Wigmore* §§ 1486, 1487 See also *Annesley* v *Anglesea*, 17 How St Tr 1160, *Rooms* v *Wolseley*, 2 Lee Eccl, 135; *Duchess of Kingston's Trial* 20 How St Tr 355, *Berkeley Peerage Case*, 4 Camp 401; *Walker* v *Wingfield*, 18 Ves 443; *Johnson* v *Lawson*, 2 Bing 86; *Casey* v *O'Shaughnessy*, 7 Jur 140, *Pohm* v *Gray*, L R 12 Ch D. 126 But "such a narrow test seems too narrow Even in England, where so much of personal advancement and material prosperity for the individual depended upon his family rank and his rights of inheritance, it seems too much to say that only those who have the immediate property interest in learning the family history can possibly have adequate information; for family physicians and chaplains, old servants, and intimate friends may, in cases be equally and sufficiently informed" *Wigmore* § 1487 The only ...
Lawson, 2 Bing ...
the family for ...
rejection said ...
it would be a ...
namely, the con...
family, affords ...
such evidence w...
testimony could ... of intimacy or confidence that subsisted between the party and the declarant"

"It may be noted," says *Prof Wigmore* "as to this reasoning, first, that the result is inconsistent with the general language used in the earlier judicial opinions, and is supportable only on the narrow test of *Lord Erskine* before mentioned, secondly, that the special reason given, namely, the inconvenience of an investigation into sources of knowledge, is anomalous in the law of Evidence, for no Court is allowed to decline to investigate the sources of a witness's qualifications so far as may be necessary, while in each case the Judge's discretion permits, and old would surely be no more found to be" *Wigmore* § 14...

Special means of knowledge ... statement admissible ... ledge

names of persons from whom they ... as to the *Devi Kariappa*, 6 Mys. L J 375 A ... ledge and existence of relationship, the person having special means of knowledge was called

267=123 Ind. Cas 907. Family bards have special means of knowledge regarding the facts of the relationship between the different members of the families of their *jajmans* Consequently statements made by them as regards the relationship between members of the family would be admissible in evidence under 32(5). *Anandi* v *Nand Lal*, 22 A L J 657=46 A 665 It is the business of a *muasi*, who is a hereditary family bard, to acquaint himself
recounts in song
hearsay does not re
Abdul Ghafer v *I*
L. J. 583 (P C)
Court had special m
cannot be received in evidence and it cannot be accepted as evidence that he had knowledge Proof of special source of knowledge is a pre requisite to the admission of the document in evidence and until the document is received in evidence no presumption can be made from the statement contained in it *Bhima* v *Mt Sender*, 9 O L J 186=4 U P L R (O C) 79 Before a pedigree said to have been prepared by a deceased member of family can be admitted in evidence under section 32 (5) it must be proved that it was either prepared by the deceased or that the deceased had that personal knowledge and belief which must be presumed in any statement of the deceased person which is admissible in evidence *Mahomed* v. *Saiyid*, A I R 1931 Oudh 1d7=8 O W N 349

Qualifications of the declarant Upon the general principle of testimonial knowledge, the qualifications of the deceased declarant—his relationship, or whatever is relied upon as equipping him with information—must be shown in advance *Banbury Peerage Case*, 2 Selw N P 764, *see also Taylor* § 640, *Wills Ev* 213 214 In India the existence of special means of knowledge in the

e he does not come
It no where appears
that he had any other knowledge than as mukhtear acting for these ladies He is not shown to have been a member of the family, to have been intimately connected with it, or to have any special means of knowledge of the family concerns Therefore in their Lordship's opinion he does not come within the description of a person having special means of knowledge ' See also *Bijay Bahadur* v *Bhupendra*
declarant has sufficier
tion is *Wigmore* § 14
priest as to the relat
clause 5 of section 32
Lal v *Radha Bibee*, 4 (
ment Court is admissible in evidence under s 32, cl 5 of the Evidence Act,
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32 suit, in which she stated, "I have no issue or any near relative *Mati Lal* is related to me as a daughter's son and *Khawali Lal* is my husband's younger brother These are my relatives on the husband's side" In admitting the evidence *Lord Shaw* observed 'In this situation their Lordships are of opinion that, in the most solemn form, this lady had declared facts which must have been within the scope of h ... facts be sound, there can in their ... ment appealed from is correct'

ntained in his deposition and in affidavits filed by him are admissible evidence under section 21 (1) read with section 32 (5) of the Evidence Act, made by a person having special means of knowledge, whether personal or hearsay *Janrathim* v *Muru Goppi*, 33 Ind Cas 969 Where the Court below had rejected the evidence of certain witnesses on the ground that it was hearsay only and had not conformed with section 32 of the Evidence Act and on the face of the evidence it was sometimes uncertain whether the witnesses were speaking ... knowledge or from information derived from other ... it ma ... which the ... nor in the latter case to question the manner in which the Courts ... the provisions of section 32 *Safijunnissa* v *Shaban*, 26 A 581=9 C W N 105 P C, So where the witness is speaking from hearsay he must show that his knowledge is derived from the person whose statement is admissible under the section *Vide Jugalpal Singh* v *Rajeshwar Singh*, 25 A 43=7 C W N 09

Statements are admissible to prove the facts contained in the statement on any issue In England dec ... relevant only in cases in which the pedigree to which ... it is only relevant to the issue ... is only admissible in England ... not where they are ... of in action Thus in ... for goods sold ... to prove the plea ... deceased father in ... was held that the ... not admissible *Haines* v *Guthrie*, 13 Q B D 818, see also *Figg* ... *bone*, 11 L J Q B 46 This rule thus interpreted, says that declarations otherwise satisfactory, can nevertheless be used in those cases only where the issue involves as material a question of pedigree, i e geneology,—chiefly therefore inheritance cases *Wigmore* § 1503 This view seems to have its origin in the observation of *Lord Ellenborough, C J in R* v *Erith*, 8 East 542 where he observed 'This was a case in which the question was, whether the declaration of the father of a bastard child, as the place of his, the bastard's birth was competent of that fact? The only doubt which has been introduced into this case has arisen from improperly considering it as a question of pedigree The controversy was not as in a case of pedigree, from what parents the child has derived its birth but in what place an undisputed birth derived from known and acknowledged parents, has happened The point thus stated turns on a ... and therefore not falling within ... and is

Settl ... Just Pe ... *Tuchal*, ... to make ... these declarations were first ... England in inheritance cases ... directly a part of the issue, bu ... litigation ought to have no bearing on the admission of these ... tion A deceased father's entry in a family Bible is equally trustworthy ... trustworthy whether the issue subsequently arising happens to be framed upon a

promissory note, or in application **S. 3**
majority of American jurisdictions
are now admitted whatever the

general nature of
pedigree, or descent,
Inhabitants of Warr
of the authorities

pedigree, and when the incidents of

cases, whenever they become
Similarly in the colonies the ru
D. 818, was not followed In

section 32(5) of the Indian Evidence Act such evidence is admissible In *Dhanumal* v *Ram Chunder*, 1 C W N 270 = 24 C 265, a plaint in a former suit, verified by a deceased member of a family and as such having special knowledge, was held admissible under section 32(5) of the Evidence Act, to prove the order in which certain persons were born and their ages In delivering the judgment of the Court *Petharam C J* said It was contended on the part of the plaintiff on the authority of the English cases that as the question at issue in this case did not relate to the existence of any relationship by blood marriage
he statements were excluded by the
his point the law in India under
England, and that the effect of the

sons of Sumbho Nath were born and their ages, and when admitted to my mind, satisfactorily proves that the defendant was the son who was born on the 6th June, 1868 Similarly in *Ram Chandra* v *Jogeswar* 20 C 758, for the purpose of the decision of a question of limitation it was necessary to prove the date of the plaintiff's birth The plaintiff and one of his witnesses each spoke to statements made to him by relations of the plaintiff who were since deceased relating to the date of the plaintiff's birth The defendant objected to such

Bipin Behary Dey v *Sreedam Chunder*, 13 C 42 has been practically overruled by *Dhunumal* v *Ram Chandra*, *supra*

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S. 32.

Stephens, Kent Assizes .
it has been said "Heare ,
when he married, and what children he had, etc, of which it is not reasonable to presume I have better evidence So to prove my father, mother, cousin other relations, beyond the sea, dead; and the common reputation and belief of it in the family gives credit to such evidence" On the authority of *R* v *Frith* East 539, the place of birth or death—something more than the fact of birth or death—has by some Courts been thought to be inadmissible But question was finally settled in England in *Shields* v *Boucher*, 1 Dig & Sm where *Knight Bruce* said "If the place of birth in *Rex* v *Frith* had been a genealogical fact, as it was not,—had been material, namely, for any genealogical purpose which it was not *Lord Ellenborough* and the Court of King's Bench ... differently" See also *Lord* ... & M 156 where he observed ...

ship of consanguinity or of affinity only,
are actual ...
pedigree,
the decla...
have been previously connected with the family respecting which their declarations are tendered" Moreover since the proof of a particular relationship often depends on the proof of some specific fact, such as birth, marriage or death, the date or place of ...
place of residence ...
history these facts ...
of the rule when ...
Wills Ev 212 , *Monkton* v *Att Gen* 2 Russ & Myl 147, 156; *Berry* v ...
Ir C L 17 A statement as to the age of a member of a family, made by his ...

... ceased person having special ...
... onship within the meaning of section 32 ...
... *Narasimha Chari*, 25 M 183, ...
see also *Ram Chandra* v *Jogeswar Narain*, 20 C. 758; *Brijnabehari* v ...
13 C 42

Contemporaneousness of the Statement It is not necessary to show that the declarations were contemporaneous with the events to which they relate for as *Lord Brougham* has well observed ... restriction "would defeat the ...

Att Gen, 2 Russ & My. 157, 158, *Tay Ev* § 639

... excluded '*In cases* ... *living witnesses* ...
of ge...
only ...
to sup...
dead ...
... right of way, or ... fact which would support ...

reputation must proceed on
like, from the necessity of the
particular facts is not exclu...
neighbourhood, and family transactions among the relations or ... may be ...
Therefore, what is thus dropped in conversation upon such subjects may be ...

presumed to be true." *Per Lord Mansfield* in *Berkeley Peerage Case* 4 Camp. 401. **S. 3**

Cases under clause (5) Very liberal interpretation should be given to the words "when the statement relates to the existence of any relationship by blood

family about certain
iority of members of
ishna Lal v *Raj Kuar*,
104 Ind Cas 299=1 Luck C 97=A. I R 1927 Oudh. 278 A statement as to the existence of a relationship is admissible even though it was made in a

s clause *Chandreswar*, v

mark of the party,
appellant in his own

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r

s 11, if not under s 32 (5) whether it is shown that the application was filed by a person who was admittedly the testator's nephew and claimed also to be his adopted son and therefore was in a position to know the date of his death and the a
Lachn
T. 891
relatic
532;

any

that his father was
'6 Before a pedigree
s made by a person

relates to the existence of relationship by adoption *Danakoti* v *Balsundara*, 36 M 19=18 Ind Cas 989 A pedigree filed in a Settlement Court for the preparation of *Kheuat* cannot be put in evidence as a family pedigree under s.

S. 32 32 (6) It can be admitted only under s 32 (5) for which purpose it must be proved that the document represents statement as to the existence of a certain relationship by blood or marriage made by a person who had special means of knowledge in respect of the matters thus stated and made before the question now in dispute was raised *Mithu* v *Bhulan*, 15 O C 364, see also *S* v *Tilok Chand*, 36 Ind Cas 66 A statement in a will made by the father describing his adopted son, aged ... and so as the sole beneficiary is admissible to prove the age of the boy under s 32, cls 5 and 6 of the Evidence Act *Krishnamachariar* v *Veeravalli*, (1913) M W N 355 = 13 M L T 350 = L J 517 = 19 Ind Cas 132 The question for decision was whether the plaintiff was the legitimate daughter of one K and R The respondent contended that R was not the legally married wife of K, and in proof of it produced a compromise and a decree between R and another person by which R obtained only a small amount as maintenance He also relied upon a statement made by R on a certain occasion admitting that she was the concubine and not married wife of K It was held that the statement of R was admissible evidence under section 32 clauses (3) and (5) *Parbati* v *Maharaj Singh* 1 Ind Cas 188 A statement made by a person before a public officer as to his ... age is ... v *Kondu* ... maternal ... age *Deb* ... Settlemen... that the ... had a spe...

199 Hearsay evidence is not admissible under section 32 ... Evidence Act, to prove the case of fosterage, in as much as, even if it be assumed that connection by fosterage can amount to relationship in any sense of the term the relationship is not by blood, marriage or adoption *Prince* ... *Nawab Qudsia* 21 Ind Cas 613 The term 'adoption' in clause (5) of section ... of the Evide... ship betwee... meaning of t... other *chela* ... ing of clause (5) of section 32 *Achyutananda* v *Jagannath* 21 C ... Ind Cas 739 = 20 C W N 122 Statements contained in the plaint ... as to the existence of relationship ... a statement within the meaning ...

A L J 349 = 39 A 426 Where the question is whether A born on ... date is of age an entry in a book containing the record of birth, death and marriages in the family kept by his father who is dead that he was born on a particular date, is admissible under this clause *Mohamed Syedol* v *Yeo* ... *Garl* 21 C W N 257 = (191... 39 Ind Cas 401 (P C) A statement by ... to X, as the sole wife of ... person having special means of knowledge *Krishna Theva* ... (1917) M W N 201 ... 33 M L T 277 ... 40 M 971 ...

ment is admissib... *Mr Justice Mooker*... that the section ... should be excluded, first because it relates not to the existence ... non existence of a relationship, and, secondly, because the relationship ...

a *Mohunt* and his *chela* is not a relationship by adoption On behalf of the defen- **S. 32**

13 C 42, *Satish Chandra* v. *Mohendra Lal*, 17 C. 849 and *Ram Krishna* v. *Manindra Mohun*, 20 C L J 302. It is not necessary for our present purpo e to determine whether the fluctuation of judicial opinion indicated in the two sets of decisions mentioned, is more apparent than real, and whether they may not be reconciled by a recognition of the principle that a statement as to the time of commencement of relationship is so indissolubly associated with the existence itself of the relationship, that it may be rightly regarded, without undue strech of language, as a statement which relates to the existence of that relationship *Oriental etc Co Ld* v *Narasimha* 25 M 183, and *Patambar Kuru* v *Raman*, 2
that question, it
tion, *viz*, first, is t
by adoption, and, secondly, is a statement that A has one *chela* B, and has no other *chela*, a statement relating to the existence of a relationship? We are of opinion that both these questions should be answered in the affirmative In the first place, there is no reason why the term 'adoption should be interpreted in a restricted sense, that the expression that A has adopted B as his *chela* is found in judicial decisinos of the highest authority In the second place, the expression 'relates to the existence' is obviously very comprehensive and need not be

The statement was treated as admissible in evidence but was held not to be conclusive '
evidence unde
ship by blood,
A document containing a statement of a deceased person as to the mode of succession obtaining in a particular family is also admissible in evidence *Patambar Kuru* v *Raman* 24 Ind Cas 519, see also *Sheo Lal* v *Gour Narain*, 7 Ind Cas 218

25 A. 236=5 Bom L R 410=30 I A. 91 See al o *Kedarnath* v *Mulchumal*, 40 C 555 (P C) The legal presumption as to paternity raised by s. 112 of the Evidence Act is applicable only to the offspring of a married couple A person claiming as an illegitimate son must establish his

S. 32.

to be good respecting ...
declaration, the declarations of illegitimate members of the family ...
persons who, thoug ... to the family ar
intimately acquainte ...
after the death of ...

Ghurreeb Hossain v ...
the age of a person, the entry of ...
he statements of his deceased father ...
ection 35 Munna Lal v Kamesh...

A I R 1929 Oudh 113 A settlement of pedigree is admissible in evidence either under s 32 cl (5) if it be shown that it amounts to the statements of deceased persons, who were members of the family and as such had special means of knowledge and further that these statements were made before there was any controversy as ... said pedigree *Sarfaraz* v ...

furni ... that ... to w ... held ... Act, but, in the case of an entry in the register in question, there is no ... show by whom the statement entered was made, much less that the person making the statement had any special means of knowledge *Mr Collier* v *Mrs L Baran*, 2 N L R 34 In an application for letters of administration the rights of the applicants to be considered the next heirs of the deceased depended on proof that the relationship between their great-great grandfather and ... was that of full brother and ... sist ... of ... in ... or deed of exchange, dated the 17th January, ... *Kursinama* as to the relationship were produced by the applicants The ... *nama* was held admissible in evidence *Shazadi* v *Secretary of State for India* ... C 1059 P C

Cases under clause (6) Entries made by a parent or relation in Bibles, prayer books, missals, almanacs, or indeed in any other books or in any document or paper, stating the fact and date of the birth, marriage, or death of a child, or other relations are also received as the written declarations of the deceased persons who respectively made them. *Tay Ev* § 650 These statements may be made by the declarant's own writing, or by assenting to or adopt ... ally true whether the statei ... epute *Wigmore* § 1495 ... said "An entry in a ... r pedigree hung up ... all good evidence" ...

... formal one—as, a deed or will—does not make the ... *Murray* v *Milner*, L R 12 Ch D 845; *Doe* v. *Pembroke*, 11 East 504, ... "Such statements ... deceased ...

them, or did anything that amounts to showing that they recog-

S. 3

"A pedigree, whether in the shape of a geneological tree or map, or contained in a book, or moral or monumental inscription, if recognised by a deceased member of the same family, is admissible, however early the period from which it purports to have been deduced On what ground is this admitted? It may be that the simple act of recognition of the document, and consequent

bers of the family, is

his information may

tated to be relations, or of information received by him from some deceased member of what the latter knew, or heard from other members who lived before his time And if so, it may well be contended, that, if, the facts rebut that presumption, and show that no part of pedigree was derived from proper sources of information, then the whole of it ought to be rejected, and so also if there be some, but an uncertain and undefined part derived from improper sources But when the

to that extent, the statements in the , and are good evidence of the relation

adopted son that statemer

the testator *Chandressuar*

book regarding the relationship of parties are admissible under this clause *Amrit Sarta* v *Prabh Dial*, 89 Ind Cas 989.

wills or deeds are admis-

D 845, *Smith* v *Tebbit*, L

he principle that they are

the natural effusions of a party who must know the truth, and who speaks upon

, without any temptation

telocke v *Baker*, 13 Ves

e Case 4 Camp 418 But

become admissible must

614 A written

has been set aside

10 M 362 So

7) does not render

o not purport or

it states only past

under section 32,

v *Mult in Chand*

does not prove

371 But when

ma macharriar v

Government v

, *Subramanian*

of parentage

as been allowed

d members of

e, 11 East, 501

Doe v *Ormerod*

and signature

S. 32. 16 So recitals of descent, and description of parties in deeds or other family instruments, will be received, provided the deeds come from proper custody and are proved or may from age be presumed, to have been executed by some member of the family to which the statements refer *Marmaqon Peerage* Pr Min 111; *Hastings Peerage* Pr Min 200; *Borthwick Peerage* Pr Min 6?; *Hengate* v *Gascoigne*, 2 Coop 117; *De Roos Peerage*, 2 Coop 541, *Stiles* v *Davies*, 1 Mason 268 cited in *Tay Ev* § 651 But the execution of the deed by a relation is an inadmissible requisite *Slaney* v. *Wade*, 1 Myl & Cr ?; *Fort* v *Clarke*, 1 Russ 604; *Tay Ev* § 651 Though a person cannot claim title under an unprobated will he can rely upon a statement contained therein indicating the relationship of the parties. *Hitnarain* v *Rambaran*, 7 Pat 7?; Pat L T 484 = A I R 1928 Pat 459 A statement, in a will left by a deceased person, to the effect that he and his brothers were living, earning and holding property separately, is not admissible in evidence under any clause of sect. 32 nor under any other section of that Act *Gokuldas* v *Chandibai*, 48 L R 225 = 10 Ind Cas 967.

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The word ...

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motive for preparing and preserving a record of family traditions ...

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observed "Nor do we think that the first portion of the observation ... Lordships is intended to lay down an exhaustive definition of 'family pedigree' as used in cl 6 s 32, Indian Evidence Act 1872 Those two words ... indicate the highest and the best type of family pedigree The decision does not show that a pedigree not conforming to that standard cannot be ...

genuineness *Jagdeo* v *Vellaba* ... The mention ...

and the sons are found to be in joint possession of the property ... shares the presumption is that the common ancestors held the property ... *Nur* v *Juan*, A. I R 1928 Lah 964 A family pedigree may be a pedigree kept by a member of the family or by another person on its behalf and it can be admitted in evidence, if it is written by a family bard for the purpose of keeping a record of the family even for its use and the use of the family Such a record can be admitted even though not signed by the person making it

665=A I R 1924 All 575, see also Ind Cas 235=24 Bom L R 289 S.

of a *Harduar purohit* is valuable on a question of a family pedigree *Tauja Singh* v *Allah Ditta*, 133 Ind Cas 874=A I R 1931 Lah 722
It is valid to presume after the den

v *Khelat*, 21 Ind Cas 274 A pedigree was filed before the Settlement Court in

Gulraj, 16 Ind Cas 625 Although a
Evidence Act may be made with respect to

32 (5) of the Evidence Act, though the entries in it were not of great value *Ram Din* v *Kayestha Patshala* 25 Ind Cas. 823

up were not
any of the
descriptions in section 32 of the Indian Evidence Act *Sorjon* v *Sardar Singh*, 23 A 72=2 Bom L R 492=5 C W N 49=27 I A 183 P C Where the
a family governed by the custom of
re can be no motive in the prepara
of the first born as the first born

would b
status w
eldest s
but that
Oudh 2
members of the family made *ante litem motam* before there was anything to

S. 32. throw doubt upon them, are evidence to prove pedigree And such statements by deceased members of the family may be proved not only by showing that they acted upon them or assented to them, or did anything that amounted to showing that they recognized them If any member . . . who presumably would . . . pedigree, that evidence . . . stances *Abdul Ghaffur* . . . 38 I A. 188=12 Lah 336=60 M L J 583 P C

Horoscope—evidentiary value of A horoscope may be tendered under clause 5 or clause 6 of section 32 or under ss 17 18 of the Evidence Act Under clause (6) of section 32 . . . relat . . .

t . . . writer is dead or can . . . moreover to come within this clause . . . horo . . . dence" . . . *Lal*, 17 C . . . this claus . . . 'Then the . . . reference to the horoscope This horoscope has been admitted as coming within section 32 of the Evidence Act and within clause 6 of that section That clause makes entries made by persons, evidence on questions of relationship by blood, marriage, or adoption, where the deceased person had some special means of knowledge As to that it is enough to say that it is not shown that the person who had made this horoscope had any special means of knowledge, and that the question which we have to decide is not one either of relationship by blood or . . . no special . . . tendered u . . . to follow d . . . point As regards the meaning of the words 'on questions of relationship' the interpretation is also not sound *Vide supra*, also *A C W Evidence Act p 336 I Note* A horoscope is receivable in evidence under section 32, clause (5) of the Evidence Act and not under clause (2) of that section but the party making it must have had special means of knowledge *Ramnathan* v *Murugappa* 33 Ind Cas 269=1916 M W N . . . see also *GopalChuah Hors* v . . . *Rattan* . . .

. . . stated to . . . could be . . . refreshing . . . So a hor . . . under sect . . . it was writ . . . 140 A h . . . *Goundan*, 1 . . .

In *Amardyal Singh* v . . . 511=58 Ind Cas 72, a . . . one *Ram Nandan Ram* who . . . his son to be in his fathe . . . scope could be admitted in evidence to . . . admitting the horoscope *Miller C J* . . . relationship between any of the parties a . . .

ments as to age made by deceased persons in the circumstances contemplated in the section were admissible The horoscope however, is merely evidence and is not conclusive and in face of the other conflicting evidence in the case I should have been inclined to remand the case for further consideration on this point

the lito of the son s

admissible in evidence

a relationship *Anna*

malai v *Annamalai* 10 L W 687=52 Ind Cas 496 Horoscopes deeds of adoption or of initiation as chela are admissible if the person writing them or hearing them read soon after their preparation is examined *Shankergir* v *Chinnuji*, 71 Ind Cas 140=A I R 1923 Nag 1 Horoscopes containing date of birth and prepared by a person having special means of knowledge and who is dead is admissible to prove date of birth A I R 1927 Pat 271=8 P L T 730=102 Ind Cas 449

Principle of authentication The principle of authentication as applicable to proof of the execution or genuineness of a writing is in general applicable to a writing offered under the present exception *Slaney* v *Wade* 1 My & Cr 338 *Tracy Peerage* 10 C & F 154 No special considerations here need attention except as regards the necessity of proving the handwriting of entries in family Bibles or the like The fundamental idea of authentication

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to the family, and therefore may be presumed to possess that authenticity which is derived from the tacit and common assent of those interested in the facts which they record But such public exposure of the writing is not needed when it contains the signature of a specific member of the family and his signature is authenticated So a signed chart of a family was admitted *Monkton* v

inscription u on a tomb-

in the mansion are all

ause in all those cases the

e existing —the want of

e ring or the Bible with

presumption is it would

nly did not more or less

ie case of family Bible,

there is no necessity of proving the handwriting of the entries Proof of the handwriting or authorship of the entries is not required when the book is shown to have been the family Bible or Testament for then the entries as evidence derive their weight not more from the fact that they were made by any particular person than that being in that place a family registry they are to be taken as assented to by those in whose custody the book has been kept' *Alvey J* in *Jones* v *Jones* 45 Md 160, *Wigmore* § 1496 *Berkeley Peerage Case* 4 Camp 421 *per Lords Ellenborough* and *Redesdale JJ* *Hubbard* v *Lees* 35 L J Ex 169 *Goodright* v *Moss*, 2 Cowp 591 *Slaney* v *Wade*, 7 Sim 595, *Shrewsbury Peerage*, 7 H L 1

Value of statements under clauses (5) and (6) Statements of the kind referred to in section 32, clause (5) of the Evidence Act may be evidence, but

S. 32. they must be received with great caution, since they are always open to the objection that the parties making them are not subject to any cross examination, the caution is all the more needed especially when the parties making them could not have h ... ng which th y ... Part X 65 ... ad man had ... Lea v Po...

County C ...
testimony ...
regarded ...
Bargis, (...
deceased ...
for the ...
subjects is weighed with great caution Moore's Facts on the Weight and ... of Evidence 1150, 1156, Matter of Williams, 128 Cal 553, Wood v Talb... 65 N J Eq 310 Similarly in Smith v Cooper, 16 Beav 101, Sir J Rom... M R said 'It is a trite but just remark, that if one link in a pedigree ... assumed any two persons may be proved to be related; and it is the ... observation in these cases, that the difficulty consists in properly weighing ... consid ...
the cl ...
cases, ...
is evidence of declarations made before any question arose as to the success... to this property but there is no trace that they were remembered or acted up...

do really by attentive and careful recollection recall the memory of ...

witness should be convicted of perjury for speaking of what ... have been said in a conversation with a deceased person" Nort Ev 190.

CLAUSE VII.

Scope of the clause The "transaction" spoken of in section 13, clause (a) is one by which any right or custom was created, etc. *It applies to private as well as public rights.* Customs, also, may be private as well as public, as for

S. [illegible]

or rights may be given under clause (4) and not under this clause In England

to private titles? How is it possible
concerns only these private titles" In
rights as well as customs can be prove
relate to any such transaction as is mentioned in section 13, clause (a) On principle there is nothing to object to the reception of such evidence Under this clause private boundaries, titles or possession can be proved "If such evidence may be offered to show customs and boundaries of a private manor, boundaries of a parish, tithe duties (*Stell* v *Pricl ett*, 2 Stark 466, per *Abott*
which a number
ht is in substan-
So in *Weeks* v

a multitude of per

in England this tendency of extend-
to private rights was checked by
Q B 809 (1850) and an arbitrary
d private property rights was laid
down. In that case he said "Reputation is not admissible in the case of such
separate rights, each
that, because there
We think this positic
is to cause
number of
v *Bedford*
shire, 4 E & B 535, *Doe* v *Thomas*, 14 East, 323

But in America the result is otherwise The earliest English practice had clearly been to admit reputation as to private titles, and it is therefore natural
regularly admitted
Cas Ev 421 note,
of the principle is
be so evidenced is
conceded *Ibid*

Old maps and old surveys so far as they have been used and resorted to by the community in dealing with the land, may be taken as representing, after the test of use and criticism, the settled reputation of the community as to the correctness of the tenor of the map or the survey *R.* v *Milton* 1 C & K. 62, *Hammond* v *Brad Street*, 10 Ex 390, *Pipe* v *Fulcher*, 28 L J Q B 12, *Daniel* v *Wilkin*, 7 Ex 429, *Bullen* v *Michel*, 4 Dow 297, *Smith* v *Earl Brown low*, L R. 2 Eqr 252, *Fouke* v *Berrington*, (1914) 2 Ch 308, *Freeman* v *Reed*, 4

32. M & M 418; *Curzon* v. *Lomax*, 5 E-p 60; *Doe* v *Whitcomb*, 1 H L C 4?, *Carnarton* v. *Vellebois*, 13 M & W 313; *Beaufort* v. *Smith*, 4 Ex 450, Wigmore § 1592

In *R* v *Milton*, 1 C & K. 58, upon the trial of an indictment against a parish for the non repair of a highway, where, in order to show that the road in question was not within the parish, a map was produced which had been made ... rveyor, from information derived from an old ... out to him the boundaries, *Eskin J* held that if ... old man's death, the map would be ... came from the chest of the parish ... *Nort Ev* 190

Clause (7) of section 32 does not declare all reputation to be relevant, but only that which consists of statements contained in a deed, will or other document relating to any transactions ... modified, recognised, asserted ... existence The clause there... evidence of reputation in th... are admissible under this clause, judgment and decrees are not in the least important. *Field Ev* 6th Ed ... 703 But where the question ... or *Bhaoli* system of rent, and th... in a *hebanama* executed by a tenant's deceased grandfather, *held* that the *hebanama* was inadmissible in evidence under s 32 (7) read with section 13 (a) of the Evidence Act *Bansi* v *Mir Amir*, 11 C W N 703

... not enough to

present plaintiffs and by ... the suit *Held* that the deed ... though they could themselve... admissible, the custom as against the defendants must be proved ... *Hurronath* v *Nittanand*, 10 B L R 263

Ancient possession In England the rule has always been that pr...

things and the finding them in such a place is a presumption they were honestly obtained, and reserved for use and are free from suspicion of dishonesty ...

Doe v *Pulman*, 3 Q B 622 In *Malcolmson* v. *O Dea*, 10 H L Cas ... laid down that the true ground for admitting a lease is that it shows an ancient acts of ownership Thus, the production from proper custody of an ancient lease granted by A is evidence of an act of ownership over the locus in quo by A at that date, and is presumptive evidence that he was then owner in

lso *Blandy*- S. 3
› to prove a
licences on
Rogers v.
rove rights
to which they refer *Heath* v *Dane*, (1905) 2 Ch 678. Entries in old parish books are admissible as evidence to prove who were the owners or occupiers of the property at a prev ous time *Smith* v. *Andrews*, (1891) 2 Ch 678; *Powell* p 287 So it is clear that the existence of a document of ownership of land (a deed, lease, or license) may be evidence that the maker of the document had
occasionally said that the
incorrect These docu-
s thus explained by *Lord*
is 641, 653, 688; "Old
being evidence of facts of
at a distant
d a person
responsible

law permits ancient documents, either with or without evidence of ancient payment of rent, to be given as evidence from which the jury may properly draw an inference that there was such possession For in the ordinary course of things men do not make leases unless they act on them, and lessees do not
payment of rent adds

laid down the reason
always attended with
. e acts of ownership

That rule is, that ancient documents coming out of proper custody, and purporting
as a lease or a license,
payment of rent under
f of possession This
at possession is proved
to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the right any number of mere pieces of paper or parchment purporting to be leases or licenses ought to be of no avail It may be a question whether the absence of proof of enjoyment consistent with such document goes to the admissibility or only to the weight of the evidence,

look at this document you find it contains a great deal It shows upon the face of it that *Jenkins* must have been in possession or else he would not have brought an action of trespass He speaks of trespass the word is used in the document itself. It is not an act of ownership, I agree, but it is a document

S. 32.

posse sion against ... it is evidence of ... This doctrine, ... adverse pos... ept the docum... kson v Wood...

5 T. R 112; *Rogers* v. *Allen*, 1 Camp 309; *Doe* v. *Askew*, 10 East 520, *Co*... v *Coether*, M & M 398; *Doe* v *Pulman*, 3 Q B 622 *Wigmore* § 157

Other cases. A deed of mortgage containing an assertion of title as ...

from in all the High Courts in ... *Tota*, 25 Ind Cas 747 = (1914) M ... Ind Cas 149 = 14 C L J 467 ...

and with transactions affecti... of certain lands as *niskar br*... *brahmatter* title in the will ... case, which was not *inter partes*, to prove ... will was not admissible in evidence under section 32 (7) of the Evidence ... read with section 13 (a) and that the recital in the judgment not *inter partes* was not evidence *Satindra* v *Krishna*, 36 Ind Cas 882; *Basi Nath* v *Jagat Kishan*, 35 Ind Cas 298 = 23 C L J 583 = 20 C W. N. 643 Where the validity of ... leprosy is ...

this clause *Nagammal* v *Sankarappa*, 54 M 576 = A I R 1931 Mad ... settlement deed under which a promissory note is transferred to the plaint ... admissible as secondary evidence, may be employed to prove the prom... note under s 32 (7) read with section 13 (a) since a settlement deed constitutes a transaction in which a right was asserted *Subba Rayabe* v *Vengama*, A I R 1930 Mad 742 = 123 Ind Cas 107

CLAUSE VIII.

...of this clause is that when a number ... one common statement, which ... ons made in their minds at the time of ... by the witnesses and is evidence *R* v *Ram Dutt*, 23 W R Cr 35 (38) These statements are admissible on the general principle that they appear to be natural and sincere. Illustration (n) exemplifies this clause This illustration is based on the case of *Du Bost* v *Bresford*, 2 Ca... ...picture, the impression pro... on the defence, ... other spectators not being themselves put into the witness box ... of the defendant a brother ... and the latter very handsome ... receive the ... "Beauty and ... the ...

and it s...

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S.

impression produced by the picture on their own minds, *viz.*, that it was intended

evidence that *Cook v Ward*, M & P 99, *Phip Ev* 332 In *Chase* v *Howell*, 151 Mass 422 (Am) notice of the rottenness of a tree's root was in issue, and to show knowledge by the city

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calling
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different places and afterwards put in second hand before the Court cannot be received as evidence under the clause *Queen* v *Ram Dutt*, 23 W R. 35 Cr "It has been held that if a statement is made by several persons and any of them is dead, each of the persons must be taken to have made the statement for himself or herself and therefore the statement of the deceased person will be admissible under this section *Chandra Nilmadhab*, 26 C 236' *Field Ev 7th Ed* 234

the by standers, on seeing a caricature called out 'there is X,' and evidence is given of their words, what is relied on is, not their statements, but the fact of recognition; the fact, that is that the caricature at once recalls the person X to the minds of those who see it." *Mark Ev* p 34.

S. 33. could not be admitted under the section. If they were not known or could not be found, it is not easy to see how the fact that there were many of them is material In the English cases, it does not seem to have been proved that the persons who made the observations could not be called ' Cun Ei IIa Ed p 85

Relevancy of certain evidence for proving, in subsequent proceeding, the truth of facts therein stated

33. Evidence given by a witness in a judicial proceeding, or before any person authorized by law to take it, is relevant for the purpose of proving, in a subsequent judicial proceeding, or in a later stage of the same judicial proceeding, the truth of the facts which it states, wh the witness is dead or cannot be found, or is incapable of giving evidence, or is kept out of the way by the adverse party, or if h presence cannot be obtained without an amount of delay or ex pense which, under the circumstances of the case, the C considers unreasonable:

Provided—

that the proceeding was between the same parties or t representatives in interest;

that the adverse party in the first proceeding had the n and opportunity to cross-examine;

that the questions in issue were substantially the same the first as in the second proceeding.

Explanation—A criminal trial or inquiry shall be deem to be a proceeding between the prosecutor and the accused with the meaning of this section

Principle The securities which have been devised by municipal law ... Court

... by Betham as *confrontation* Betham's *Rationale of Judicial Evidence* III, Ch XIX This was established long ... "The other side ought not ...

... a test ... and a certa ... however ...

In other words, this secondary advantage is a result accidentally ... with the process of confrontation, whose original and fundamental object is ...

S.

It is no essential part of the notion of confrontation; it stands on no better footing than other evidence to which especial value is attached; and just as the

party.
attainec
People v
W
tion ar
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have b

remaining alive and actually examined in the cause" See also *R* v *Chrisopper*, 2 C & K 994, 1000 Its weight, however, is of course affected by the loss of the demeanour of the witness *Phip Ev 7th Ed* 423. *Mr Taylor* however considers it an exception to the rule excluding secondary evidence of documents, holding that the rule is wide enough to exclude secondary evidence of oral

48 (52), *Balgangadhar* v. *Shrinivas*, 39 B 441=19 C W N 729=42 I A 729 (P C)

The rule contained in this section is an administrative expedient for doing justice between litigants in a particular situation as a rational compromise between two well known canons of judicial administration A presiding judge will require that a party
within his power to do so
be required to cause a witness
admissible facts given on a

33. to the particular witness —It is not essential that the proponent also shows that he can prove the fact itself in no other way The evidence being in its nature secondary, i e, inferior in a probative point of view, less decisive and convincing than the face to face testimony of the witness himself, the party tendering the less probative proof must show to the reasonable satisfaction of the judge presiding at the trial that it is impossible for him to procure the attendance of the witness himself This may be for one of several reasons. The witness may be dead, insane, sick or absent from the jurisdiction ' *Chamberlayne's Ev* § 16

in interest, if criminal must relate
person *Mc Kelvey's Ev* S 164 The chief reason for the exclusion of hearsay
evidence are the wan
cross-examine the wit
judicial proceeding, in
the power to cross-ex
ordinary test of truth
sible, af
parties.
v *Beacl*
not dea
insane,
have been kept away by th
264, *R* v *Erisuell*, 3 T R
all the objections which n
Wright v *Tatham*, 1 Ad &
E of Winchelsea, 3 C &
Court new powers, which require to be ... with great caution ...
no doubt that it is still necessary
every witness at the trial, unless it is p
produce him, or to be so difficult
unreasonable to insist on its production" *Per Macpherson J* in ... *Moujan*, 20 W R 69 Cr, *R* v *Piyari* 4 C L R 511, *R* v ... 648 In England the law on the subject is thus stated "Agreed in th case, where a person has been examined in chancery, that in a cause at law between the same parties his deposition may be used in evidence if it can be proved that the witn ... not able to

ers what the law ...
ned could not be read at law
that the witness could not
reus v *Palmer*, 1 Ves & B ...
ns taken in a former proceed
It specifies what evidence is

receivable This is, whatever is deliver
proceeding or (*b*) before any person
Oral evidence therefore is as receivable a
deposition *Nort Ev 194*

The deposition of a witness is not adm ... under section 33 of the
Evidence
The mere
of the defe
admitting the prior deposition *Brajaballav* v *Akhoy*, 30 C W N ... I L R ... Cas. 115=A I R 1926 Cal 705, *Ghulam Haider* v *Emperor*, ...

S.

L J. 205 Deposition in a civil suit is

can only
an absent v
ould be extr
In the
Evidence Act,

ight and opportunity to cross examine and the questions in issue were substan
ially the same in the first as in the second proceedings *Chakauri Singh* v *Suraj Kuar,* 2 A L J 91 If that fact is a statement made by a person who is not called or cannot be called, the statement cannot be admitted unless it

78 Ind Cas 178 The Sessions Judge before transferring the deposition of a

section a party's deposition in a previous suit can be used against him in a

S. 33. subsequent suit as his admission. *Soojan* v. *Achmat*, 21 W. R. 414, ... *Moharaj*, 36 C L. J 186; *Exp Hall*, 19 Ch. D 583.

Relevancy. Even where primary proof is practically unavailable, the secondary actually offered is not necessarily admissible. It must, in addition, be relevant. It is essential that the fact tendered in evidence as secondary proof be relevant, both objectively and subjectively, to the existence of some *res gestae* or constituent fact *Morgan* v. *Nicholl*, L R 2 C P 117. Objective relevancy, being in the matter of natural law, of the reality of things, is assumed and but little classified or, indeed, discussed. Subjective relevancy is however more carefully scrutinized, in its two essential requisites of adequate knowledge and absence of controlling motive to misrepresent. When these administ ... [illegible] ... ity and Relevancy are ... introduce secondary evi... ch was not relevant eviden... in the second proceeding ... *Small* v. *Naram*, (1849) 13 Q. B 840.

... **Waiver** A compl... [illegible] ... nection is that of wa... swer received at a for... , they cannot be exclu... subsequent trial. In the same way, wh... l observer, "expert" so called, on a form... it cannot be rejected as improper in to... ...inions, on a subsequent trial. *Chamberlayne* ... [illegible] ... presiding judge to l... further invaded in th... [illegible] ... former trial. The elem... [illegible] ... of his adversary ... It will be remembered that it is frequently ... loss to the cause of justice and the primary evidence is not produced and that ... within reasonable lim... the rights of the opponent should be confi... [illegible]

Objections ... [illegible]

... ds acknowledge the ... his testimony might, upon ... e stand under oath, and ... *v. Welsh*, 17 Mass. 160 (167) ... to prove that what he said was a falsehood" questions (*Small* v *Nairne*, 13 Q B 840). The opponent can take objection to leading ...; hearsay (*R* v *Cicole*, 71 J P Rep ...

152); or statements of the contents of unproduced documents (*Stein Keller* v *Newton*, 9 C & P. 313; 319; *Tufton* v *Whitmore*, 12 A & E 370), *Phip Ev*, 7th Ed. 425. S.

In order to enable the ground for its ble the High Court to judge its propriety. *Mol* . I. R 1930 Cal 756=32 Cr L J. 233, It is necessary that under this section the is admissible

and fast rule for the application of this section Each case must depend upon its own facts and the matter is essentially one for the exercise of the discretion on the part of the presiding Judge *Jati Mali* v *Emperor*, 33 C W N 1215

Affidavit An affidavit of a person who died subsequently and who has not been subjected to cross-examination is not admissible under ss 32 and 33 of the Evidence Act *Doraisuami* v *Balasundaram*, 38 M L T (H C) 275=102 Ind Cas 243=A I R 1927 Mad 507=52 M L J. 477, see also *Mir Abdul* v. *Musst Bibi Sona*, 8 Ind Cas 897

jointly tried, n B and the ee witnesses not a party to ist, with his as not really witnesses is *Abdul Gaffor* I R 1929 117, *Ponnu am* v *Umar*, consent So admitted in ch witnesses are alive *Lakshmi devamma* v *Krishtiah*, 39 M L T 198=104 Ind Cas 518 Any irregularity in the admission of such evidence is cured by consent of the parties *Radha Kishen* v *Kidar Nath*, 22 A L J 761=I L R 5A 536=46 A 815=80 Ind Cas 874=A I R 1924 All 845, *Pannusuami* v *Sihegaram*, 41 M. 610 The provisions, of this section are intended for the benefit of a party to a suit and he may waive their benefit at any rate in a civil is involved *Jainab Bibi* v *Hyler* T 23=56 Ind Cas 957=1920 M *Gopal*, 24 B 591=2 Bom L R 924, J 1 But that is not the rule in criminal matters *Kottammal In re*, 69 Ind Cas. 636, see also *Reg* v *Bernard*, 4 Moo P C N S 460, *Queen* v *Bishnath* 12 W R Cr 8, *Deputy* v *Upendra*, 12 C W N 140; *Mokshed* v *Emperor*, A I R 1930 Cal. 756; *Ghillum* v *Crown*, A. I R 1929 Lah 542; *Annavi* v *E*, 39 M 449

107; *R* v *Bird*, 5 Cox 11, *Struell* v *Bovingdon*, 5 Esp. 56 In *Lord Palmerston's*

33. *Case*, the evidence was rejected, because the witness could give the effect only and not the words. But it may be doubted whether such minute particularity is requisite, for the very words could seldom be remembered after a lapse of time Where a note has been made by a reporter or a short-hand writer he could of course use the n
short-hand writer might
A & T 275" *Nort Ev*
prove what a deceased

put at the head of a deposition, form no part of it and are no evidence to prove the facts stated *Magbulan*
N 241=6 Bom L R 238, 1
357; *Chalor* v *Emperor*, A.
v *Abdul*, 50 Ind Cas 431.
sition, the identity of the pc
ballav v *Akshay*, 30 C W N 254

common case proved to the
of on But it is
sati treacherous,
of while a written record of what is said abides *Litera scripta manet*' Some forcible remarks on the superiority of written over oral testimony will be found in the case of *Bunwaree Lal* v *Maharajah Hejnarain*, 7 M. I A 156; *Nort Ev* 191.

Judicial Proceeding The evidence taken in the ejectment proceedings before the revenue authorities
Court to recover possession by pe
in the revenue Court *Saru Khai*
1928 Lah 43 Where certain
who had no jurisdiction to conduc
a proceeding is inadmissible on a retrial before a competent Court *buta*
v *Crown*, 27 P L R 447=7 Lah 306 Cas 752=27 Cr L J 1103=A
3 M 48; see also *Empress* v
694 The evidence taken in the
conditions and for the purposes
33, previous evidence
the person gave the

Nga Pu, 22 Ind Cas. 675=

completed The moving party may have abandoned the proceedings *Chamberlayne's Ed* § 1652

Before any person authorised by law It is not necessary that the evidence should have been given in a judicial proceeding Any deposition taken by a Magistrate in his ministerial capacity could be receivable, if not excluded on any one of the grounds mentioned in the section So a deposition taken before a Coroner (*R* v *Rig*, 4 F. & F 1985; *State* v *Campbell*, 1 Rich 124, *R* v *Ba*... 61 J P. 608; but see *R* v *Cowle*, 71 J P. 152), a British consul of Zan... (*Empress* v *Dossaji*, 3 B 334), a Special Registrar (*Jeketo* v *Jaifanessa*, 18 C W N 605. *Jekah* v *Jaifanessa*, 20 Ind Cas 661; *Lanka* v *Lanka*, 42 M 10...) an arbitrator (*R. v. Amanulla*, 12 B. L. R. App. 15), or a Comm...

appointed under Civil Procedure Code to take down evidence (Civil Pro S.
Code, Order XXVI), a revenue officer in a mutation proceeding (*Mamtaz v. Wazir*, 65 Ind Cas. 308), is admissible in a subsequent case So no
ted by a Court which
Keraga, 54 M. 561 In
n by the Commissioner
Nundo, 3 C W N. 239;
C W N 794) but in

compel or not in practice employing cross examination as a part of its procedure
nd the
er its
nation
Judge
As
ved is
one of the constitution of Courts and their officers *Wigmore* § 1376 "It is sufficient if the point was investigated in a judicial proceeding of any kind, wherein the party to be affected by such testimony had the right of cross-examination" *Chamberlayne's Ev* § 1652

law
law.
and
4-17
of Civil Procedure Code lay down the rules which must be observed in taking down depositions in civil cases When any deposition is taken in accordance with law, the Court shall presume that the document is genuine (*Vide* s 80 of the Evidence Act) See also *Dorghai* v *Emperor*, 52 C 499, *Emperor* v *Phagunia*, 89 Ind Cas 1043

When the witness is dead Evidence given by a witness in a previous
action
procee
Steph
decease
eviden

Wigmore § 1403, *Gilbert's Ev* 60, *Lord Morley's Case*, Kelying 55, *Fry* v. *Wood*

S. 33. 1 Atk 444, *R.* v *Castro* (Trichborne Case), charge of Chief Justice, II also Such depositions cannot be admitted in the subsequent suit when the witnesses are living and their evidence is procurable *Hurish* v *Tara Chand* 2 B L R App 4; *Chakauri* v *Suraj*, 2 A L J 91 *Bhoobun Moyee* v *Ambica* 23 W R 343, *Mahomed* v *Iatan*, 1
The evidence of witnesses, (
given before a Magistrate,
fresh charges have been added *Emp*
ven

E
is well *Chamberlayne* § 1634

Absence Absence of a witness
permanent, and such as to prevent th
upon him may be a sufficient justificatio

sail starting to move has
rule" *Chamberlayne's Ev* § 16
v *Wells*, 1 Taunt 461,
French, 2 C & K 1008 The deposition by a person where he denied on oath that he had presented a certain petition in Court which purported to be from him is held to be inadmissible as evidence when such person might have been brought into Court, but was not *Bhoobun Moyee* v *Umbica*, 23 W R 343

Illness Illness, by causing inability to attend has the same effect as death *Lord Morley's Case* Kelving 55 *F* v *Wood*, 1 Atk 445 *R* v *Savage* 5 C & P 143, *Ro* *contra Doe* v *Evans*, 3 C & P
Beaufort v The phrase usually employed as a
test is 'so he application of the principle should
be left to the trial Court's discretion *Thornton* v *Britton*, 144 Pa 130
eed only be in probability such that,
y, the trial cannot be postponed
s a question for the determination of
K. B 581, *R* v *Stephenson*, L &
able to travel

mined testimony or deposition, and would probably be much less
Mathews J in *Miller* v *Russel*, 7 Mart N S La 268" *Wigmore* § 1406 See also *Fry* v *Wood*, 1 Atk 445, *R* v *Savage*, 5 C & P 143; *R* v *Harris*, 4 Cox C C 440, *R.* v *Harney*, 4 Cox C C 441, *R* v *Ullner* 4 Cox Cr 441, *R* v *Stephenson* 9 Cox Cr 156, *R.* v *Bull*, 12 Cox Cr 31, *R* v *Wellon* 9 Cox Cr 296 *R* v *Farrell* 12 Cox Cr 606 *R* v *Thompson* 13 Cox. Cr 181

his previous deposition was not admitted *R* v *Thompson* 13 Cox
R v *Farrell* 12 Cox Cr 606 A temporary illness will not excuse attendance and examination of a witness *Empress* v *Piyarilal*, 4 C L R 504, *Empress* v *Ashgur*, 6 C 774=8 C L R 124, *Harrison* v *Blade*, 3 Camp 457 *R* v 5 C & P 143, *R* v *Tail* 2 F & F 533, *R* v *Wilson*, 12 Cox 622

Cannot be found 'Inability to find the witness is an equally sufficient reason for non production, by the better opinion (*Oate's Trial*, 10 How St Tr 1285, *Anon*, Godbolt 236; *Gilbert Evidence*, 60, *Buller N P* 239,

S. 3

State, 33 Ark.
ecedents (*Lord*
Scaife, 8 Q B
is usually and
If the witness
or the purpose
by the party's
to recognizing
ween party and
been no collusion
force *Wigmore*
e dead to him"
on Godbolt, 326 This principle has also been accepted by *Jeffreys L C. J.*
Oates Trial, 10 How. St Tr 1227, on the assurance of Oates to the effect,
I cannot any
cannot when

ent and unsuccessful search
1, *Wiedemann* v *Walpole*,
But in England the above
R v *Scaife*, 17 Q. B 238;
v *Austen*, 7 Cox 55, *R.* v *Hogan*, 8 C & P 167; *Phip Ev 7th Ed.* 425.
it in India there is no difference between civil and criminal cases.

Insanity I ... *nswell*,
T R 707; *Mor* ... 37 A
Court
estimony or
r & M 147
ind and the
Even tem-
& M 147

also renders
Gallaghar,
1 Pa 112, *Cent R Co* v *Murray*, 97 Ga 326, *Ewing* v *Dihl*, 76 Pa 373;
rayton v *Wells*, 1 N
ve the same eff
Pa 378; *contra*,
6, *Greenl. Ev*
tisfied of the fact
order that this
no dispensation
se the deposition or report the testimony as a record of past recollection
Wigmore § 1409; *State* v *N O Water Works Co* 107 La 1; *Jack* v. *Woods*,
a 378; *contra*, *Cook* v *Stout*, 47 Ill. 531; *Stearns Lumber Co* v *Howlett*,
E 217.

Loss of faculties necessary for testimony The same result follows
e witness loses his voice (*R.* v *Cockburn*, 7 Cox Cr C 265), hearing
ockburn, *supra*), eye sight, so far as necessary for the examination of
Kinsman v *Crooke*, 2 Ld Raym 1166, *Hoaston* v *Blythe*, 60 Tex 506;
aculty essential to the giving of testimony *Chamberlayne's Ev*
Wigmore § 1408. Where evidence was given before a committing

S. 33. but in the Sessions Court the witness proves shy and speechle , this ... does not apply to the case and the evidence cannot *ipso facto* be treated a evidence at the Sessions *Moti Ram* v. *Emperor*, 75 Ind Cas 152- 4 C. L. J 904.

Incapable of giving evidence The capacity to give evidence mentio... section 33 of the Evidence Act need not be a permanent one; someth... of permanent incapacity might satisfy the words of the section "incapab... giving evidence" *In the matter of the petition of Asgur Hossein*, 6 C ... L R 124, but see *In the matter of Pyari Lal* 1 C. L R 504, where it was ... that the words "incapable of giving evidence" in section 33, Evidence ... denotes an incapability of a permanent ... The Court has no di...

if it is proved to be either actually impossible to produce him, or ... difficult to do so, or if it is unreasonable to insist on his production *In re matter of Pyari Lal, supra*

Kept out of the way by the adverse party If the witness has been ...

case where three prisoners were indicted for felony, and a witness ... one of them, the C... nst the man who ... against the other ... men *R.* v *Scaife*, 2 Den 281 = 17 Q. B 238 = 5 Cox 243 S C, *E...* *Larl ...*, 1 Arn M & O 403, see also *Lord Morley's Case*, 6 How St Tr ... *R.* v *Harrison*, 12 How St Tr 851; *Green* v *Gatewick*, B N P. ... *R.* v *Guttridge*, 9 C & P 473; *Taylor* § 478. The proposition that if witness be kept out of the way by the adversary, his *former* statem... oath will be admissible, rests partly, on the authority of several dec... both in civil and criminal Courts, partly on statutory analogy but chiefly on the broad principle of justice which will not allow a party to take advantage of ... own wrong *Taylor* § 478, *Greenl Ev* § 163(g); *U S* v *Reynolds*, 1 ... 322 Where it appeared that the witness who was related to the accused ... bsconding and the Se... as part of the evidence ... 3 *Abbas Mandal* v *Emp...* 131 Ind Cas 855 = 35 C W N 143 = A. I R 1931 Cal. 473

Proof of unavailability ... Th... ponent of the former te... or the deposition is of course ... ing thereto in consequence o... former testimony is offered, ...

J in *Dunn* v *Dunn*, 11 ... process of the Court, his previous deposition is inadmissible. ... *Blagrave* v. *Blagrave*, 1 Deg & Sim 252, 259 Under this section, the ... of an absent witness taken in the Magistrate's Court cannot be received in the Sessions Court without proof of the circumstances which make it admiss... Such circumstances should be proved like any other fact by the ev... witnesses and a mere report that a witness is dead or absent is not ...

ueen Empress v. Naq Po, L B R (1872—1892), 134 Khem Singh v Emperor S.

dia and an argument based on the
here Alyan v King-Emperor, 31 C
766=A I R. 1927 Cal 679, R v
oakes, (1917) 1 K B 581, but see R v Cohen, 34 L J. 623 A previous
eposition can be admitted in evidence only under the provisions of s
3 of the Evidence Act, but before it can be placed on record of a criminal
d been made on
at in spite of
, or that he was
capable of giving evidence,
r his presence could not
hich, under the circumstance
Ghulam v Emperor, A I R 1929 Lah 542; Annam v Emperor, 39 M 449=
e v Emperor, A I R 1929 Mad 32=46 M. 117;
n 437=A I R 1925 Lah 418, Emperor v.
Cas 161=15 Cr L J 713, Falconer v Hanson
pole, 1891 Times, June, 15, Bishan Das v. Ram
06 P R 1915

Official duty etc Inability on the part of a witness to attend a trial
owing to requirements of official duty, will usually be deemed sufficient admiss-
ry evidence of his former testimony
of the
compel-
ing the attendance of the official wi Wigmore
§ 1407. But in India such evidence will not be admissible when he can be
examined on commission

Presence cannot be obtained without an amount of delay or expense
etc It is only in extreme cases of expense or delay that the personal attendance
of a wit
prisoner
, in the absence of special
able Per Phear J in Queen
ness is no ground allowed
4 What delay or expense is
circumstances of each case Of
the circumstances of the case, one of the chief which the Judge has and ought to

exists, or
for which
witnesses are produced at the trial Per White J in In the matter of Pyari Lall
4 C L R 504 (509—510) But where the absence of the witness is due to
temporary causes, his previous deposition cannot be admitted Ibid The mere

actually impossible to produce him, or to be so difficult to do so, or if it is
unreasonable to insist on his production In the matter of Pyari Lall, 4 C. L. R.

S. 33. 534; see also *Asiatic Steam Navigation* v. *Bengal Coal Co* 35 C 751; *Nga Ba* v *Emperor*, 104 Ind. Cas 637=A. I. R 1927 Rang 248; *R.* v *Hogg* 6 C & P 176; *Beaufort* v. *Crawshay*, L. R 1 C P. 699. *Empress* v *Rama Reddi*, 3 M ... So where a witness is procurable his subsequent deposition is not admissible. *Bhoobon* v *Ambica*, 23 W. R 343; *Emperor* v. *Nandu*, 2 A L J 509 The whole notion of taking depositions is that they are a provision in advance for obtaining testimony from one who will not be available at the *time of the trial*, i. e., in the traditional phrase, they are taken *de bene esse*, conditionally. If the witness is in fact available at the time of the trial, the principle of confrontation requires that he should be examined *viva voce* on the stand This principle is constantly indicted. *Greenl Ev* § 163(i) In certain States of the United States of America, such deposition is admitted where the personal attendance of witnesses would involve them in great pecuniary loss and involve a sacrifice of their personal interest without any person ... *& A R Co* v *Bussen*, 95 Ga. 584. ... The notion that any citizen ... his duty to the community ...

Proviso—Para (1) At common law testimony given by a witness in a civil or criminal proceeding is admissible in a subsequent, or in a later stage of the same trial, in proof of the facts stated, provided that the proceedings ... *Phip. Ev 4th Ed p 406* ... against a person not a party ... That cannot be done for this reason because such person has it not in his power to cross-examine" *Goodright* v *Moss*, Cowper, 592 So "examinations upon oath, except in excepted cases, are of no avail unless they are made in a cause or proceeding depending between the parties to be affected by them and where each has an opportunity of cross-examining the witness" *Per Lord Kenyon L C J in R.* v *Eriswell*, 3 T R 707 The law on this subject is thus summarised by *Chief Baron Gilbert* "When you give in evidence any matter sworn at a former trial, it must be between the same parties, because otherwise you dispossess your adversary of the liberty to cross examine." *Gilbert Ev* 68. So a deposition cannot be given in evidence against any person that was not a party to the suit; and the reason is because he had not liberty to cross examine the witness, and it is against ... proofs in a cause to which he ...

would have been more accurate if it had been ... interest" Here the effect is the same as that of *res judicata* and estoppel. In fact they are ... *Ev 190* ... ves in interest. ... Ind Cas ... privies ... L T 510=101 Ind Cas ... =A. I ... *Nicholl*, 2 L R C P ... *Willes J* ... parties, is really meant persons ... claiming ... trial between different parties having different rights and with whom the plaintiff had no privity, and as he had no opportunity to examine or cross-examine the witness it would be contrary to the ... d or in any way affect the interests by the ... *Per Hinman C J in Lary* v *Brainerd*, 30 Cox ... rties being the same is thus ... N 379 (Am) ... "If the laid down by *Gilchrist J* ... adverse testimony be given under oa... litigant was a party and ... calle... want... parti... *the* ... 343 ... made by an accu... ing against the accused is admissible in evidence in a ...

igh the prosecutor in the second case is the **S.**
Queen Empress v Bhabhutgar, Rat Un
To satisfy the requirements of this section the
unst the same parties or their representatives in
nterest, at the time when the suits are proceeding and the evidence is given. *Sita Nath* v. *Mohesh Chunder*, 12 C 627 ; *Queen* v *Ishri*, 8 A. 672 = A W. N. 1886, 257.

Where the parties of the present suits were not parties or representatives of the parties of the previous suit, in such a case, a deposition made in the former suit is not admissible in evidence in the present suit *Mrinmoyee* v. *Bhooban Moyce*, 15 B. L R 1 = 23 W. R 42 ; *Queen Empress* v. *Ishri*, 8 A. 672 A W.
. Bom L R |599 (601).
a former suit when

The parties may be
it may be defendant in
Tatham, 1 A & E 3

ng to the competency of
discredit or
if Mr W
now if B had
further well
nent, though
nt opponent
has. *Ibid*

The parties are deemed to be the same when those between whom the evidence is offered were on opposite sides in the former case, and a judgment or

may not have an opportunity to cross examine the witness, yet the person in

lity could not be used by the defendant therein, "as a man who cannot be prejudiced by a deposition or proceeding in a suit shall never receive any advantage from it." *Gibb Ev*. 55; *Brown* v *Johnson*, 13 Gratt. 641; *Burr Jones* § 683.

S. 33.

& El 783, *Krishna Rao* v *Raja of Fittapur,* 102 Ind Cas 713=A I R Mad 733 The wording of this proviso is perhaps a little defective *Instead*

the suit in which the depositions were taken; and they cannot be ... party unless they can be read against him" So evidence *taken on the first trial* is admissible in a second trial if although the two trials be not between the same parties the second trial is between persons who generally *represent the former* parties or are their privies in estate *Taylor on Evidence, 11th Ed* § 467 The vague expression "representatives in interest" has not been defined in the Evidence Act ... include privies ... for the purpo...

tayne's Ev § 1670 . for all purposes synonymous with the expression ... in s 11 in C P Code *Rama Krishna* v *Tirunarayana,* A I R 193... 198=62 M L J 116.

... *Infant* The accused ...

... redemption ... a representative in interest of the mortgagor *Mashwe* v *Alg* ..., 26 Ind Cas 111=8 Bur L T 104 A Hindu widow in possession of the estate of her husband completely represents the estate and consequently a reversioner can be said to be the representative of the party (i e the widow) within the meaning ... *Kumari* v *Nitya Kali,* 12 C L J ... therefore *Mookerjee J* said "*Prima facie,* the same parties ... proceedings are between the same parties, as or their representatives in interest But it has been argued that *Monmohini* ... Hindu widow in possession of the estate of her husband, completely represented the estate, and consequently the position is the same as if she was a party to the ... contested ... 9 M I A ... may in th... *Moyee* v *Hurlal* ... pressed the view of evidence ...

S.

ı both the proceedings *Morgan* v. *Nichol*, L R 2 C P 117, see also *Fool Kissory* v. *Nobin*, 23 C 441, *Patinharkuru* v *Raman*, 24 Ind Cas 519 "The equirement of identity" says *Prof. Wigmore*" of parties is after all only an ncident or corollary of the requirement as to the identity of issue It ought, hen, to be sufficient to inquire whether the former testimony was given upon such

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hough a different person, had the same property interest that the present

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former evidence *Mutatis Mutandis*, the rule is the same where a party whose omission from the record fails to alter the issue or the opposing party's right of cross-examination has been dropped in the second case *Chamberlayne's Ev* § 1671

t no
of
oss-
still
been satisfied *Moore* v *Triplet*, Va, 23 S E 69 So the general principle is that in all cases where the party has without his own fault or concurrence

Greenl. Ev 163(*f*) The doctrine requiring a testing of testimonial statements by cross examination has always be

or be shaken by cross examinati
declining, he has had all the be
examination of that
Moule, 1 Drew 472,
law is that no evi
examination of both
examine and has
if he had cross-exan
an opportunity of
Vaughan, 1 M. & S. 6, *Empress* v *Jhubo*, 8 C. 739.

S. 33. "A deposition is considered a partial representation of fact, as to all p...
who
Per
Dr

taken in former suit depends upon the fact that the adverse party, or those ... privity with him, had the opportunity, to cross-examine the witness, if it ... that the deposition was taken without authority, or without the sanction of ... oath or without such chance of cross-examination it should not be ...

proceeding provided that the adverse party in the first proceeding had the ... and opportunity to cross examine That the accused had the opportunity of cross-examining this witness, is I think quite clear He was asked to do ... he refused to do so But I think it is also clear that at the stage at which the case had arrived he had no right to cross-examine Now as far as I can see the accused in a warrant case has no right to cross-examine the prosecution witnesses until after the charge is framed ... No doubt s 256 (Cr Pro Code) does ... prohibit cross-examination at a previous stage but that is not the same as saying that the accused has any right to cross-examine. I am of opinion that until ... 56 is reached the accused has no right ... the present case the accused had no r...

under s. 33" But in *Mangal* ... was examined by prosecution ... the charge it was discovered ... unable to answer the ... It was that he ...

must also be right to do so *Dal Bahadur* v. *Bijai Bahadur*, A ... C F 9—34 C W N 369 In the case ... which requires that the adverse party ...

is dead and the opposite party had an opportunity of cross-examination though he did not avail himself of it *Tafiz* v. *Emperor*, 50 C L J 584 ...

but was not cross-examined by the defence, his deposition ... under s. 30 in the Session's trial, even when the Sub-Inspector dies ... the Session's trial. *Tafiz* v. *Emperor*, 50 C L J. 584=A I R ... 228. A deposition taken in an *ex parte* proceeding cannot be used under this section in a subsequent contested proceeding between the same parties even

where other conditions of the section are satisfied *Raj Mungal* v *Mathura*, 13 S. A. L J 881.

, if not admitted, must be proved, before
3 The deposition of a witness obtained
and forming part of the
the Evidence Act, provided
Empress v *Ram Chandra*,
19 B 749, see also *Queen Empress* v *Basvanta*, 25 B 168=2 Bom L R 761

In an enquiry under Chapter XVIII of the Criminal Procedure Code, a witness was examined by the prosecution but he was not cross examined by the

accused had the opportunity to cross examine a witness examined by the prosecution, where the accused did not cross examine any of the prosecution witnesses, and was not asked by the enquiring Magistrate to exercise his right of cross-examination *Ibrahim* v *King Emperor*, 17 C W N 230=18 Ind Cas 406=14 Cr L J 70, see also 2 Weir 755 Deposition of a witness can be taken in the absence of an accused who has absconded When such a deposition is to be used in a subsequent case, it is necessary to establish that when that deposition was taken, the accused had absconded, and after due pursuit could not be arrested *Queen* v *Etwaree*, 21 W R Cr 12, *Queen Empress* v *Sahib Singh*, A W N 1896, 182, see also *Ghurbin* v *Q E*, 10 C 1097

Failure of cross-examination There may have been an adequate opportunity of cross-examination, so far as depends upon the nature of the tribunal or

stances preventing adequate cross examination *Wigmore* § 1390

S. 33.

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oath, or without such chance of cross-examination, it should not be re
although if due notice was given, it is not necessary that any cross-exam
should have been actually made. *Fitzgerald* v. *Fitzgerald*, 3 Swab & T 5
also *Lawrence* v. *Maule*, 4 Dr 172; *Macomble* v. *Anton* 6 M & G 27

33, Evidence Act, the statement o
3, provides that in certain circum
is relevant in a subsequent ju
proceeding provided that the adverse party in the first proceeding had the
and opportunity to cross examine That the accused had the opportun
cross-examining this witness, is I think quite clear He was asked to do s
he refused to do so But I think it is also clear that at the stage at wh
case had arrived he had no right to cross-examine Now as far as I can se
cross examine the prosecution witn
No doubt s 256 (Cr Pro Code) does
stage but that is not the same as
that the accused has any right to cross-examine. I am of opinion that un
stage of the case provided for in s 256 is reached the accused has no righ
cross examine That being so in the present case the accused had no righ
Mr Milne is not admissible in evi
A I R 1929 Lahore 540

dur v. *Bijai Bahadur*, A
requires that the adverse pa

adverse party had both the right and
So a deposition of a witness is admissible under this section whe
is dead and the opposite party had an opportunity of cross-examining
though he did not avail himself of ... 50 C L J 584
Ind Cas 743=A I R
Q E v *Ram*, 19 B 749

524=A I R
208 of the Cr Pro
but was not cross-examined by the defence, his deposition is not adm
under s 30 in the Session's trial, even when the Sub-Inspector dies
the Session's trial. *Tafiz* v *Emperor*, 50 C L J 584=A I R 1930 Cal
228 A deposition taken in an *ex parte* proceeding cannot be used under this
section in a subsequent contested proceeding between the same parties

opponent is also entitled to cross examine the interpreter so as to test the correctness of the translation, and to call other witnesses to verify the interpretation. *Wigmore* § 1393 **S.**

Whether the deposition of a witness who cannot be cross-examined on account of some organic defect, such as defects of speech, hearing or the like, should be admitted in evidence, it is for the trial Judge to decide. *Quinn* v. *Halbert*, 55 Vt 228 The same principle also applies when the accused is deaf or dumb or blind *Felts* v *Murphy*, 201 U. S. 123; *Wigmore* § 1393

Sundry insufficiencies of cross examination Where a party is absent from the Court at the time of the cross examination, but his counsel is present, he can ... a witness Still in ... No. 429, 133 But such ... a witness taken in his absence is read over to him and liberty is given to him to cross examine the witness *R.* v *Smith*, R & R 339; *R* v *Forbes*, Holt, 599 In *R* v *Hoke*, 1 Cox. Cr 226, *Earle J* said · 'The reading of it in the prisoner's presence is equivalent to the taking of it in his presence The object is to afford to the

Ibid Failure to take advantage of a known opportunity for cross examination ... ishes no ground for modifying the ... ion that the party in question had no ... assistance such an opportunity for ... ces, be a very barren privilege Nor is ... was embarrassed by the absence of his lawyer and was not afforded an extended time in which to exercise the option to cross examine personally The existence of such infirmative consideration is not deemed inconsistent with the reception of the evidence upon a subsequent trial Where the party to be affected by the secondary evidence has announced an intention to take no further part in pending proceedings, subsequent tender of opportunity to cross examine is regarded as having been expressly waived

cross examine Where a witness leaves the country after the charge and he ... xpense, his deposit on before ... this section *Nga Ba On* v ... Bur L J 114 = A I R 1927 Rang 248

Section 33 whether controlled by s. 350 The general provisions of section 33 of the Indian Evidence Act are not in any way affected by section 350 of the Code of Criminal Procedure *Lelal* v *Crown*, 101 Ind Cas 183 = 28 P. L R 199 = 28 Cr. L J. 451 = A I R 1927 Lah 332 = 8 Lah 570

... without an opportunity of examining and cross-examining on the *very point* on which their evidence is adduced in the subsequent proceeding Though separate proceedings may involve issues, of which some only are common to both, the evidence of those common issues given in the former proceedings may, on the conditions mentioned in s 33 arising, be given in the subsequent proceedings. *Ram Reddi* v. *Seshu Reddi*, 3 M 48 = 2 Weir 756 = 2 Weir 455. Unless the issues were then the same as they are when the former deposition is offered, the

S. 33. cross-examination would not have been directed to the same material point of investigation, and therefore could not have been an adequate test for exp[osing] inaccuracies, and falsehoods *Wigmore* § 1386 It is absolutely necessary th[at] the former statement was sufficiently tested by cross examination upon the p[oint] now in issue. It is sufficient if the issues were the same or sub[s]tant[ially] ... s v ... 7 C ... 8 C L R 273, *Wig*...

Doe v *Foster*, 1 A & E 791; *R.* v. ... 6 Cox Cr 52; *R.* v *Beeston*, 6 Cox Cr 4... *Castro*, Tichborne Case; *Brown* v. *Whit*... 2 Cr App. 257, *Wigm*... same rule holds in criminal cas[es] thus a deposition on ... grievous bodily harm, ... facts *Phip Ev 7th Ed* 124 citing, *R* v *Smith*, Rus & Ry ... 6 Cox 52, *R* v ... 4 F & F 63, *R* v. *Beeston*, 24 L J M C 5, *R.* v. *Dilmore*, 6 Cox 52, *R* v *Williams*, 12 Cox 101

In *R.* v *Beeston*, 6 Cox Cr 425, deposition of a witness on a charge of ... intent to do bodily harm, was admitted on a trial for ... *C J* said

he would not ... same case, and ... has had full opport... said. "The question ... circumstances that the ... situation" says *Prof* ... in the application of the rule, and not a narrow and pedantic ... the whole the judici... ...tion to receive testimony, already adequately ... or much improvement" *Wigmore* § 1387 ... issue are substantially the same, it is always a useful test to see whether the same evidence will prove the affirmative of the issue in both *Field Ev 6th Ed* 149, *Wordroffe Ev* ... Ed 356, *R* v *Rochia Mohata*, 7 C 42=8 C L R. 273, *Doe* v *Foster*, 1 A & E 791

Depositions of deceased persons are not admissible under s 33 of the Evidence Act unless the subject-matter of the dispute in the two suits is the same and also the subsequent suit is between the same parties or their representatives in interest ... 34 Ind Cas. 870 ... suit under s 9, Act ... at a former case ... since dead, is admissible ... 23 C 441

... the purpose of exclud... case that

Markby Ev p 33. ... and on behalf of F ... own behalf for assau... these charges F ... of the same house under section ... institution of the civil suit ...

... was ...

Foolkissory v. *Nobin Chandra*, 23 C. 441.

STATEMENTS MADE UNDER SPECIAL CIRCUMSTANCES.

34. Entries in books of account, regularly kept in the course of business, are relevant whenever they refer to a matter into which the Court has to inquire, but such statements shall not lone be sufficient evidence to charge any person with liability. **S.**

Entries in books of count when relent.

Illustrations.

A sues B for R
be indebted to hin
ent, without other

Principle. "The reasons justifying the admission of this class of statements ntested as they are by cross-examination have not been as clearly defined by e Judges as in other Hearsay exce
ore § 1522. It has already been stat
an exception to the Hearsay rule,
ircumstantial guarantee of trust-
On the face of it, in this class of
In such a case the situation is
ne where, even though a desire to state falsely may casually have subsisted,

elated motives whic
probable trustworthin
abit and system o

al inaccuracies and to counteract
ince the entries record a regular
course of business transactions, and error or mistatement is almost certain to be detected and the result disputed by those dealing with the entrant; mis statements cannot safely be made, if at all, except by a systematic and comprehensive plan of falsification. As a rule, this fact (if no motive of honesty obtained) would

8 Ind. Cas 81 = 13 C. L. J. 139.

"It is recognized that to use a system of regular accounts to sustain a

S. 34. In or…

… ar as a party's own … kind of evidence … certain class of transactions … a witness for his … evidence obtainable from others, certain past statements of his must be adm… by very necessity. Thus the principle of necessity and the principle of c… stantial guarantee were both recognized … footing of …

… rule was established before th… …n therefore be understood only by keep… Courts in establishing it was precisel… …more § 15… admissible if …

in the affairs … cases the book … it being practi… …

… of a completed transaction. Ch…

… ordinary motives for untruth and adding certai… …tus for correctness. *Per Tindal C. J.* in *Poole v. D…* 1 Bing. N. C. 6…

… abuse of this evidence in … were living or dead. But there was more … "leaving the books uncrossed and any way disc… and still suing for the claim; moreover, the whole proceeding was al… paraged as involving the making of evidence for one's self, for "the rule is … a man cannot make evidence for himself." In 1609, Stat. Jac. I. C. … after, reciting these considerations, forbade this use of shop books … action for any money due for wares hereafter to be delivered or for …

S.

hereafter to be done," except (1) within one year after the delivery of the wares or the doing of the work, (2) where a bill of debt existed (3) between merchant and merchant, merchant and
man," for matters within the
.I C 4 § 22 and 16 Car I
that a man cannot make evid
complete, by refusing to recognize these books at all, after the expiration of the year. In the lower Courts, where the jurisdiction was limited to small
ued (*Vide Thayer, Cases on Evidence,*
the historical material), and a recent
(to an extent somewhat indefinite) in
the upper Courts (Rule of Court, 1883, Ord 33, R 3; Ord 30, R 7 as amended by Rules of July, 1902) But before the end of the century of the above Statute,

where there was such evidence (entries) by a servant known in transacting the
ber, such entry,
from time to
re that servant,
the servant or
agent usually employed in such business, was intrusted to make such entries by his master, (and) that it was the course of trade,—on proof that he was dead and that it was his hand-writing, such entry has been read (which was *Sir Biby Lake's Case*) And that was going a great way, for there it might be objected that such
t by reason of the
has gone so far."
rty But already
Williams, Comb
gory, Peake Add
nd, 3 B & Ad 890, the matter was placed
be of the exception was understood as
since deceased, in the ordinary course of
lly unconnected with the parties, or the
clerk of a party, or a party himself *Greenl Ev* § 120b

law *Cun Ev 11th Ed 99; Field Ev 6th Ed* p 151

S. 34.

the books of merchants and tradesmen regularly kept and written from day to day, without any blank, when the tradesman has the reputation of probity constitutes a semi proof and with his supplementory oath are received as full proof to establish his demand. *Greenl Ev* § 119 *cited in Taylor* § 712 The same doctrine is familiar in the law of Sc
others, kept with a certain reaso
Court, may be received in evidence,
in supplement of such imperfect proof. It seems however that ...
or other
ali unde,
probatio,
273—277,
evidence of a debt being due to him by entries, whether by himself or an... in his own books, provided the books have been regularly kept in the course of business *Cun Ev 10th Ed 175*

therein" So, even by that Act a man was not allowed to make ... himself by what he chooses to write in his own books behind the back of the parties. But where there was other independent evidence of the truth of the transaction to which the accounts referred they were admissible as corroborative evidence, provided the books were first shown to the satisfaction of the Court to have been regularly kept in the course of business *Nort Ev* 193, see also *Dwarka Doss* v *Jankee Doss*, 6 M. I. A 88 But such books could not be used as independent evidence *Rai Sri Krishen* v *Rai Hurri Kishen*, 5 M I A ... *Dwarka Doss* v *Darka Doss*, 2 Agr 308; *Ramkristo* v *Hurrydos*, Marsh 219; *Jagun Kooer* v *Raghoonundun*, 10 W R C R 148; *Allyat* v *Jugut Chund* ... W R C R 242, *Seth* v *Seth*, 13 W. R (P. C) 36; *Sorabjee* v *Kunnaye* ... W. R 29 P C, *Gopal Mundal* v *Nabbo Kishen*, 5 W R Act X Rule ... Account books are legal evidence to corroborate oral testimony *Rajnarain* ... *Olivia*, 5 W R Act X Rule 30, *Ram* v *Hurry*, Marsh 219=1 Hay ... Ind Jur N. S. ...

fraud, it must be considered binding upon him *Gopee* v ... N S 358

Books of accounts as evidnce—American rule 'The 'shop book' rule is that by which shop books and tradesmen's books of account, regularly and fairly kept as books o ... oath are admitted as *prima facie* evidence ... The rule is ... by the ... regard to the admission ... contained is a very old one ... It

going into the history of the admissio
noted that the origin of the shop-book
administered in this country was it seems,
but from the law of Holland. .. It has long been the settled ...

that entries made in the regular course of business in shop-books by the clerk or **S.** agent of a person are, with proper restrictions, admissible in evidence after the ting ... It has long been the

lab

In many of the states statutes have

been en
account n
parties to
entries to
may be in
them, sinc

ates that books of accounts regularly

selves to charge any
rated they are still
nissible They are
ooks of accounts are
rson with liability

It would be more correct to say that though admissible they do not establish the facts required to be proved, i e, that a person owned a certain sum of money,

present sectio
instances with

an entry relevant under section 34 and one relevant under section 32, cl (2) is that in the former case the person who made the entry may be available as a witness while in the latter case he is not. I find it very difficult to appreciate on

Sridhar, 28 B 291 and has been accepted as correct in *Daji Bhai Kuare* v *Gopi Narayan*, 10 Bom L R 811, *Dukha Mandal* v *W N Grant*, 16 C L J 24 and *Alloch* v *Tarak Nath Ghosh*, 17 C W N 774=16 C L J 328, and it is perhaps too late to contest it If this other view is adopted it should be held

S. 34. *Sen* v. *Bijoy Chand, supra*, see also *Jainab Biswas* v *Sita Kumari Debi*, 46 C L J 253=101 Ind Cas 733=A I R 1927 Cal 855, *Manickchand* v *Paralaji*, 9 Mys L J 337 It is essential in every case where reliance is placed upon books of acc . . . . . course of business; . . . the entries themsel . . . removed by the admission of the opposite party. *Bibi Imambandi* v *Haji Motasuddi*, 15 C. L J 621=13 Ind Cas 678 Under the Indian Evidence Act entries in books of account regulary kept in the course of business are admissible in evidence, not only for refreshing the memory of the witness, but also as corroborative evidence of the story which he tells Books of account which profess to record facts relating only to the particular transaction in question are less reliable than a book where in the same is recorded in common with other transactions in the or . . . *nathan*, 29 C 331 P C=6 . . . . . It is not necessary in a . . . written and that they were kept in regular course of business. If a gomasta and a member of a firm were examined and depose that the accounts were regularly kept, *the accounts may be held to have been proved* in the absence of evidence to the contrary *Biccha Lal* v *Jai Pershad*, 45 P R 1899 A party who calls for an account book is bound by all the entries contained therein *Shib Pershad* v *Promotho*, 10 W R 193; *Raneswari* v *Bal Kishun*, 9 A 713 P C

Account books . . . the Privy Council in *Jaswant* v *Sheo Nara* . . . 3 are instructive as to the variety in account-book . . . al value, but merely a man's private record, p . . . ordance with his pleasure and convenience "Other accounts may be so kept, and may so tally with external circumstances, as to carry conviction that they are true" "And," their Lordships continue, "the Evidence Act, section 34, therefore, enacts that entries in books of . . . relevant evidence, . . . The admis . . . to the general rule laid down in section 21 of the Act"

"The wor . . . : . paper bound . . . by tearing a p . . . in the sense . . . portfolio, or clip, or strung together on a piece of twine which is intended . . . But so untied at will, would not in the ordinary English, be called a book narrow a signification would not do in India, where accounts are often kept on sheets of paper laced or threaded together in a manner which allows removal of any sheet at any time by the untying of a knot Of this class are the bahis of practically every Ma . . . in the English Copyright . . . 'every volume, part or div . . . of music, map chart, or . . . for the conve . . . Act, and w . . . : enacting sect . . . even the Ma . . . not made in . . . intended not to be taken apart at any time for any purpose . . .

. . . however to say what is not a book for the purpose of section 34, . . . hesitation in holding that unbound sheets of paper, in whatever quantity, though filled up with one continuous account, are not a book of account within the purview of section 34 . . . book of

accou . . . of rel . . .

S. 3

ing substantive evidence on which reliance may be placed A private diary may be most regularly kept and contain
made, of the utmost value It may be used
a witness or refreshing his memory and
and others of the Evidence Act; for such user does not make the document itself evidence. (*Cf. Ramji* v. *Rangayya*, 1 M. H C R 168) It may also come in under section 32 (2) if the requirements of that section are satisfied But no entry in such a diary can be filed as documentary evidence of the facts stated in it in favour of the person making the entry if he is a party to the suit. It would be excluded by section 21 of the Act, and section 34 provides no exception in favour of it The reason for such differentiation between a private diary and a private account is manifest An account, regularly kept necessarily results in a continuity which makes fraudulent addition extremely difficult and dangerous, it is a chain of forged links into which the subsequent interpolation of a link of forgery without discovery is almost impracticable The man who wishes to defraud his neighbour
accounts, or, having kept them, suppresses then
hood with truth in regularly kept account
popular, because of the mathematical connection running through them But these safe-guards of truth are entirely absent in the most regularly kept of private diaries, and subsequent interpolations, to meet an unexpected demand and facilitate fraud, are generally possible without difficulty and danger of discovery It is clear that the Legislature, which guides itself by human experience, had such considerations before it when it enacted, by section 34, an exception to section 21, in favour of books of account I am therefore of

discovery are not admissible under section 34" *Per Stanyon A J C.* in *Mukund Ram* v. *Dayaram*, 23 Ind. Cas. 893 (894, 895)=10 N. L. R. 44.

urse of business
have been kept
e and not as in-
words 'regularly
kept,' and in
ows" and not "proves' It is
34 of Ac I of 1872 is not
Act II of 1855, and this seems
ection 34, indicate that the
regularly kept in the course of business—in the first place, making them relevant whenever they refer to a matter into which the Court has to enquire, and nextly, providing that when such entries are sought to be used as statements for a particular purpose—namely, to charge any person with liability, they shall not alone be sufficient evidence for the purpose. Section 32, clause (2) makes relevant a statement consisting of an entry made by a person who is not a witness before this Court, in books not necessarily books of account but—kept in the ordinary course of business. A

Per Mookerjee J
the old Act I
regularly kept
"proved to have been' have been dropped. In the later Act I of 1872 the w
in the law. The legislature has dispen
that the book

itself and as appears such a regular and usual account book as the party against whom it is offered, and not be a memorandum for other purposes. Burr Jones § 570 The entries in the books of account should relate to the business or occupation of the person whose books they are and not to transactions of such person having no relation to his regular business or occupation. But the admissibility of the book in respect to proper items will not be because of the fact that the book contains some entries not connected with the regular business of the party The charges particular, and should itemize the frequently

most elementary
"Finally, when Ganesh, 95 Ind Cas evidence, but would of course

tenance and general accuracy of an account-book is not admitted, it must be formally proved" Mukundam v Dayaram, 10 N. L R 44=23 Ind Cas. They may be kept in the form of a ledger, if this is general mode in which the party keeps his books, provided the entries are original entries The entries may be made in pencil, or in the form of a time-book the labour of the plaintiff

Cash books in which the entries of the issuance of the checks are not admissible evidenced by them are admissible in evidence were made at the time of the transactions prescribe the form in which books are to be kept, nor the degree of definiteness to be observed in making entries The statutes do not generally They have been so framed as to have a general application. The account-books of an illiterate labourer, as well as those of a tradesman or a banker are admissible in evidence if within the condition, the purposes of which are to secure authenticity and credibility in respect to the evidence, rather than to prescribe the form of it. Whatever may

be its form, it is only evidence *prima facie* of what is shown by it. Supplementary proof may often be required to make such evidence relevant to particular case. *Burr Jones* § 570 **S.**

plaintiff that there were dealings between him and defendant, *held*, that the dealings were not proved under s. 34, Evidence Act, in the absence of evidence of specific sums having been paid. *Buta* v *Trilok*, 100 Ind Cas 862=A I R. 1927 Lah. 903; *Narayan* v *Vithoba*, 100 Ind Cas 863=A. I. R. 1927 Nag 177.

not prove anything.

account kept in the

n with liability The

Firm of Jodha v *Ditta*, 84 Ind. Cas. 909=6 Lah L. J 504=A. I R. 1925 Lah. 242 This section does not limit in any way at all the nature of the material

tements in a book of account.

vouchers, receipts or other

Kallu Mal v *Bhawani*, L. R. 6 A 375=88 Ind. Cas. 383=A I. R 1925 All. 742; see also *Yesuvadiyan* v. *Subba*, 52 Ind. Cas. 704; *Abdul* v *Puran*, 82 P. R. 1914=277 P. L. R. 1914; *Ramaswami* v *Ramanathan*, (1914) M. W. N. 240=22 Ind. Cas. 627 Where a claim based on entries in account books is entirely denied, plaintiff must prove the various items of his account by independent evidence, as the entries cannot in themselves charge any person with liability. *Ganesh* v. *The Firm of Mangal Ram Atma Ram*, 76 Ind. Cas. 157 In a suit for recovery of water cess, *bahi* entries showing that in previous years the defendant has been paying cess at the rate demanded, are admissible in evidence. *Prabbu Dayal* v *Ram Chander*,

n slips of paper

, the books cannot be rejected on the ground that the entries were not made in them regularly from day to day *Mangali Prasad* v *Mandir Das*, 11 Ind. Cas. 95. Where the plaintiffs can easily produce independent and trustworthy evidence in support of entries in their account books, it would be unfair to defendants and wrong in principle to accept as sufficient proof the entries, uncorroborated by any evidence

one of the plaintiffs to the effect

Ganga Ram v *Kala Ram*, 53

try in the *patmarsh* alone is not

erty which is denied. *Keshavan* v.

ook, not otherwise suspicious, is

supported by *prima facie* reliable

. R. 1909 Entries to be admitted

ter testimony must be made in the

to prove that the entries were taken from books which were regularly and correctly kept. *Queen Empress* v. *Sayad Sarfuddin*, Rat. Un Cr. C. 344=Cr Rg 37 of 1887. Though certain account books are proved not to have been regularly kept in the course of business, yet if they are proved to have been kept on behalf of a firm of contractors by its servant or agent appointed for that purpose, they are relevant as admissions against the firm. *Reg* v. *Hanmant*, 1 B 6, 10. If books are kept in pursuance of some continuous and uniform practice in the current routine of the business of the particular person to whom they belong, they are 'books of

S. 34.

that the books were kept up in the regular course of business It is a matter of intrinsic evidence as to whether the books in question were books of account and regularly kept in the regular course of business *Emperor* v *Narbada*, A. I. R. 1930 All 38 The book should be such a regular and usual account book as explains itself and as appears on its face to create liability in an account with the party against whom it is offered, and not be a memorandum for other purposes *Burr. Jones* § 570 The entries in the books of account should relate to the business or occupation of the person whose books they are and not to transactions of such person having no relation to his regular business or occupation. But the admissibility of the book in respect to proper items will not be lost because of the fact that the book contains some entries not connected with the regular business of the party The charges in the book must be specific and particular, and should itemize the transactions recorded Such entries have frequently been rejected when they consisted of charges in gross for continued very cos... *B... Jones* § 571

have no weight *Kesheo Rao* v *Ganesh* 95 Ind Cas 198=A I R 19.. 407 "Fir ... must see that th... supposed, ... usually called the *mahajani* system Their evidential value ... method of ... depend upon their formality and the checks against fraud secured by ... d with admissibility A ... , will be admissible As regards ... between the cash books and ledger of a large bank, and the day-book of a house-keeper. The difference lies in the weight to be given to the entries therein But where the fact of regular ... must be

stubs of checks, several days after the issuance of the checks are not ... Cash-books in which the entries were made at the time of the transaction generally evidenced by them are admissible in evidence The statutes do not ...

respect to the evidence, rather than to prescribe the form of it ...

S.

absence of recital in a
who is not a party
the case of *Ram Persh*
restricted in the sam
621=13 Ind Cas 678; *Ali Nasar Khan* v *Manik Chand*, 25 A 90=22 A W N 207; *Pragdas* v *Daualtaram*, 11 B 257; *Debendra* v. *Arun*, 1925 Cal 65; *Tarakumar* v *Arun*, 74 Ind Cas 383; *Kasam* v *Haji*, 76 Ind Cas 327; *Ganga Ram* v *Lachmi ram*, 19 C. W. N. 611=28 Ind Cas 705; *Imambandi* v. *Haji Mutsaddi*, 28 C L J 409=45 C. 878

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ough
other
causes they have a suspicious and fraudulent appearance, and are not explained they should be rejected The book may be admitted as to entries which are proved to be original, althought other entries in the same book are not original, unless the two classes of entries cannot be distinguished Irregularities in account-books sufficient to justify their exclusion must be gross and palpable Books of account must, however appear to embrace all of the items of account between the parties which are proper subjects of entry The account book must

the power of
of the book
and veracity
give evidence of facts or circum-
ok is not fairly and honestly kept as a
r routine of business, subject, it is
said, to the limitation that the investigation should be confined to a time at or near the period covered by the account in suit *Chamberlayne's Ev* § 3148

Jama wasil baki papers Where certain entries are admissible under section 32, the position is that there is no statutory obligation to look for anything else in order to found the liability It does not follow that such entries should necessarily, in any event, be regarded as conclusive of the truth of the statements therein made When such entries in the landlord's papers are sought to be used against the tenant, their evidentiary value has got to be carefully

evidence to show when and by whom these entries in collection papers were

S. 34. made *Held* that the collection papers were inadmissible in evidence *Mtor* v *Tarak Nath*, 16 C L J 398 *Jama wasil baki* papers have no weight except as corroborative evidence *Sunnomoji* v *Johur Mahomed*, 10 C L R 310; *Belaet Khan* v *Rashbehary* 22 W R 519, *Gopal Mandal* v *Nabokristo* 5 W R (Act X) 83 *Kherromonee* v *Bejoy*, 7 W R 533; *Umed Ali* v *Habibullah* 47 C 266; *Yeshuvadiyan* v *Subba Naicker*, 52 Ind Cas 701; *Dwarka Das* v ... *Baksh* 18 A 92 *Mahomed Mahmud* v *Safar Ali* 11 C 407 (409), *Fan ...* v *Agnikumar*, 71 Ind Cas 300, *Jonab* v *Siva Kumar* ... Cas 733 = A I R 1927 Cal 855; ... J 68 The fact that ... Evidence ... if the co... ...established *Bhaba Sundari* v *Tara Nas*... ... entry in a *Siaha* which is a copy of the accounts ... be admissible in evidence if regularly kept but the law specifically states that of itself it shall not be considered to be sufficient evidence to charge any person with liability *Bhagwat* v *Prasad* 15 R D 401

Account books, entries how to be proved Where certain account books were produced in the original Court by the plaintiff, and all that was proved was that they were in the handwriting of his father, and the books were not even examined in detail in the original Court, and the particular entries upon which the plaintiff relied were not selected and exhibited it was held that the entries ought to have been pointed out and proved and evidence should also have been given in detail as to the character of the books themselves *Hungu ...* v *Heramba Chandra*, 8 Ind Cas 81 = 13 C L J 139 In that case the Court in delivering the judgment said "It is essential, in every case where reliance is placed upon books of account, to establish that they have been regularly kept in the course of business It is perfectly true that as laid down by their Lordships of the Judicial Committee in the case of *Deputy Commissioner* v *Ram Parshad* 27 C 118 = 26 I A 254 = 4 C W N 417, they need not be written up from moment to moment or from day to day But it is obvious that if they have been written up casually once a week or a fortnight, though they may be admitted in evidence, obviously they do not possess the same claim to confidence that attaches to books entered from day to day or from hour to hour as transactions take place (*Muncher Shaw* v *New Dhurumsay*, 4 B 576) The proper procedure to follow therefore, is, as laid down by ... Committee in *Dwarka Dass* v ... has kept the accounts or ... prove that the books have ... that they are generally accurate But this is not all th... necessary, section 34 makes the entries relevant if they are entries in a book of account regularly kept ... is therefore not sufficient merely ... themselves have to be proved ... moved by the admission of the o... books were produced ... the plaintiff ... *sonno Chucker...* ... Court. The p... ...the plaintiff relies were not even selected and ex... ...this Court som... at all. Obviously the ... considerable laxity ... to have been pointe... detail as to the charact... the books closely ... has been applied ... use ...

t ... r ... ...ust, therefore ... w ... of his pred... ...evidence to show assured that the ... ...nt and expenses th... ...were destroyed

by him soon after the *furd*, embodying the expenses, and *maskabar*, monthly S. 3
accounts, were prepared It was found that these latter accounts were kept regularly in the ordinary course of business The *maskabars* and *rola* books,
furds
under
Mohan
rt gave
a decree for the plaintiff on the evidence of his account books and of his book-

going into the witnessbox was not entitled to succeed *Hira Bhagat* v *Gobind Ram*, 63 P R 1897

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m
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at
ertain disputed items interpersed in the account should not be disallowed
l *no specific evidence*
hy such fictitious items
Hanuanta v. *Akbar*,
0 P R. 1910=147 P. L. R 1910=117 P W. R 1910 It is not a condition precedent to accepting entries in account books as relevant under section 34, Indian Evidence Act that it should be proved how the accounts came to be written, and
necessary is
to be establi
who were examined as witness for the defence, was considered sufficient corroborative evidence of the accounts to charge the defendants with liability. *Bichha Lal* v. *Jai Pershad*, P. L R 1900, 5 It is unnecessary to prove, by independent evidence, the correctness of every single item of an account extend-

for the decision of the
nittee likewise observed
d account books, but
each book contained that amount of difference which was appropriate to its character The committee also used the *better test of genuineness than the*
correspondence
other evidence,
firmed the deci
I A 6 P C

Plaintiffs sued to recover money due as balance of a running account and

The various items entered
plaintiff, the High Court
er this section, sufficient
he evidence, however, one
of the plaintiffs having given evidence with reference to the account books, stating the amounts advanced to and repaid by the defendant, and no question
speaking from his own
lence of a witness for the
was sufficient to uphold
carla Das v. *Sant Baksh*,

S. 34.

There is frequently confusion in the subordinate Courts as to how an account book should be proved and used under section 34 aforesaid. It is common practice to call a witness and examine him, as to the particular item sought to be proved ...

...

mouth of a witness who merely reads it and cannot supplement it with his personal knowledge. Use of an entry to refresh memory is one thing, its proof as substantive evidence under section 34 is another, but this distinction is constantly lost to sight by Judges and practitioners. A clerk called as a witness may depose:—I remember ... last year. Having ... my master's cash book ... not a case of evider... section 34 of the Evidence Act. But suppose the account book had been produced and the entry tendered in evidence. Then the deposition of the clerk might have been in these terms:—'I know the defendant ... 'I ... ye... m... ca... wa... bo... we... da... ad... wi...

...

ını

Adequate knowledge. The declarant must have adequate knowledge as to the fact as ... w of his knowledge the truth of the transaction ... acts in pursuance of a report ... him by an ... ployment there is presumption of the truth of the ... 3071. In a suit on accounts the plaintiff produced his ... send goods to the pla... used to be entered ... an account. *Held* that the matter was left in doubt whether the witness was speaking from personal knowledge or without personal knowledge and that the defendant not having chosen to cross-examine the witness the plaintiff should be given the benefit of doubt and the evidence taken to be tendered on personal knowledge. *Mt Har Dei* v *Kishen*, 1931 A. L. J. 946=133 Ind Cas 900=A. I. R 1932 All 60.

But such statements shall not alone be sufficient evidence. Section 34 ... s regularly kept in the ... o charge any person ... 5. Section 34 of the ... a decree by mere ... proving the existence of certain entries in books of account, even though ...

...

entries. No particular form or kind of evidence in addition to the ... is required. Any relevant facts which can be treated as evidence within the meaning of the Evidence Act would be sufficient corroboration of the entries furnished in books of account, if true. *Yesuvadiyan* v. *Subba Naicker*, 22 Ind. Cas 704; see also *Rama Swami* v. *Ramanathan*, 22 Ind. Cas. 627; G... v. *Kala*, 22 Ind. Cas. 403=17 P. L. R. 1914; *Beni* v. *Bisan*, 89 Ind. Cas. ...

Kalu v. *Bhairam*, 88 Ind Cas 383 = A I. R. 1925 All. 742, *Abdul* v *Firm* ...*Ditta*, 81 Ind Cas 909, *Gopeswar* v *Bijoy*, ... 28 B 291, *Dhuka* v *Grant*, 16 C L J. ... P C, *Ganashi* v *Firm*, 76 Ind Cas. 157; ... *Khumi Mal* v. *Dwarka Das*, 1930 A L J. ... -orative proof must be given by evidence ... l, it seems to have been deemed necessary that this corroborative evidence should be furnished if the rule itself is to apply. Confirmation of a particular item may be sufficient In other words it was necessary for the proponent to call third persons such as those who had dealt with the plaintiffs and found their books to be correct Where evidence of this ... produce the best ... good faith with ... In this connec-...e. The book to be verified by the testimony of the witness must be the same in which the account in question is entered *Chamberlayne's Ev* § 3096. But such entries are evidence against the person making them *Ningama* v. *Bharmappa*, 23 B. 63; *Mathilda* v *Gaebele*, 96 Ind Cas, 429 = A I R. 1926 Mad. 955; *Jodha Mal* v. *Ditta*, 81 Ind Cas 909 = A I R 1925 Lah 212

... accident *Seth Maganmal* v *Darbarilal*, 24 N L R. 10 = 30 Bom. L R. 296 = 107 Ind Cas. 113 = 47 C. L J 222 = A I R. 1928 P. C 39.

35. An entry in any public or other official book, register or record, stating a fact in issue or relevant fact, and made by a public servant in the discharge of his official duty, or by any other person in performance of a duty specially enjoined by the law of the country in which such book, register or record is kept, is itself a relevant fact.

Relevancy of entry in public record, made in performance of duty.

General Principle An exception which in practice is by far the commonest in its employment is the exception admitting statements made by officials in persuance of official duty The principle of Necessity, which in one form or another ... the death, insanity, ... arant, but ...

... attendance of the officer is corporally impossible to obtain, there is ... a high degree of expediency that the public business be not deranged ... ing on the strict enforcement of the Hearsay rule *Wigmore* § ... *Ev.* § 162 (m).

S. 35. The second essential for an exceptions to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of ordinary confrontation and cross-examination so far as may be. Two reasons are ... by the Courts as ... [illegible] ...tion in this respect. The first ... public officers do their ... justifying the exception ... § 162 (m) In ... "The law reposes such ... public officers that it presumes they will discharge their several trusts with accuracy and fidel... charge of their public duty may ... true, under such a degree of ... case may appear to require" Sir ... "It depends upon the public duty of the person who keeps the register to make such entries in it, after ... Kennedy, 5 App Cas 623, ... F 468, *Parke B* said ...

... the return ... the document ... duty exists ... will ... ably the duty ... whose violation a penalty is expressedly expressed. Possibly the officer may not be one from whom in advance an express oath of office is required. No stress seems to be laid judicially on either of these considerations, nor need they be emphasized. It is the influence of the official duty, broadly considered, which is taken as the sufficient guarantee of trustworthiness, justifying the acceptance of the hearsay statement. *Wigmore* § 1632.

... another person before use in Court is small, so ... making of this particular official statement is hardly amenable to the ... above supposed. Finally, so far as the other element is concerned—the ... correction of errors by public inspection—its efficacy must be of the ... moment, for it is not supposed that the public, or specifically interested members of it, do in fact (whatever their rights may be) ever demand inspection of the vast majority of official records that are made, and there can be hardly any chance of checking or revision from that source. It would seem that the second reason, put forward so definitely by *Lord Blackburn*, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception." *Wigmore* § 1632.

case as the present, statements in public documents are receivable to prove the facts stated on the general grounds that they were made by the authorized agents of the public in the course of official
public interest or required to be r
Taylor Ev 10th Ed § 1591 "In man
a lapse of years, it would be imp
contained in such documents were in
an exception is made to the rule
Ghulam Rasul v *Secretary of State*, 30 C W N 101 (101) = 86 Ind Cas 651 = 52 I. A. 201 = 23 A. L J 639 For further discussion *vide* next topic.

S.

v. *Halpat Singh* 5 C 744 751, 753 = L R 7 I A 63; see also *Mallikarjuna* v. *Secretary of State*, 35 M 21) So the register is admissible irrespective of whether the official who actually wrote the entries had any personal knowledge or whether the register was a copy of a previous register which had become untidy *William Graham* v *Phanindra Nath Mitra*, 19 C W. N 1038; *contra Ambalavana* v *Sree Minakshy*, 28 M L J 217 = 26 Ind Cas 841 = (1915) M W. N. 76 Now let us examine whether the principle is violated on the ground of want of personal knowledge on the part of the entrant. The argument for excluding the use of entries except for facts necessarily within the entrant's personal knowledge is thus stated by *Denman L C J* in *Doe* v *Wallaston*, 1 Moo & R. 389. "The clergy man must be present . and this fact of the time (of the marriage) is gistery of baptism, the time of from
think it here stated necessarily within the
. But *Pattison J.* thus reasoned for
there was no personal knowledge on the part of the entrant "Must we not take it to be the act of the incumbent, who, however he got his information, *had satisfied himself* of the fact before he sanctioned the entry?" *Doe* v *France*, 15 Q B 758 In the same case *Wightman J* s
having taken
English Comm

1073,
ray, 8
389;
(988);
gmore
§ 1646

"It
tion of a
personal
receivabl
practical
that the same principle is applied to persons whose hearsay statements are receivable under the exceptions to the Hearsay rule; and the application of the

here as elsewhere, but the principle itself need not be and is not judicially employed to the extent of unpractical strictness; and it has its qualifications and exceptions, based on good sense and practical convenience" *Wigmore* § 1635. So it is at first sight unsatisfactory to accept an entry as evidence of a fact not occurring within the personal knowledge of the entrant At the same time there

S. 35. The second essential for an exceptions to the Hearsay rule is that some circumstantial guarantee of trustworthiness be found, to take the place of ordinary confrontation and cross examination so far as may be. Two reasons are stated by the Courts as justifying the present exception in this respect. The first

that public officers do their

ness justifying the exception

al Ev. § 162 (m) In P

trusts

charge

n *Doe* v *France*, 15 Q B

who keeps the register to make such entries in it, after satisfying himself of their truth' See also *Lyell* v *Kennedy*, 5 App Cas 623, 641 In *Irish Society* v *Bishop of Derry*, 12 Cl & F 168, *Parke B* said "The bishops in making the return discharged a public duty, and faith is given that they would perform their duty correctly, the return is therefore admissible on the same principle on which other public documents are received" The fundamental circumstance is that an official duty exists to make an accurate statement, and that this special and weighty duty will usually suffice as a motive to incite the officers to its fulfilment Possibly the duty may not be one for whose violation a penalty is expressedly expr Possibly the officer may not be one from whom in advance an ex oath of office is required No stress seems to be laid judicially on either of considerations, nor need they be emphasized It is the influence of the cial duty, broadly considered, which is taken as the sufficient guarant trustworthiness, justifying the acceptance of the hearsay statement *Wig* § 1632

of official documents, there are every where numerous official docu

and comparison by another person before use in Court is small making of this particular official statement is hardly amenable to the

concerned—the

vast majority of official records that are made, and there chance of checking or revision from that source It would seem second reason, put forward so definitely by *Lord Blackburn*, is to be regarded as merely a casual advantage, and not an essential limitation, of the class of documents to be included within the exception." *Wigmore* § 1632

city be not confirmed by the usual tests of truth, namely the swearing and the S.
titled to this
by law to
out
at
so
en
be difficult to prove them by means of sworn witnesses" *Per Wayne J* in *Gaines* v *Relf* 12 How 472, 570, *Wigmore* § 1631 So "official registers, or books kept by persons in public office, in which they are required to write down particular transactions, or to enrol or record particular contracts or instruments, are generally admissible in evidence, notwithstanding their authenticity is not confirmed by those usual and ordinary tests of truth —the obligation of an oath and the power of cross examining the persons on whose authority their truth and authenticity may depend This has been said to be because they are required by law to be kept, because the entries in them are of public interest and notoriety, and because they are made under the sanction of an oath of office or in the discharge of an official duty" *Per Fowler J* in *Ferguson* v *Clifford*, 37 N H.
al books, etc,
books, and
keep *Nort.*

vo sufficient
guarantee of reliability to render them admissible if offered in evidence *McKelvey's Ev* § 206 The exceptional privilege given to public records by this section cannot be extended to entries which a public officer is not expected to, and is not permitted to make *Ali Nasar* v *Manikchand*, 25 A. 90 (F. B) = 1902 A W N 207; *Madhabrao* v *Deorao*, 21 B 695. There must be

might not be admissible *Bhaiya Dugaj* v *Beni Mahto*, 22 C W N 139 = 23 M L T 382 = 20 Bom L R 712 = 28 C L J 1 = 47 Ind Cas 1 (P. C) But registers kept under private auth
private individuals are inadmissibl
(1913) 1 Ch 392, *Whittuck*, v
R 303, *Doe* v *Gatacre*, 8 C & P 5
it is not the duty of the officer to
14 App Cas. 137, *Farrell* v *Maguire*, 3 Ir L R 187 A register can be received to prove incidental particulars concerning the main transaction where they
(1926) 1 Ch 284
known to be prepared
any other person
he country, nor has
the act or record
he absence of proper
I R 1930 All.

English Law Another exception to the hearsay rule consists of statements contained in public or official documents which are admissible as evidence of
294 Statements
Royal proclama-

United Ins Co 7 *Johns* 38;
mentary Journal (upon all matters properly before either House, *Jones* v.

S. 35. *Randall*, 1 Cowp 17; *Root* v matters, *Oates Case*, 10 How. St T not conclusive evidence of the f *Dacklin, supra*, *Att.-Ge* Official registe is required by ... or reference, and (2) the entry has bee ... er. *Ibid* p 298. So in England, a ch ... in of the Established Church, is adm ... by the evidence of the identity of the ch ... baptism; but not the time of its ... to make enquiry about the time of ... *Draycot* v *Talbot*, 3 Bro P C ... *May* v *May*, 2 Stra 1073; *Wihen* v *Law*, 3 Stark, *R* 63, *Doe* v *Barnes*, 1 M & Rob 389; *Stark. Ev* ... 9 Eq 373, *R.* v *Weaver* L R 2 C ... the church of England, from the t

Hubback on Succession, 470; 474 ... in 1644 and 1653 provided for the registration of births, deaths and marriages. *Scobell's Ordinances*, 76 236, *Dudly's Case*, 2 Sid 71 But these Ordinances were annulled upon the restoration of Charles II And registers kept under ecclesiastical authority continued to be admitted in evidence by the Courts although not required to be kept, nor declared to be evidence by any Statute. This is probably the meaning of *Lord Holt's dictum* that such registers are evidence from "the nature of the thing", and of the additional words attributed to him by one reporter of least au ... " *Slaney* v *Burgesses of Droitwich*, 1 Salk. 28 ... 290 Abo ... the time of the decision of that ca ... which were repealed

... Will IV (... Statutes ...

... *yer*, 13 L J N S Ch 398 ... dence of the baptism of the ambassador's son ... entries in a register are admitted " ...

of their own or of England. *Evans* v. *Ball*, 38 L T. 111; *Taylor* § 1593; *Phip Ev 7th Ed.* p 329. S.

e entry must have been contemporaneous ... the sanction of being under oath, but the official character of the transaction appears to afford a *prima facie* guarantee for its truthfulness—stronger, perhaps, than that which obtains in respect of books kept in the ordinary course of business *Nort Ev* 200 But the entries should be made promptly, or at least without such long delay as to impair their credibility. *Phip Ev 7th Ed* 330, *Doe* v *Bray* 8 B & C 813

... of the Indian Evidence Act, the following documents are public documents —(1) documents forming the acts or r... , (ii) of official bodies and ... icial and executive, whether o... Majesty's dominions, or of a ... private documents ... 5 App. ... whole w... that it ... in a corporation book concerning a corporate matter, or something in which all ... ld be public within that sense But it must be made by a public officer I understand a ... a document that is made for the purpose of the ... able to refer to it It is meant to be where there is a ... be the ... ay be ... ; but I ... for the purpose of being ... have access to it afterwards ... any cases entries in the ... entries of that kind, ... are admissible, and they were "public" then, because the common law of England making it an express duty to keep the ... e kept by a public ... I think as far ... o its accuracy, and ... at, in every case ... , it has been made ... , as a register to be ... m public" says *Prof.* ... being known or ... signify open to all', 'capable of persons in general,

... Ind Cas 125=A I R 1926 ... n cases, be a public record within ... it does not follow that every ... public servant to a superior officer and made in pursuance of orders given by the latter, is admissible evidence to prove such fact *Mallikarjuna* v. *Secretary of State*, 35 M. 21=14 Ind Cas 401.

S. 35. **Other official book, register or record** It is important to observe that whenever it is the duty of a public official, either at common law, or by S... to record certain facts in any book which is int... referred to ever after...

...ot as a rig... ...rove not only th... ...recorded in the...

...s kept by any law ... y the station writer, the ... where it neither purports nor The statement of ... Mohammad v Emperor, 22 ... register not being one directed ... Cr Pro... and the... prove th... is not a r... the docu... ... in que... provisions of that secti... N 65 The certificate of guardianship ... v Queen Empress, 28 C. 348=5 C. W under this section, for it is neither a book ... is no evidence of the age of the m... any officer in accordance with law ... nor a register, not a record kept b... *Teiskhana* papers prepa... not papers of the de... *Samar Dasadh* v *Jaggu*... of this section can be ... kept ouside British In... *Teiskhana* Register (so called ... ammat v *Sundaram Pillai*, 23 M 493 ... register) prepared by a person who is called a *patwari* from the number of columns in the statement ... lector, in accordance with the rules framed ... and submitted to the C... of Reg XII of 1817, is not an official publ... by the Board of Revenue under s... *Makhan*, 18 C 53...

... evidence, is admissible ... in consequence that part may not be admi... *Dirgaj* v *Deo Bahadur*, 22 C W N 439=23 M L T 382=28 C. L J 1... in evidence under this section *Rai* ... Ind Cas 1 (P C)

P... preted ... as inc... in this section must be take... 28 Bom L R 1225=50 B 716=A I ... of a foreign state. servant' has not been defined in this Act. ... 21 of the Indian Penal Code and s 2 (17) o... Code of Civil Proc... of 1908) As regards who are public servants vide 10 B H C R 1 8 ... 7 B L R 448=16 W R ... R 99 ...

... *Gan*... v *Fakirgouda*, 51 C L J 592

Register or record ... in that ... recorded ... it is kep... that it is ... arises (perman... ...saction ... its own), ... separate ex...ence of the staten... circumstances that ... the official precincts and the ...

ore not fitted for entry in a single office volume The return differs from the S.
artificate in that it is preserved in official custody A further distinction, within
s that the former deals with
r, while the latter records
nt has occurred out of his

s 1637. It must always be a
correspondence which do, and those which do not, fall within the scope of s 35 But where there is a statutory duty laid upon public officers to investigate and report facts, a report of the facts elicited by their investigation is an official record within the meaning of this section *Ramakrishna* v *Tirunarayana*, A. I. R 1932 Mad. 198.

it essential that a register should be
n str *7th Ev p 330*, see also *Graham* v
Phan *Winfield*, 18 Ves 143; *May* v *May*,
2 Str P 552

Nature of the Duty—General Principles Whether a given statement was made under an official duty will depend chiefly upon the nature of the office, the subject of the statement, and the form of its making (1) It is clear that no

they did not occur (7) A statement otherwise admissible is not generally to be excluded where there existed for the declarant a special interest or motive to misrepresent (8) The person having the duty and the person making the statement must on principle be identical *Wigmore* § 1633

B 756

Any other person in performance of a duty, etc An entry in a *Chaukidar's* register of births and deaths was relied upon as proof of the date of the

S. 35. birth of a person The entry was admittedly not made by the *Chaukidar* & there was no evidence that it was made by any other public servant or that it was the duty of any public servant to make it *Held*, that the register was not admissible under s 35 of the Evidence Act *Ganpat* v. *Gauri Sankar*, 190 C 68.

Errors of interest . . . . affect the weight of . . App Cas 437, *Falcon* . . . They do not also affect . (1907) 2 Ch 592 So also, the fact that the entry is in the intere t of the ow or body keeping the register, affects weight only, not admissibility *Irish Soc*. *Derry*, 12 *Cl. & F.* 641; *Phip. Ev 7th Ed.* 330, *Sturla* v. *Freccia*, L R. 5 App Cas 623, 628

Wajib ul arz An entry in the *wajib-ul-arz* is admissible in proof of the custom under s 35 and its validity does not depend upon the question wh ... with the *wajib-ul-arz* . . *Hasan* v *Abdul* . . village admini . . the statements . rights and custo . of such rights . and purport to give the history of the devolution in certain families ... When the narrators stand in no better position than any other tradition ... are incidents not with ...

safe to accep . . . 4 O W N . : . have been . is shown by the party alleging it. *Manya* v. *Sitaram*, 23 N L R ... Ind Cas 438=A I R 1927 Nag 147, *Wasiq Ali* v. *Athar Ali*, 110 Ind Cas ... I R 1928 Oudh 409, *Sartaz Koer* v *Mahadeo Bux*, 29 O C 153=92 Ind Cas 657=A I R 1926 Oudh 332, ... *Singh* v *Rustam*, *Singh* 3 O W N ...

or *Riwaj i am* should be supported by instances *Baij Nath* v ... W N 979 ... An entry in a *wajib-ul-arz* ...

Singh v *Babu Lal*, 21 A L J 822=L R 4 A 557, *Sher Munar* ... *Ahmad*, 78 Ind Cas ... What

existed or that ... had been made . 207 *Wajib-ul* ... of 1863 when ... much more reliable than oral evidence given after the event ... *Ashgar Ali*, 57 I A 29=52 C. L J 183=A I R 1930 P. C ... J 156 (P. C.) ... in the village records

...s laid down for his 216 = 13 C. W. N. *Musammat Lali* v ... = 10 C. W. N. 730; 63; *Isri* v *Gunga*, *Moharaja*, 2 A. L. *arurudhiraja*, 15 A. , 16 A 10, *Garura-* ... W. N 33 = 23 A 37; *Ali Nasir* v. *Manick Chand*, 25 A. 90.

Riwaj i am. An entry in a ... *facie* proof of the custom *Lalh* ... 924 = A I R 1927 Lah 241, *Ghu* ... *Riwaj-i-am* being a public reco... of his duties, is admissible in evidence to prove the facts therein entered and the ...

Lah. 99 = 1923 Lah 401

...fact ... *rana* ... Ind ... *swam* ... a judgment, therefore, an ... to a relevant ... the judgment ... s In support ... *urno Chunder*, ... 15 M 378 and ... For the respondents it is contended that the relevancy of judgments is governed by sections 40 to 43 of the Evidence Act and that a judgment not *inter partes* is not evidence ...

issue or relevant fact, even though the judgment may be between persons who ...

...ds" Then after dissenting from the *Parbutty Dassi* v *Purno Chunder Singh* *Mahpal Singh*, 5 C 744 = 6 C L R 593, ...ectness of this decision (i e *Parbutty* ...oubted in *Sundar Das* v *Fatimul ul nissa* ...

Appavu, 12 M 9 a judgment not *inter* a fact in issue or ...

S. 35.

ition between the parties."
Ind. Cas 298='0 C W N
Ind Cas 583=43 C 707=
20 C W N 802=14 A L. J 121=18 Bom L R 490=21 C L J. 116, see also *Asa Singh* v *Uansa Ram*, 621 Ind Cas 509=A I R 1930 Lah 237 On a consideration of the authorities and the provisions of the Evidence Act it is clear

L. R 763

relevant under s 35, Indian Evidence Act. *Gehimul* v. *Kurmumal*, 10 S L R 38=25 Ind Cas 551

book
death
to be
accepted as conclusive of the dates of the death recorded *Rangappa* v *Ranga Swami* A I R 1925 M W N 232=88 Ind. Cas 249=A. I R. 19 Mad 1005 The register of deaths maintained under para 367 of the Police

Reddi v *Kotaiyya*, 33 M L J
III of 1899, the Registers of Births and
e Board of Revenue since the year 1865 do
come under this section *Ibid* Entry in death register may be rejected when used to prove or disprove death on a particular day, if register is prepared in casual way. *Kali* v *Sashi*, A I R. 1930 Cal Death Registers are evidence of the
of
ed
tribunal *Phip Ev 7th Ed.* 332.

of a partition which affected the public revenue is admissible in
l purpose only. *Abdul Hamid* v
Khasra is not a record with
herein in the name of a tenant in
35 of the Evidence Act, but
ory of the plot in question before
bua, A I R. 1923 P. 163.

weight cannot be attached to a partition paper in the absence of detailed inform- S.

35 of the Evidence Act *Soshi Bhoosan* v *Girish Chunder*, 20 C. 940; see also *Ramsarup* v. *Ramnaram*, A. I R 1929 Pat. 32. A *batuara chitta* is not admissible in evidence under s. 35 of the Evidence Act. *Isuar Chandra* v. *Taranath*, 1 Ind. Cas. 807. Entries in *batuara khasra* papers are admissible in evidence, but it is for the Court to decide in each particular case whether the

made in a proceeding under Reg. XIX of 1831 between predecessors of the parties to a suit are good and admissible evidence, quite apart from anything contained in section 35 of the Evidence Act. *Khetra Nath* v. *Mahomed*, 23 C. W. N. 48 = 45 Ind. Cas. 921.

Entry in a certified copy. Under this section an entry made on a certified copy indicating the date on which it was completed is certainly relevant But when an enquiry as to correctness of such an entry has been started or its

report *Nizam Din* v *Mahomed Iqbal*, 108 Ind. Cas 619 = A. I R 1928 Lah. 643.

Ghori v. *Ajudhia*, 14 R. D 444

Satish Chandra Mukho-
ficate of guardianship was
be a record kept by a

Court of a District

S. 35.

erein So in the province of
strict Judge to a guardian
made by a public servant in
in such record is therefor
mcer Hasan v Ejaz Husain
A I R 1929 Oudh 135; see *Mehdi Ali* v. *Walayat Hasain*, 5 Luck 605 7
O W N 25 = 121 Ind Cas 277 = A I R 1930 Oudh 97

duty
to titl
ship c
of his official duty and the same was recorded It was held that the statement
was admissible in evidence on the question of relationship under this section
Lal Harihar Pratap v *Bishesu*
Ind Cas 422 = A I R 1928 (
by the surveyor who recorded
Ba Htue 5 Bur L J 116 = 98 Ind Cas 166 = A I R 1926 Rang 204;

entries in a prescription register maintained by a Government
in a Government although the particular
compounder or c
witness. *D Cruz*
Oudh 310 Altl
final or sole test published at the

Bidya Prasad v *Surkhur*, 134 Ind Cas 638 = A I R 1931 Pat 263.
of Chart ssistant Collector is admi-
sible *Gany* A report in police diary
is admissib witness. *Abheraj* v *Gaj*
Singh, A I R. 1932 Oudh 137

Where the subdivisional officer directed an enquiry by a *Kanungo* of the circle into the matter of the complaint by virtue of s 202 (1) of Cr Pro Code was admissible

the actual state
for that purpose
being an offici
comes under section 35 of the Evidence Act, and is admissible without formal proof *Mohan Singh* v *Emperor*, L R 6 A 49 Cr = 85 Ind Cas 647 = 26 Cr L J 551 = A I R 1925 All 413 The contents of the report may be used as a corroborative piece of evidence to show that the implication of the accused in the offence is not an after thought. It cannot certainly be used as a substantive piece of evidence *Mohan Singh* v *Emperor*, *supra*

An *Inam Register* embodies the conclusions of the *Inam* Commissioner on **S. 35**

3 Ind Cas 616 = 48 M L J

Protap Chandra Deo v *Jagadish Chandra*, A. I R 1925 Cal 116. Entries in the *Siyaha* are made by the *Patwari* in the ordinary course of business and are

4 M. L J 182 = 72 Ind Cas 214. Extracts from Revenue Registers Nos 1 and 3

Surendra Nath, (1919) Pat 465 = 53 Ind Cas 20

A recital in a public record as to a statement made by a public servant with reference to a particular statement of the grant by the Government may be admitted, under section 35 of the Evidence Act as proving that the public servant made the statement that he is to have made, if the fact that he made such a statement is a relevant fact. *Sankaracharya* v *Manali Saravana Mudaliar*, 51 Ind C 876

Revenue Records are not evidence of title for they are kept for fiscal purposes and it is not part of the duty of the Revenue Officer to record title But

under the Land Acquisition Act *Secretary* v *Satish*, 58 C 828 = 35 C W 173 P C

Though survey entries in survey records may not be sufficient evidence to prove that certain land is *poramboke* they are good evidence where the only question is as to the extent of *poramboke* land *Kalayal* v *Secretary of State*, 2 L W 413 = 29 Ind Cas 154

Officer that the name of this or that person was entered as the occupant of certain lands could be admissible if relevant, but it would not be admissible

S. 36.

36. Statements of facts in issue or relevant facts made in published maps or charts generally offered for public sale, or in maps or plans made under the authority of Government, as to matters usually represented or stated in such maps, charts or plans, are themselves relevant facts

Relevancy of statements in maps, charts and plans.

Principle This section ... charts generally offered f... authority of Government ...

... are in favour of any inaccuracy being challenged and open to the criticism of all, the probabilities ... (7th Ed) The person or persons who prepared the map in question ... unavailable, both the principle of Necessity and the principle of the Guarantee of Trustworthiness are satisfied Hence ...

... ment surveyor ... rized to do; an ...

... to make return of his official surveys, the officer has an implied duty ... admissible *Wigmore* § 1665

Scope of the section ... harts offered for public sale ... ountry, etc, and as regards ... the section refers not only ... fields *Whiteley Stokes* ... also boundaries of villages, estates and (in *Khasra* ...

B D 406, 14 Cox C C ... *Castro*, alias *Orton*, L R 9 Q B 350, 12 Cox C C ... B D 406, 14 Cox C C 436, 6 App Cas 229, 14 Cox C C 546 Under the rule excluding declarations ... admissible in Engla... Car & P 481, *Bridg*... L R 5 Ch D 709 ... a map is prepared, must be an authority given by statute *Gahjoo Lal* v *Jagat Pal*, 11 C W N 230 = 9 C L J. 415 But there must be judicial or quasi judicial duty to enquire by a public officer *Sturla* v *Freccia*, 5 App Cas 623, *Irish Society* v *Derry*, 12 C & F 64.

Survey ...

... Nevertheless, the principle was sufficiently recognized at common law ... *Evans* v *Taylor*, 7 A & A 617; *Wigmore* § 1665 These maps were admissible because they were findings by a ...

it raises a reasonable presumption of title. Revenue Survey maps are not conclusive and may be shown to be wrong *Ramnandan* v *Jaigobind*, 2 Pat. 839. *Thak* and survey maps are not conclusive as to whether lands which formed part of the bed of the river were included in the permanent settlement of 1793. It is not permissible for a Court to act on the assumption that in 1793 a state of things existed different from what appeared from any evidence before the Court. *Secretary of State for India* v *Upendra Narain*, 71 Ind. Cas. 819 = A. I. R. 1923 Cal. 217 = 36 C. L. J. 336. Maps and surveys made for revenue purposes are official documents prepared by competent person with due publicity and after notice to ... issible as ... They are ... h weight. ... **S.**

As a rule *exparte* statements in survey maps should be created on the same basis as books ... corroboration of ... distant times, ... available their value assumes greater proportions, and if they indicate a state of ... hey may be ... rd and fast ... this nature ... 28 Pat. 281 ... not direct ... the survey was made. In each case the Court has got to decide whether the evidence of possession is sufficient to raise a reasonable presumption of title. A survey map is an official document prepared by competent persons interested and with such publicity and notice to persons interested as to be admissible and valuable evidence of the state of things at the time they were made" *Debendra* v. *Surendra*, 31 C. W. N 419 = 102 Ind Cas 370 = 45 C. L J. 474 = A. I R. 1927 Cal. 347; see also *Musst Bibi* v. *Deo Nandan*, 5 Pat. L J. 681 = 2 Pat L. T. 81 = 59 Ind. Cas 298

Where the parties consent to be bound to regard the boundary lines as laid by the su... correctnes... *Kistwari* ... between th... but evide... *Abdul*, 3 P... favour of the accuracy of *thak* and survey maps and it is for the party who ...

Ind Cas 182 There is no gener... on the *thak* or survey map must be presumed to have been in existence at the time of the permanent settlement The question is essentially one of fact and must be determined on the facts and circumstances of each case *Profulla Nath* ...

... ontrary ... made. ... maps ... but it ... at the time of the permanent settlement. *Ananda Hari* v *Secretary of State*, 3 C L J. 316, *Mirza Shamsher* v *Kunj Behari*, 7 C L J 414 Unless it can be proved that the person against whom a *thak* or survey map is attempted to be used

S. 36. expressly consented to the delineation or admitted the correctness of such maps they have no binding effect *Kristomoni* v *Secretary of State*, 3 C W N 53 ... *thak* map is admissible as evidence ...

... man ...

R. 310 But a ... sufficient to prove ... v *Gobind*, 9 C ... *Watson & Co*, 27 ... sought to be set ... an Amin's report ... v *Bisseshur*, 5 W. R 34 If there has been a Government survey, the survey map must be taken as evidence. *Radha Choudhrain* v *Girdharee*, 20 W R ... 25 W. R 153; *Guddadhur* v *Tar* ...

v. *Fakrunissa*, 15 Ind Cas. 159.

Thakbust map ... sketches, in ... magnetic be ... made from c ... *Bhusan Bane* ... thak authori ... to title or pos ... can legitimately be drawn from thak map *Debendra Lal* v. *Secretary of State* 31 C W ...

... and is in possession ... the *zemindari* papers ... value of such a map is ...

... was jungle ... undiscoverable from a mere inspection ... nor their agents have by their signatures, admitted the correctness of the ... *Joytara* v *Mohomed* ...

... picked up and verified the thak marks indicated ... in the *thakbust* map, prepared the revenue map by accurate observations made by expert surveyors with scientific instruments *Keshabjee* v *Sashi Bhusan* 99 Ind Cas. 1027 = A I R. 1926 P 385 As the object of a *thakbust* survey and map is to ascertain and delineate the boundaries of the estates borne on the Revenue roll of the District, the entry in a thak map that certain lands formed part of an estate become a relevant fact under this section and such entries are evidence on which a Court may act. *Abdul Hamid* v *Kiran Chandra*, 7 C W N 849

Entries in a . . . . . . 1 Court of fact to hold that disputed . . . . at the time of the Permanent Settlem . . . it the boundary . . . . *Ramnandan* v. . . . v that the state survey maps existed at the time of the *f State* v. *Wazed*, 31 C L J. 111 A . . . tmm in connection with the measurement . . . is a rough register, statements entered in . . . affected thereby had notic . . .

23 C. 552.

In case of dispute between Thak an. . . . revenue survey map which was carefully and . . . officers and the *thakbust* map do not agree, . . . pillars, put down on the ground . . . xistence; and they correspond with . . . the field book and the materials . . . ish sufficient data The revenue . . . e signature of the revenue surveyor on the thak map does not mean that if the thak map is reduced to the same scale as the revenue survey map, then the two boundaries will necessarily agree but merely that the surveyor has satisfied himself that the boundary accepted and intended by the demarcation staff has been correctly picked up on the ground, . . . an v *Ranjas*, 3 Pat 85 . . . Cas 1027= A I R . . . jah *Mahendra Ranjan*, 4 . . . rule that a

. . . the *thak* and the survey . . . clearly agrees with the . . . There is no general or . . . llow either the one or the other, the Court may, if it considers the *thak* map more reliable, follow that in preference to the survey map *Abid Hossein* v *Doucurry Pal*, 6 C. W. N 629

held that a Topographical survey map of 1869 in which the boundary line between the two *perganahs* was given, was admissible in evidence under section 36 of the Evidence Act When *perganah* boundaries are found entered in such

S. 36 valuable eviden
conclusive and
contrary, they
made. In cases o:
to possession is
boundary line on
absence of better evidence, the lower Appellate Court erred in law in not accepting a Topographical survey map as evidence of possession at the time the map was made. *Gajhoo Damor* v. *Kotwar Jagatpal*, 11 C. W. N 239=9 C. L. J. 415.

45 M. L J 444=50 C. 446=50 I. A 121=(1923) M. W. N 511 The map
rd is the settlement map and the entr
in a different notation and therefore the
nap, nor is it an independent piece of
evidence *Laharam* v *Gurmukh Rao*, 99 Ind. Cas. 628=A I R 1927 Na. 204 Maps prepared under the Calcutta Survey Act have great evidentiary value as regards question of title *Debendra* v. *Surendra*, 31 C W N 419=102 Ind Cas. 370=45 C. L. J. 474=A I R 1927 Cal 345 A site plan prepared for

Warden of the Cinque Part was excluded and this decision was . . . appeal in *Mercer* v *Denn*, (1905) 2 Ch. 538, 555 A map prepared by a Commissioner entrusted with local inspection is only evidence in the case in which he was entrusted with such inspection. *Dinabandhu* v *Nistarini*, 12 C L R 50

Under sections 36 and 83 a map prepared by a Deputy Collector particularly for the settlement of land forming the settled bed of a river is not admissible . . . *Kanto Prosad* v *Jagat Chandra*, 23 C 335 A map prepared for one purpose
eonath Mozumdar v *Durga Tarini* 11 C.
maps and plans were prepared by the
not for a private purpose, such maps and
plans are relevant facts under section 36 of the Evidence Act *Rahimatulla* v *Secretary of State*, 112 P . . . =18 Ind Cas. . . .
Though a Rennell Survey
is valuable evidence on
not conclusive of its non e
N. 1113; see also *Secretary of State* v . . .
Haradas Acharya v *The Secretary of State*, 26 C L J, 590 A map pr . . . a *kanungo*, is not relevant under this section. *Tarini Sarkar* v *Fakrannissa* . . .

maps and *chittas* are gi
Maps and plans prepared
under this section. *Rahim*
Cas 799.

37. When the Court has to form an opinion as to the existence of any fact of a public nature, any statement of it, made in a recital contained in any Act of Parliament, or in any Act of the Governor General of India in Council, or of "any other legislative authority in British India constituted for the time being under the Indian Councils Act, 1861, the Indian Councils Acts, 1861 and 1892, or the Indian Councils Acts, 1861 to 1909,"* or in a notification of the Government appearing in the Gazette of India, or in the Gazette of any Local Government, or in any printed paper purporting to be the London Gazette or the Government Gazette of any colony or possession of the Queen, is a relevant fact.† S.

Relevancy of statement as to fact of public nature contained in certain Acts or notifications.

Legislative recitals—Principle The general grounds of reception are (1)

sometimes advanced (*vide R* v. *Sutton*, 4 M & S 532, 549)—cannot otherwise suffice to give it any weight as evidence in controversy) But, next, it is clear he authority to inform itself

was in fact the distinction

of a statement in the recit

* Substituted by Act X of 1914, Sch 1

† The last paragraph added by s 2 of the Indian Evidence Act, 1899 (5 of 1899), was repealed by the Schedule II of Act X of 1914

S. 37. *Phillips* in *R* v *Suton*, 4 M & S 532, 539 These considerations indicate it as the wiser course to reject ordinarily such recitals as evidence Should it be made to app that the recitals offered
unknown basis but are n
means of information h
for their admission as official statements made with due authority and up adeq
of th
532 (
and
and
seem
forth by the learned Judge is not sufficient to meet the objection raised by *Wigmore*, neither
by *Prof Wigmor*
laws to operate on
accrued or vested u
ought in such a
intended that is an apology for the passage of the act and the reason why Legislature so acted Such a preamble is evidence that the facts were represented to the Legislature, and not that they are really so' *Elmondorf* v *Carmichal*, 3 Litt 472, 480 So the better opinion seems to be that the Legislature has no jurisdiction to determine facts touching the rights of individuals.' *Parmalee* v *Thompson*, 7 Hill N Y 77 (80)

Recital con
of a statute is t
made by autho
spiritual and
truth ' *Cole* v
sible *Leister*
But in England recital in a Private Act was not admitted *Gardner* v Le Merchant's Rep 276 *Bret* v *Beales* 1 M & M 416 421 But this distinct is apparently not only without principle to support it but is also ill adopted to in [illegible]

of those outrages to support the averments to that effect in an inform libel on the Government in relation to them *R.* v *Sutton*, 4 M & S 532 So a recital of a state of war, in the preamble of a public Statute is good evidence of

Khn, 17 How St Tr 63[illegible] House upon ence of the action of that House upon vp 17 *Root* v *King* 7 Cowen 613 E S 191 This section makes no di

is as much relevant as the sam
England recitals in Private
between the persons in whose behalf they are enacted *B* 619 *Beaufort* v *Smith* 4 Ex 450, *Cowell* v *Chambers*, 21 Beav 619 *Colchester* 36 L J C P 20 They are not however evidence against the strangers to the act *Elmondroff*

admissible to prove the
and speeches of members, these publications not having the authority of mentary Journals (*McCarthy* v *Kennedy* Times March 4, 1905, per *D* cited in *Phip Ev 7th Ed* p 325) Section 9 of the repealed Act II of 1855

S. 3

follows: "Any r ... ndia in Council, ... ereinafter to be pas ... l such Courts an ... cited" This has been incorporated in this section.

... though ... nclusive ... si ... rely as ... ot as determinations of controverted ... be made evidentially conclusive ... 1352; see also *Harrat* v. *Wise*, 9 B C. 712; *R.* v *Greene*, 6 A. & E 518; *R* v *Franklin*, 17 How St Tr 636; *Att. Gen* v. *Bradlaugh*, 14 Q B D 667 So a legislative declaration of fact that are material only as the ground for enacting a rule of law—for instance, that the use is public one may not be held conclusive by the Courts; but a declaration by a Legislature concerning public conditions that by necessity and ... ock v *Heigh*, 256 U ... se, the recital may ... *Wigmore* § 1352

principle admissible The executive cannot be supposed to need express authority

Canada).

Government Gazette The Government Gazette is admissible and sufficient evidence of such acts of the executive or of the Government, as are usually ... inations and the ... 8 Price 89 For, ... the publisher to

nature proof of the publication under due authority *Goodere Ev* 307 The Government *Gazette* is also evidence of various Acts of state at common law *R.* v. *Holt*, 5 T R 436, *A G* v *Theakstone*, 8 Price, 89, *Taylor* § 1662; *Phip.*

S. 38 *Ev. 4th Ed.* 711. The appointment of an officer may be proved by the government *Gazette*. *R.* v. *Gardner*, 2 ...
2 Mod. & R. 363, where the ...
division of a parish. The Gov ...
of sale, and a printed paper ...
in the *Gazette*, and issued from t ...
were admitted in evidence to ...
Jatindra v *Brajo*, W. R. (8864) 5 ...
conclusive even where such knowledge is presumed from the publication ... fact in the Government *Gazette* *Harret* v. *Wise*, 9 B. & C. 712.

Gazette of India Previous to 1863, the Government of India had ... exclusive organ of its own; its notifications, orders, etc, being published in ... of the Local Gazettes of the Local Governments as was necessary. In that ...
... as the Gazette of the Government ...
... 1863 was passed to give to publication ...
... ablication in any other Gazette in which ...
publication was prescribed by the law then in force. Vide s. 1 of Act XXXI of 1863; *Field's Ev* 7th Ed 15...

document constantly used and referred to, are to be assumed genuine ... principles, however, are in fact usually involved, first, the admissibility of ... proved to be printed by official authority, as hearsay evidence of the contents ... of the original and secondly the presumption of genuineness of a particular ...
... two que...
... nction of ...
... nction of ...
... t, to prove ...
... ng to be ...
... The Judge ...
... rent, ...

proof of its being bought of the Gazette printer, or where it came ... Wigm ... § 2151 ... Section 81 of the Indian Evidence Act enacts: "The Court shall presume ...

known or observed by all and in which persons in general have ... well as which is done by an officer of the Government, executive, legislative or judicial.

Relevancy of statements as to any law contained in law books.

38. When the Court has to form an opinion as to a law of any country, any statement of such law contained in a book purporting to be printed or published under the authority of the Government of such country and to contain any such law, and any report of a ruling of the Courts of such country contained in a book purporting to be a report of such rulings, is relevant.

Principle. There is no reason why an officer may not be authorized to give printed copies as well as to give written copies; nor has there been any doubt that such authorized copies are admissible Yet it cannot be said that such an **S. 3**

had their source, not so much in a doubt of any of these principles, as in the

the copy rather than the authority to furnish it that the difficulties have arisen. *Wigmore* § 1684 "Not that the printed Statutes are perfect and authentic copies of records themselves, but every person is supposed to know the law, and therefore the printed Statutes are allowed to be evidence because they are the prints of what is supposed to be lodged in every man's mind already *Buller J Trials at Nisi Prius*, 225 The reason of their reception is thus stated by *Duncan J.* uthentic publication danger of mistake Statute King's for by t affords to all parties, and en the States The rule, too, nger of abuse, and error or *rry*, 28 N H provides that be printed

law authorized reports of foreign countries would be admissible to show the ports of the domestic Government as well ld not be admissible. Taking every thing seems, to extend the meaning of the section of India, Great Britain and other foreign countries.

Mich 196

S. 38. by an expert witness (*Tilas* 45 ... copy? It is usually said tha ... case a copy must be used But the ... that the state of ... Statute, but o ...

l ... copy of it. This argument has much force but ... rarely prevailed, except that ... Statute already proven by copy ... Cowp 161, 174; *Picton's Tria* ... 178, *Alivan* v. *Furnival*, 1 C M. & R 291; *Millore* v. *Heinrich*, 4 Camp 1... *Baron de Bode's Case*, 8 Q. B 250; *Cocks* v *Purday*, 2 C & K 270, *Nelson* ... *Bradfort*, 8 Beav. 539, *Sussex Peerage Case*, 11 Cl & F 115; *Bremer* v *Freem*... 10 Moore P C. 362, *Greenl Ev* § 488. The particular question is whether ... evidence of a foreign "written law" should be presented in the shape of a c... or merely by recollection testimony of one qualified to know it *Wigmore* § 12... In *Baron de Bode's Case*, 8 Q B 250, *Patterson J* said: 'I quite agree that ... witness conversant with the law of a foreign country may be asked what in ... opinion the law of that country is But I cannot help thinking that as so... as it appears that he ...

I ... why the rule should not be the same in the case of a foreign writ... law I think the rule would be just the same if the question related to ... French Code as existing at this moment. If a witness were asked what the la... now is with respect to a bill of exchange in France, and were immediately cro... examined as to whether that law was not in writing, and answered that it wa... I think a copy of the law must be produced.' So also *Justice Story* sta... "Generally speaking authenticated copies of the written laws, or other publ... instruments of a foreign Governm... not to be presumed th... authenticated, which ... justice in foreign coun... foreign Government ... *on Conflict of Laws* § 640.

According to this section evidence of foreign statute law can be given ... the authorised copy of the Statute of the foreign government But section ... of the Act says that it can be proved as well by the opinions of persons specially ... skilled in such law Now the ... proving a foreign statute, or ... different circumstances The ... "But the answer to this is clear ... purely and simply directed to the contents of a specific Statute, the proof ... be by copy of its terms But in the usual case this is not the question ... inquiry is as to the state of law at the present time or at a given time past. The ... inquiry ...

... ter accuracy, would ... se other material element ... JJ in *Baron de Bode's Case* ... *Sussex Peerage Case*, 11 Cl. & F. 115; *Cocks* v. *Purday*, 2 C. & K. 270, *vide* notes under s 45 But in some cases a copy was required. ... *Harford* v *Morris*, 2 Hagg Cons 430, *Boenlinck* v *Schneider*, 3 Esq ... v *Levy*, 3 Camp. 166; *Miller* v. *Heinrich*, 1 Camp 155; *Alves* v *Hodgson*, 7 T R ...

S. :

The books are produced, but the witness, describes them as authoritative Proof. of the law itself, in a case of foreign law, could not be taken from the book of the law, but from witness who described the law If the witness says. 'I know the law and this book truly states the law,' then you have the authority of the witness

Majesty's Dominions to ascertain the law of that part. *Phip Ev 4th Ed. 359*; *Lord v Colvin*, 1 D & S 24; *Login v Princess of Coorg*, 30 Beav, 632=1 Jour. O. S 109. So also by Stat 24 & 25 Vict Ch 11, a similar case may be stated for the opinion of a Court in any foreign state with which His Majesty may have entered into a convention for ascertainment of such law *Phip Ev.* 4th Ed 359 An unauthorized translation of the Code Napoleon is not a work to which reference can be made under this section *Christian v. Delanney*, 26 C 931=3 C W. N. 611 Under this section the Ceylon Insolvency Ordinances might be looked at to decide the question of the defendant's liability *Devanayagam v. Muthu Kumar Swamy*, 14 Ind Cas 560

admits authorized as well as unauthorized Law Reports when the latter is recog- or shall ded by report

always been done and ought to be done A judgment is none the less an authority because it has not been reported, otherwise the question of whether or not a judgment could or could not be regarded, would depend upon the mere whim of the Reporter I therefore respectfully dissent from the view on this point expressed in the case reported in 4 C W N 732" *Brett* and *Banerjee JJ.* concurred with him; see also *Trustees, P. D. v. Venkata Chalam*, 92 Ind. Cas.

S. 39. 710 An unauthorised report of a High Court case is entitled to respect. L J 153=A I. R 1925 Nag 414 Unauthorized reports are on the s footing as an unreported case 24 O. C. 319.

HOW MUCH OF A STATEMENT IS TO BE PROVEI

What evidence is to be given when statement, forms part of a conversation, document book or series of letters or papers

39. When any statement of which evidence is given forn part of a longer statement, or of a conversa tion or part of an isolated document, or i contained in a document which forms par of a book, or of a connected series of letter or papers, evidence shall be given of so much and no more of the statement, conversation, document, book or series of letters or papers as the Court considers necessary in that particular case to the full understanding of the nature and effect of the statement, and of the circumstances under which it was made

Principle ... ing of an utter ... word in another p ... clause is modified by a prior or subsequent clause; one sentence qualifies another; and one paragraph may form only a part of the whole exposition We must compare the whole, not because we desire the remainder for its own sake, but because without it we cannot be sure that we have the true sense and ... f parts is thus as ... he in tru ting ... emainder was." ... a portion only

... ent or subsequent words or ... the thing produced, and give ... Buller, J, Trials in N. P. p. 298 ...

... or criminal ... statement ... taken together; for thus alone can the whole of what the person making the statem ... It ...

How St Tr 257 ... evidence against him can ... In *Algernon Sidney's* ... arguing passages piecemeal said "My l ... you will make all the penmen of sc. ... *David* of saying' there is no G ... was a ... *ngelists* of saying, ... *L C J* ... t they were drunk." ... the sens ... part of it that explains ... e trifled with a little. It is ... you must not take that alone, ... is heart, There is no God' Now here ... call for it" This rule ... you can say there is any part that is in the admission of an opponent and to conversations in general, including in impeachment. Where a series of letters in a correspondence, or of entries in an account-book are involved, it is sometimes difficult to draw the line between

those which are in effect part of the same statement and those which are not S (*Call* v. *Howard*, 3 Stark. 6; *Sturge* v. *Buchanan*, 10 A & E 59; *Roe* v *Day*, 7 C & P. 705) But it seems that so far as the letter or oral statement put in as an admission was written or made in reply, or contains within it a reference to a

under section 33 *Prince* v *Samo*, 7 A & E 627

Abbot C J in *the Queen's Case*, 2 B & B 297, observed. "The conversations of a party to the suit, relative to the subject matter of the suit, are in themselves evidence against him in the suit, and if a counsel chooses to ask a witness as to anything which might have been said by an adverse party, the counsel for that party has a right to lay before the Court the whole which was said by his client in the same conversation —not only so much as may explain or qualify the matter introduced by the previous examination, but even matter not properly connected with the part introduced upon the previous examination, provided only that it relates to the subject-matter of the suit because it would not be just to take part of a conversation as evidence against a party without giving to the party what he said on the same heory at least, be defended E 627 *Denman L C J* "We cannot assent to it. We will merely observe that it was not introduced as an answer to any question proposed by the House of Lords, and may therefore be strictly regarded as extra judicial, that it was not necessary as a reason for the answer to the question that was proposed, that it was not in terms adopted by *Lord Eldon* or any of the other Judges who concurred, that it was expressly denied by *Lords Redesdale* and *Wynford*, and that it does not rest on any previous authority" The Indian Legislature has wisely left to the discretion

book f the iders and d to is concerned, they are still governed by the provisions of section 27 which must be construed as favourably to the accused as possible for it is a section which makes an , namely sections 25 A I R 1929 Lah ting in a confession in respect of which the bar created by ss 24, 25 and 26 Evidence Act, has not been removed by s 27 *Sakhan* v *Emperor* A I R 1929 Lah 341 Because a document is admissible

first, whether the party

other parts, of the conversation, document, whose statement it is, may afterwards, by remainder, or other parts, or other statements

Tr. N S. 785) or a lost writing *Hardy's Trial*, 24 How St. Tr 681 As to a

of P ...

in Bankruptcy Such judgments
her parties or strangers Such
bind only part ... between persons not so affect ... Judgments in personam are all
Co Lit 271 ... and Cole
donor or do ...
ancestor and ... purchaser ... as
executor, intestate or administrator, tenant ... (3) In law (or representation) as testator and
successive incumbents The s
parties, viz, that a party cl
manner as the original party
of their legal effect, as distin,
(Cockle Cas 14)

The distinction between judgments in rem and judgments in personam was thus laid down by Blackburn J in Castrique v. Imrie, L R 4 H L pp 427-429 'Some points are clear Where a tribunal, no matter whether in England or a foreign country has to ...

judgment
country
rights of th
exercise of that jurisdiction ... on the disposition of the thing, and does in the
of any particular party in it, be sold or transferred, the case is very
different Whatever it settles as to the right or title, or whatever disposition it
makes of the property by sale reven ...
valid in ...

special jurisdiction ... has also been defined as a judgment by a Court having
274, 278); such judgments operate ... over the subject-matter (M Dannel v Alcorn, [1894] 1 Ir R
Brem er ... (Needham v

publicity attending such judgments; ... of two reasons—first on account of the solemnity ... secondly, on account of the principle

S.

Interest reipublicae ut sit finis litium (It concerns the state that there should be an end to all law suits) Hence the maxim, *transit in rem judicatum* The

gment and also

principle is that

solemn character, must be presumed to be faithfully recorded), but that it
between the
Ev 10th
up Ev.
Aljan,
ist 361;

relevancy of
74) F B But
the judgment

partes, except where the judgment is clearly *resjudicata* A judgment other than a judgment referred to in ss 40 to 42 may be admissible to prove that a right was asserted or denied under s 13 of the Evidence Act or to explain or introduce facts in issues or to explain the history of the case *Purnima* v *Nand*, 12 Pat L. T 582=A I R 1932 Pat 105 The law of evidence does not make a

one suit
t *Tulsi*
applies
should

not do so because that matter has been decided before *Lakshman* v. *Ramdas*, A I R 1929 Cal 374 (F B)

Judgment, meaning of The word judgment in sections 40—44 means any final judgment, order or decree of any Court *Step, Dig Ev* art 32

Scope of the section This section deals with judgment *in personam* and
is v *Bapu Kanhor*, 10 B 439,
anji v *Dipa*, 3 B p 3), it is plain

ns
ge,
er,
also

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied" This section provides that the existence of a judgment, decree, or order is a relevant fact, if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial *Per Mitter J* in *Gujju Lal* v. *Fatch Lal*, 6 C 171 (176) In the same case *Garth C. J* at p 190 said "It is true that s 40, might

Khoti Act, conclusive and final evidence of the liability thereby ... and the Civil Court cannot look behind the entry And, under the circumstances mentioned above, the evidence of a decision otherwise relevant under s 40 of the ... a date of the survey entry ... that the

have been shown to the surv... the record is the entry *Ram* ... *Balbin*, 21 B 235, *Gopal* v *Dasarathi* 21 B 244; *Gopal* v *Mogeshwar* ... *Antaji* v *Madhab*, 21 B 480 Where a subsisting judgment, order or decree, relevant under this section is set up by one party as a bar to the claim of the ... Court

judicata or otherwise under some other rule ... This section ... because do with question of evidence beyond the adm... a plea of *res judicata* is not a plea as ... barring the action ... parties ... refers ...

to a point in issue *Udamauthal* v *Paramesicara*, 85 Ind Cas ... 460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation *Re May*, (1885) 28 Ch D 516 (C A) Judgments being public transaction of a solemn nature are presumed to be faithfully recorded Every judgment is therefore, conclusive evidence for or against all persons of its own existence, date and legal effect as distinguished from the accuracy of the decision rendered *Phip Ev* 7th Ed. 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment

)w of the foreign Court, render the **S.**
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ection
: shall be conclusive as to any matter
es
under whom they or any of them : —
(a) where it has not been pronounc b)
where it has not been given on the merits of the case; (c) where it appears on
incorrect view of international
India in cases in which such law
ich the judgment was obtained
are opposed to natural justice, (e) where it has been obtained by fraud; (f) where it sustains a claim founded on a breach of any law in force in British India."

So a foreign judgment operates as *res judicata* except in the six cases specified in section 13 of the Civil Procedure Code of 1908 *Bababhai* v *Narharbhai*, 13 B 224 "Where a Court of competent jurisdiction has adjudicated a certain sum to be due from one person to another, a legal obligation arises to pay that sum on which an action of debt to enforce the judgment may be maintained It is in this way that the judgments of foreign and colonial Courts are supported and enforced" *Per Parke B* in *Williams* v *Jones*, 13 M & W. 633, *Russel* v *Smith*, 9 M & W 819, *Goddard* v *Gray*, L R 6 Q B 139

So where the subject matter is a *res* so situated as to be within the lawful control of the state under the authority of which a Court sits and that authority has conferred on the Court jurisdiction to decide as to the disposition of the thing and the Court has acted within that jurisdiction, that decision is conclusive,

they are final and unalterable by the Court pronouncing them *Duchess of Kingstons' Case*, 2 Sm L C 731, *Ricardo* v *Garcias*, 12 Cl. & F 368; *Nonvion* v. *Freeman*, 15 App Cas 1

Previous Judgment to bar a second suit A judgment which is not a judgment *in rem*, is not admissible in evidence against those who are neither parties to it nor derive title through such parties, as proof of the facts determined therein. *Kesho Prosad* v *Kastanath*, A I R 1926 Pat 577=97 Ind Cas 282 Under *section 40, the existence of a decree is a relevant fact when the question* is whether in
or to hold th

would also conclude the trial of the question as to what the rate of rent at the date of that suit was if the decree showed that that question was heard and finally decided in that suit *Ibid* 'It is not competent for the Court, in the case of the same question arising between the same parties, to review a previous decision If the decision was wrong it ought to have been appealed against" *Per Lord Macnaghten* in *Badar Bee* v *Habib Merican*, (1909) A C at p 623, see also *Huntley* v *Gaskell*, (1905) 2 Ch 656; *Mangma* v *Wright*, (1909) 2 K B, 958, *Humphries* v *Humphries*, (1910) 1 K B 796

Res judicata by general principles of law Where a matter has been

S. 40. 2 of Act VIII of 1859 was to be construed as including a material issue, and we think that, similarly, the terms 'taking cognizance of a suit' may be construed as including a material issue in the suit between the same parties; in other words, that section 40 was intended to include cases in which the general law relating to *res judicata inter partes* as then understood applied" This section provides that the existence of a judgment, decree, or order is a relevant fact if by law it has the effect of preventing any Court from taking cognizance of a suit or of holding a trial *Per Mitter J* in *Gujju Lal* v. *Fatch Lal*, 6 C 11 (176) In the same case *Garth C J* at p 190 said "It is true that s 40, might have be

VIII of

Dayee v

was in

whether civil or criminal, from taking cognizance of a suit or trying any particular issue The words 'holding a trial' are amply large enough to admit of this construction, and it is not because in some other Act the words 'holding a trial', may have been construed to refer to criminal trials only, and we ought to confine their meaning in the same way in s 40 of the Evidence Act" See also the judgment of *Mitter J* in page 176 A party is precluded from contending the contrary of any precise point which, having been once distinctly put in issue, *Ex parte Official Receiver*, (1896) 1 Q B. st and second actions are different, the irectly (not collaterally or incidentally) in a second action between the same parties. *Pritman* v *Thomas*, 9 P. D 210 C A; *Halsbury* Vol XIII p 33 An entry in a record prepared under s 108 of the Bombay Revenue Code, by the Survey the Bombay

Khots have never received tha conclusive effect of the entry have been shown to the surv the record is the entry *Ram Balbin*, 21 B 235, *Gopal* v ... *Antaji* v *Madhab*, 21 B 480 Where a subsisting judgment, order or ... relevant under this section is set up by one party as a bar to the claim of the other, the latter can show that the judgment, order etc, was delivered by a Court without jurisdiction or was obtained by fraud or collusion, and it is not necessary *Bansi Lal* v *Dey* admissible judgments own as plea of res ection has nothing to judgments because a plea of *res judicata* is not a plea as a matter of evidence, but only a plea barring the action ... distinguished from the rules of evide ... see also *Sit* ... contain ... to a poi ... 460 = A I R 1925 Mad 1019

Principle The doctrine of estoppel is a fundamental doctrine of all Courts that there must be an end of litigation. *Re May*, (1885) 28 Ch D 516 (C A). Judgments being public transaction of a solemn nature are presumed to be therefore, conclusive evidence for or ..., date and legal effect as distinguished *Phip Ev* 7th Ed. 392.

Foreign Judgment A party who has submitted to the jurisdiction of a foreign Court is bound by its judgment, when such judgment is within jurisdiction and does not offend the principles of natural justice. Irregularities which do not affect the jurisdiction of the Court do not vitiate such judgment

only when it is so pleaded, or there is an opportunity of so pleading it Otherwise it is only a relevant fact from which the Court may draw a conclusion in favour of the person who tenders it as evidence. *Vooght* v. *Winch*, 2 B & Ald 662.

S.

But "the plea of *res judicata* as a bar to an action belongs to the province of adjective law, *a l litis ordinationem* ; but difference of opinion prevails among jurists as to whether the rule belongs to the domain of *procedure* or *constitutes* a rule of the law of evidence as furnishing a ground of estoppel In England, and I may say also in America, the rule is usually dealt with as belonging to the law of ...

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suit between the same parties, or between the parties under whom they or any of them claim, litigating under the same title, in a Court competent to try such subsequent suit or the suit in which such issue has been subsequently raised, and has been heard and finally decided by such Court

Explanation I The expression "former suit" shall denote a suit which has been decided prior to the suit in question whether or not it was instituted prior thereto

Explanation II For the purposes of this section, the competence of a Court shall be determined irrespective of any provisions as to a right of appeal from the decision of such Court

Explanation III The matter above referred to must in the former suit have been alleged by one party and either denied or admitted, expressly or impliedly, by the other

have been made
med to have been a

is not expressly granted by the decree, shall, for the purposes of this section, be deemed to have been refused

Explanation VI Where persons litigate *bonafide* in respect of a public

cause ... a suit in respect of such
cause ...

A judgment *in per*
record and their privies

S. 40. cannot canvass the same question again in another action, although, perhaps

there must be an end of litigation, otherwise there would be no security for any person"

Stay o
the matter
instituted su
or any of
in the same
relief claim
continued by the Governor-General in Council and having like jurisdiction, o
befor

a suit in a foreign Court does not preclude
the C a suit founded on the same cause of
action Vide section 10 of the Civil Procedure Code of 1908; see also *Mooj v Kasouji* 1 C L R 282, *Balkissen* v *Kishan Lal*, 11 A 148, *Ramalinga v Raghunath*, 20 M 418, *Venkappa* v *Manjunath*, 16 M L J 526; *Bissessur v*

Din Shaw v *Galstaun* 29 Bom L R 382 = 102 Ind Cas 229 = A I R
Bom 245; see also *Kuberan* v *Kornan Nair*, 88 Ind Cas 421 = 48 M L J
= A

suit shall include the
whole
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sue in respect of,
not afterwards sue in respect of the portion so omitted or relinquished. of action
person entitl
may sue for
the Court, t
so omitted
for its performance and successive claims arising under the same
shall be deemed respectively to constitute but one cause of action *Order II, rule 2, Civil Procedure Code*

Previous Acquittals or Convictions Section 403 of the Criminal Procedure Code, 1898 as follows —A person who

against him might have been made under section 236, or for which he might have been convicted under section 237

S. 4

A person acquitted or convicted of any offence constituted by any acts may, notwithstanding such acquittal or conviction be subsequently charged with, and tried for, any other offence constituted by the same acts which he may have committed, if the Court by which he was first tried was not competent to try the offence with which he is subsequently charged

Explanation The dismissal of a complaint, the stopping of proceedings under section 249, the discharge of the accused, or any entry made upon a charge under section 273, is not an acquittal for the purposes of this section

Judgments how proved If a party offering a record does so in support of a plea of *res judicata*, or to show that he has acquired or his adversary has lost some title or right either by the judgment alone or by it and proceedings taken for its enforcement, the whole record so far as it concerns the formal stages, must be either produced or exemplified, and if exemplified, the exemplification must show on its face that the record is complete and is regular nor can the record be patched with parol *Wharton on Evidence* § 824 Before any document, whether an original or a copy can be received in evidence of a judicial proceeding, it must, in general appear that the record or entry of such proceeding has been finally completed *Taylor Ev* 10th Ed § 1570

Judgments not relevant under ss 40 to 43 R was charged with the offence of defamation and convicted The complainant then sued R in damages

41 A final judgment, order or decree of a competent Court, in the exercise of probate, matrimonial, admiralty or insolvency jurisdiction, which confers upon or takes away from any person any legal character, or which declares any person to be entitled to any such character, or to be entitled to any specific thing, not as against any specified person but absolutely, is relevant when the existence of any such legal character, or the title of any such person to any such thing, is relevant

Relevancy of certain judgments in probate, etc, jurisdiction

Such judgment, order or decree is conclusive proof—

that any legal character which it confers accrued at the time when such judgment, order or decree came into operation,

that any legal character, to which it declares any such person to be entitled, accrued to that person at the time when such judgment, *[order or decree] declares it to have accrued to that person,

that any legal character which it takes away from any such person ceased at the time from which such judgment, *[order or decree] declared that it had ceased or should cease,

and that anything to which it declares any person to be so entitled was the property of that person at the time from which such judgment, *[order or decree] declares that it had been or should be his property.

* These words in s 41 wherever they occur were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 3

... continual doubt; and as regards *things*, that his interests by becoming a party to the proceedings. In addition to which it is to be remembered that a decision *in rem* not merely declares the status of the person or thing, but *ipso facto* renders it such as it is declared, thus a decree of divorce not only annuls the marriage, but renders the wife *feme sole*, and adjudication in bankruptcy not only declares, but constitutes, the debtor a bankrupt, a sentence in prize Court not merely declares the vessel prize, but it vests in the captor *Phipson Ev 7th Ed 397;* cited with approval in *Venkataramananayya*, A I. R 1931 Mad ...

tion pronou

... the status ... So a ... person, but for the purpose of adjudicating upon ... So a judgment *in rem* may be defined as the judgment of a Court of competent jurisdiction determining the status of a person or thing, or the disposition of a thing (as distinct from the particular interest in it of a party to the litigation (*Castrique* v *Imrie*, L R 4 H L 414, 428) Apart from the application of the term to persons it must affect the *res* in the way of condemnation, forfeiture, declaration of status or title, or order for sale or transfer *Halsbury*, Vol XIII, p 327.

Scope of the section Th...

makes ...

... *Gangabai*, A I. R 1928 Sind 121 = 22 S L R ...

S.

the purposes for which the judgment of a competent Court operates as conclusive against the world, and so far as such purpose relates to the status or what is referred to as legal character of a person, it specifies three purposes only: it

is conclusive against all the world as to that status, whereas in a judgment in

B. 455=65 L. J. Q. B 616=75 L T. 95.

is thus supposed to be a party. *Nort. Ev.* 214; *Cunningham Ev.* 187. The four

S. 41. classes of judgments, etc. which alone are to be conclusive, affect, it will be observed, the *status* of a person

... the status is that of a thing—that the title to it accrued at the time when the judgment declares it did or should where the vesting is in *futuro*, Art. Ev. 215. *Radhakessin* v. *Mt. Gangabai*, 22 S. L. R. 105 = 1928 Sind 1.1. Judgments declaratory of

... therefore a ... conclusive against ... 1928 A. 395.

... *ficial Receiver* v. *Lakshmi* ... 54 M. 727 = A. I. R. 1931 Mad. 474.

Probate Jurisdiction. The Courts in India exercise the Probate jurisdiction under Act XXXIX of 1925 ...

... m probate is granted ... vers as such may be ... I think that it was ... intended to include the case of an executor. The fact that the section has been frequently applied to cases of persons after the Hindu Wills Act came into force shows this The only legal character when the Probate Court declares a person to be entitled to is that of executor. It confers the character of administrator. It does not declare it. So the section would be meaningless unless 'legal character, included the office of an executor. I do not think that the circumstance that in the particular case the powers of the executor may be limited, makes any difference in the construction of the section."

... s only granted after satisfactory evidence has ... quate capacity on the part of the testator ... (*Jones* v. *Goodrich* ...

in any Co... v. *Duke of* ... v. *Concho*... *Griffiths* v. ... *Harris*, 1...

to probate must be taken to have been conclusively determined and therefore probate is conclusive proof of the due execution of the Will which is the foundation of the title of the executor. *Chandreshuar* v. *Bisheshuar*, A. I. R. 1927 P

R. also *Ralabundu* v. *Yanamandia*, 79 4 C 360; *Mayho* v. *Williams*, 2 N. *anjanabai* v. *Ram Das*, 4 C. W. N. clxxvi; *China Sami* v. *Hariharabarda*, 16 M 380; *Jagan Nath* v. *Ranjit*, 25 C. 354; *Mt. Phekni* v. *Mt. Manki*, 9 Pat. 698 = 128 Ind. Cas. 128 = A. I. R. 1930 Pat. 618.

Court in such matters is conclusive. See also *Field Ev* 335

in a Common-law Court, either he executed the Will (*Marrio* not then in England (*Whitaker* L. R 29 Ch. D. 657), provic the title of the executor, in whic 1433. But where the points were directly in issue and actually decided by the

S. 41. Court between the same parties, or persons claiming under them, the judgment *in rem* will be conclusive evidence of the matters decided in it. *Spencer* v *Williams*, 2 L R P. & D 230=40 L J P & M. 45 For instance, if, in a suit for administration, the sole question be, which of the two parties is next of
Probate Division, declaring 'that as f...
...lant has proved himself next of kin,' ...
...m as such, will be conclusive evidence of
the relationship of the parties in a subsequent action between them for distribution, instituted in another Court *Barrs* v *Jackson*, 1 Phill. 582; *Bouchier* v *Taylor*, 4 Bro P C 708, *Doglioni* v *Crispen*, 35 L. J P. & M 129, *Thomas* v
Kettriche 1 Ves Sen
execution of the Will,
Harmusji v *Bai Dahn*
Ganesh v *Ramchandra*, ...
question was considered in *Ramani Debi* v *Kumud Bandhu*, ...
"The Judgement in a probate
...s has been repeatedly held as
...ct to the law of limitation (*In re*
Ishan Chandra Roa, 6 C 707) A probate proceeding, therefore, while it enjoys
the advantage
that a decision
it is clear fror
nandan v *Sheo*

by their very
cause of action
21 B 563 In
conclusively sl
testator, and d...
proceeding; in other words, the judgment of a Court by which ... refused, does not necessarily operate as a judgment *in rem* in the same way as a
judgment by ... No doubt, such a judgment if it
declares that ... has not been duly executed by the
testator with ... it has not been duly attested may
... legal character of a
...racter and the
Will, but every
refusal to grant probate does not conclusively show that the Will propounded is
not the genuine Will of the testator The decision may be based upon entirely
different grounds, which do not touch the question of the genuineness of the
Will Such a judgment cannot operate conclusively unless it embodies a final
decision against the genuineness of the Will The learned Judges of the
Bombay High Court while they lay down the proposition carefully guard
themselves, however, against any expression of opinion upon the question
whether, if an issue had been raised upon the question of forgery of the Will
and had been decided, the decision might not be conclusive." The true rule
is thus formulated in the case of *Schultz* v *Schultz*, 10 Gratt, 358. When a
Will has been propounded by a party interested and fairly rejected on the
merits, it would defeat the policy of the law and be productive of many
mischiefs, if it could be again propounded by the same party or by others who
might be interested and the contest thus renewed from time to time. The
sentence, therefore, against the Will must be regarded as a sentence against
all claiming under it, it stands upon a footing analogous to the subject
... adjudications upon the ... which they
... If there
or against
... cannot be
ment of the matter ...
the same or in any other Court by
in privity with them, in other w...
a refusal to admit a Will to probate is conclusive of the facts necessary to
support the decision *Freeman on Judgments*, Vol I, *section* 319 (*f*). O...

S. 4

for probate by another person, for example, a legatee who claims an interest under the Will; if so, it would be futile to hold that an executor who has made default, cannot propound the Will again. *Ramani* v *Kumud*, 14 C. W N 924 The finding as to the execution of the Will of the Probate Court binds at any

as is contemplated in section 41 of the Evidence Act in as much as such judg

Ramoje, 5 Mys L J 107, see also *Monmohini* v *Banga*, 31 C 357 = 8 C W N 197.

The expression 'legal character" in section 41, Evidence Act, when it has

Matrimonial jurisdiction This section enacts that a final decree of a competent Court in the exercise of matrimonial jurisdiction which confers upon or takes away from any person any legal character not as against any specified

S. 41. (IV of 1869), does not make the proviso in section 17 applicable to the confirmation by the High Court of a decree of nullity of marriage made by a District Judge, and such a decree may therefore b
six months from the pronouncing thereof
to be applicable to a decree of nullity,
the same before the six months' period has expired, cannot on that ground be treated as made by a C : ithin the meaning of sections 41 and 44 of the : is therefore, under s 41, conclusive proof *Edward Caston* v *L H Caston*, 22 A 270 (F B) In a case decided before the passing of the
nedans
in the case
er wil the
a ide, and
out it would

be no evidence against
that the two ladies were s
Charan, 7 W R 38=I
whether the decision can
judgment by a Court h

L R 4 H L 428) or maritime lien (*MinnaCraig* v *Charbreed, etc* ... 1 Q B 460) A decree for enforcement of maritime lien by a Court of Admiralty is a judgment in condemnation of property as forfeited, and also is a judgment *in rem* *Geyer* v *Aguilor*, 7 T R 696, *Maingay* v *Gahan*, Ridge, L & S 1, 79

is barred by the previous decision which is a judgment *in rem* ... section *Narayan* v *Hardutta Rai*, 16 N L R 201 The decision of the Insolvency Court amounts to conclusive proof as to the title in respect of the specific things claimed by the applicant, not merely as against him, but absolutely, within the meaning of this section *Pitaram* v *Jhujhar* 33 Ind Cas 798, see also *Mussamat* v *Mathura*, 40 Ind Cas 102, *Bhairo* v *P C Das*

even if it could be held that the decision was not a judgment *in* ... judgment *inter partes* and binds the creditor *Ram Narain* v *Durga Das* Ind Cas 568=55 P R 1912=242 P W R 1912

An order of an Insolvency Court refusing to adjudicate a person insolvent on the ground that he was not a member of a firm which had been declared insolvent is not a final order which conferred upon or took away from him any legal character within the meaning of this section and hence it is not a judgment *in rem* Being a partner in a firm is not a legal character. *Off. Assignee* ...

Madras v. *Off Assignee of Rangoon*, 46 M. L. J 580=1924 Mad. 662=34 M L T. (H. C) 90=83 Ind Cas. 171, see also *Radha Kishen* v. *Mt. Gangabai*, A. I. R. 1928 Sind 121=22 S L. R 105 An order adjudicating a person an insolvent and vesting his property in the Official Receiver no doubt operates as a judgment *in rem* but the grounds on which the order is based has no such effect *Radha Kishen* v, *Mt Gangabai*, A I. R. 1928 Sind 121=22 S L. R 105 S.

Legal Character.
The legal character assig
legal status of the person

"We : 'A man's
"legal attaches
to hir ... or dress, as it were with which the law clothes him apart from the attributes which may be said to belong to normal humanity in general *Rama Krishna* v *Narayana*, 39 M. 80=26 Ind Cas 883.

ng must have been declared not as
A decree *declaring that A is entitled*
t only made against a specified person,
so it is not conclusive proof of title to a debt *Venkataramanayya Pantulu*, 54 M 601=A I. R 1931 Mad 441=61 M L J. 229 (S B) Similarly a right to recover a debt or a chose in action cannot be deemed to be a "specific thing". *Ibid.*

f an issue as to the age of a
of the guardian for person,
proceeding, is not one of
the judgments *in* conclusive
against the world R 1910
On an application ministration
her father,
sly been made under the Guardians
idow for a declaration that she was the
infant son of the alleged testator,
by the present petitioners who claimed
to be testamentary guardians of the property appointed by the Will now
propounded, and that the ie
question of genuineness of t ie
proceedings under the Pro
haraborda, 16 M 380 A ju of
adoption is not admissible ie
matters decided therein *Guru Mahadev* v *Jagatraj*, 71 Ind Cas 929, *Kanhya Lall* v *Radha Churn*, 7 W R 338, *Yarakalamma* v *Ana Kala Naramma*, 2 M H. C. R 276

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S. 42. of

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a sentence of ... evidence on a questio
estate

...arriage . . But in these cases the parties whom the ...

Judges, when taken ... But it has been contended that this opinion of the ... entitled to much weight, apart from the reasons on which it is founded, is not ... decision of ... it being merely ...

... section does not ... was not in issue ... on the matter appearing in the Administration ... *Mah Muthu* v *Servai*, 4 Rang. 251 = 97 Ind. Cas. 1051 = A 1926 Rang 202 ; see also *Oates* v. *King Emperor*, 38 C. L J. 163.

Relevancy and effect of judgments, orders or decrees, other than those mentioned in section 41

42. Judgments, orders or decrees other than those mentioned in section 41, are relevant if they relate to matters of a pulic nature relevant to the inquiry ; but such judgments, orders or decrees are not conclusive proof of that which they state.

Illustration.

... relevant, but it is not conclusive proof that the right ... exists.

...not as res judicata ... parties ... Per ...

s section judgments S.
whether between the
see also *Collector* v.

such as the existence of custom in succession in particular communities. Such

regarded as a species of reputation,—will also be received and this too, whether the parties in the second suit be those who litigated the first or be utter strangers.
when admitted, will so far vary, that
ey will be bound by the previous
suit be strangers to the parties in the
nclusive. *Reed* v. *Jakson*,
Even before the enactment
this country. *Doorga* v.
Narendra, 6 W. R. 232; *Madhab* v. *Toone*, 7 W. R 210, *Totaram* v. *Mohan*, 2 Agra 120; *Venkata* v. *Subba*, 2 M. H. C. 1.

Origin of the Rule *It has often been said that verdicts of juries, and* judgments, decrees, and orders of Courts of competent jurisdiction, are evidence of reputation, and possibly when juries were summoned *de vicineto*, and were consequently assumed to be acquainted with the subject in controversy this may
s were admitted,
said "Reputa-
is case; *a fortiori*
lays there is no
exception to the
Hearsay Rule *Wigmore* § *1593* Because "that was when the jury was summoned *de vic*
Per Alderson B
early part of the
verdict was a c
Pre Treat Ev 90
nor a Judge's c

S. 42. pronounced in a cause litigated is also admissible, not as tending to 'e

to be forced into evide to the Hearsay Rule Il Case 147, which was dec the Reputation Exceptio explained in notes und "Such evidence, admiss is not in itself in any proper sense evidence of reputation It really stan upon a higher and larger principle, specially in cases, like the present, of prescription; it comes within the category of *res gestae* and of declarations accompanying acts . The effect of this evidence. is extremely strong to estab . In the same c as evid and bet being fil referenc actions, the pat decree stronger Court b observed 'Here the persons acting as Judges had no knowledge of the except what they derived in the course of that proceeding" But see *Duke of Newcastle* v *Braxtowe*, 4 B & Ad 279, where *Parke J* said, 'Though they (Justices) are not proved to be residents in the country or hundred they must from the nature and character of their offices alone, be presumed to have sufficient acquaintance with the subject to which their declarations relate" Similarly in *Evans* v *Rees*, 10 A & E 155, *Denman L C J* said The opinion of an arbitrator as to a boundry is formed not upon his own

933), and it seems to receive some support from a recent case in which held that old depositions are not admissible under this head of evidence if they contain testimony only as to particular facts *Mercer* v *Denne*, (1904) 2 Ch 534; (1905) 2 Ch 538, *Wills Ev* 234.

Cases in which judgments were held admissible where they relate to public matters In the verdict in an action

A judgment in favour of a Lord of a manor on a *quo warranto* for a franchise is evidence of the right even against copy holders of inheritance *Carnarvon, Earl of* v . . . . a suit for pre-emption based on custom, evidence which it was alleged The most satisfactory based on the custom *Akbar Khan*, 1 A 44 *Mundil*, 27 C 379 (391), *Kalian Das* v *Bhagirathi* 6 A . Judicial decrees *Sheonarayan*, 1 A. 373; *Sheoboran* v *Bhairo*, 7 A 880 Judicial decrees recognising the existence of a disputed custom amongst the Jains of one place are very relevant evidence of the existence of the same custom among the Jains of another place, unless it is shown that the customs are different and oral evidence of the same kind is equally admissible There is nothing to

S. 4

setting up of a High ge of the 43 of the ustees of a es money gments in have been decreed in favour of the trustees of the temple were relevant under s 42 of the Act as relating to matters of a public nature *Ramasami* v *Appavu*, 12 M. 9

to show that shrine *Sri Ganesh* v. *Keshavrao*, 15 cretary of State, 16 C 173

(183) Where daughter's son is sanctioned by cutom amongst *Dehastha Smarth* Brahmins, decisions in suits in which

who made it. *Banwarilal* v *Sheochand*, 85 Ind Cas 795=A I R 1923 Lah 384 When a question of status is in issue, judgment and orders between the e case, rent suits, suits for are of high evidentiary value *Jumilal* v *Mt Hulki*, A I R ugh a judgment not *inter partes* , as a fact in issue, or as a recitals in the judgment cannot *Kashinath* v *Jagat Kishore*, 20 C W. N. 643=23 C L J 583=35 Ind Cas 298; see also *Ram Ranjan* v *Ram Narain*, 23 C 533 (P C); *Bhitto* v *Kesho Prosad*, 1 C W N 265=24

of a public nature' within the meaning of section 42, and the judgment of the

S. 43. Faridkot Court is not therefore relevant as relating to a matter of public nature *Ibid.*

43. Judgments, orders or decrees, other than those mentioned in sections, 40, 41 and 42, are irrelevant, unless the existence of such judgment, order or decree is a fact in issue, or is relevant under some other provision of this Act

Judgments, etc, other than those mentioned in sections 40 to 42, when relevant

Illustrations.

h of them

A obtains a decree against C for damages on the ground that C ... make out his justification The fact is irrelevant as between B and C

a l fet ma

A afte ... tion As b ...

(*d*) A ... murders A in consequence

The existence of the judgment is relevant, as showing motive for a crime

* (*e*) A is charged with theft and with having been previously convicted of theft. The previous conviction is relevant as a fact in issue

* (*f*) A is tried for the murder of B The fact that B prosecuted A for libel and that A was convicted and sentenced is relevant under section 8 as showing the motive for the fact in issue

Principle It is well settled that a judgment *in personam* is not admitted in a suit between strangers or a party and a stranger except in a question of ... settled, the reasons ... tendered against ... (*R.* v *Fo* ... *Morcan*, 11 Q B D 1028), sometimes as hearsay (*Step Art* ..., *Whart* s 8 ..., though it has been objected to this view that even if the judge were called as witness ... or to prove his judgment ...

could not make defenc ... legitimate ground for r ... satisfactory reason for ... that the objection of *res* ... solemn acts of strangers if relevant to the issue *Phip Ev* ... where the instance of judgments, orders or decrees is a fact *in* issue or a relevant fact under some other provisions of the Act, the judgments, orders or decrees ...

however, there is a highly important limitation. A judgment ...

*This *Illustrations* was added to s 43 by the Indian Evidence Act (I ... Amendment Act, 1891 (3 of 1891) s. 5

sible for *proving the truth* of what it asserts may be valuable as evidence for some other purpose Its very existence may be a fact in issue, and then of course, evidence of it may be given; or it may be a fact relevant within some **S.**

'ence

So

. Imis-

0, 41

or 42. So the cases referred to in this section are such, as the section itself

taking this view I am doing any violence to the language of s 43 of the Evidence Act, which, if I understood it aright, declares that judgments, orders and decrees other than those mentioned in ss. 40, 41 and 42 are of themselves irrelevant, that is in the sense that they can have any such effect or operation as

which the partibility of the estate was asserted and recognised The reason upon

and cannot be so

than the transaction

Gobinda v *Shamlal*

C W N 521 P C

but if they are not

inter partes unless there existence of such judgment is a fact in issue or is relevant under some other provisions of the Act The existence of the judgment may be relevant but not the decision of the Judge or the opinion expressed by him It is immaterial if the defendant on both cases is the same and the decision of the Privy Council in 22 C 533 is no authority for the general proposition that a judgment against a party can always be used against him in a subsequent suit by another person *Benodelal* v *Secretary of State,* 34 C W 1113=A I R 1931 Cal 239 So recitals of judgments not *inter partes* of relevant fact are not admissible in evidence *Asa Ram* v *Mausha,* A I R 1930 Lab 237

Existence of judgment etc is a fact is issue If the object of the judg

even though his name appear on the back of the bill, or of his malice, or of

S. 43.

l v. *Macnamara*, 9 East 361; *Incledon* v *Barr* *hika*, 11 W. R 339; *Keramat* v *Gholam* notwithstanding the verdict is still at liberty to r § 1667; but see *In* *I* *Lar* v *Sheo*...

vill apply to other cases, wh... , or the like *Powell* v *H*... 158, *Griffin* v *Brown*, 2 Pick 304 In defence was that the plaintiff had received atisfaction of his damages, it was held that the plaintiff, on traversing this plea, might put in evidence a judgment recovered from him by the assignee of the principal for the amount so received ... eed as conclusive proof that the money had

29 L J Ex 270 ... *Watson* v *Little*, 5 H ...

Irrelevant under some other provisions of this Act. Ordinarily a ... s judgment not *inter partes* is ... *m Lal*, A I R 1929 Lab 13... regards the value of the entries ... *Nageshar* v *Hanuman* ...

... L R 10 (Rev)

In a sui... binding on ... by the same ... part of the land in suit was not binding on the ground of the land ... ancestral, can only be treated as admissible for the purpose of showing that on former occasion the right of the alienee to alienate part of the property in suit was called in question on the ground that the property was ancestral. The finding of the Court in the previous suit that the property was ancestral is not relevant *Partap* v *Mothu*, 8 Lah L J. 492 = 96 Ind Cas. 938 = 27 P L R 544

the f... *Harih*... Wher... not re... with s...

transa... previous decisions in Land Acquisition cases are relevant in a subsequent ... where the market value of the land in the same neighbourhood is in ... *Madan Mohan* v *Secretary of State*, 78 Ind Cas 557.

S.

5 Pat. L. W. 97 = 43 Ind. Cas. 393.

One N, who was a usufructuary
her right to recover profits in that sh
defendant for a number of years. R
dant's name continued to be recorded as a
the defendant and R

present suit for a declaration that the
, the lease in his favour having come to
The defendant pleaded an arrangement

the unexp
mortgage
pleaded b
admissible
Mahomed
Rec
Satindra v.

possession was claimed or disputed, and also as evidence to show that there
was such a j
determine w
trial should c

n an action for
his land by the
was accidental

of the executants
of a bond on which a suit had been brought, directed the prosecution of the
plaintiffs in t
for the offence
Raj Kumari
Sarma v. *Kash*

Kalipada, 28 C. W. N. 587. But
p. 618, *Ghosh J* said: "I am not
prepared to say that the decision in the civil suit would not be admissible in

, and what the land in
Nath v. *Mahomed Wafiz*
P. C.) = 6 C. W. N. 387.

S. 44.

Judgments, etc are admissible, meaning of The general principle is that the mere existence of a judgment, its date and legal consequences, are conclusively proved, as against all the world, by the production of the record, but that ... even though, as between the ... must have been proved. The ... non th...

sively ... the par... used ... of such third person ... though the judgments cannot be ... W N 402 Judgments and decrees recognizing rights between parties to a suit or between persons whom they represent are not conclusive but are admissible in evidence under s 13, ... different from those in the former suit ... *Neamut Ali* v *Gooroo Das*, 23 W R ... *Gopi* v *Khetod*, A I R 1925 Cal 194. ... in evidence in order to prove that there w... certain way, does not make all the recitals in ... in the subsequent action *Abdul Latif* v ... Cas 667, see also *Tripurana* v *Rokkam*, 42 M L J 324 (F B)=45 M ... *Krishnanath* v *Jagat Kisho*... 3 C L J 583; *Sarod* v ... *Kanta* ... ...rties contains a recital of the ... refers to a point in ... ...900 Statement ... A. I R 1925 Mad. 996=85 Ind Cas 996=... the respective claims which the parties put ... *Chhadek* v. *Syd Ali*, 85 Ind Cas 979 (981) ... available, and the substance of the pleading is narrated in the judgments, the judgments furnish evidence of the allegations made by the parties on that occasion *Kailash* v *Bijoy*, 72 Ind Cas 680, see also *Parbatty* v *Purno*, 9 C 586; *Bhaya* v *Pande*, 3 C L J ... *Byathamma* v *Avallu*, 15 M 19, *Thama* v *Kondar* 15 M 378, *Krishnaswami* v *Rajagopala*, 18 M 73, *Malcomson* v *O'Dae*, 10 H L C 593, *Lyell* v *Kennedy* (1889) 14 A C. 437 *Neil* v *Devonshire*, 8 A. C 135

Fraud or collusion in obtaining judgment, or incompetency of Court, may be proved

44 Any party to a suit or other proceeding may show that any judgment, order or decree which is relevant under section 40, 41 or 42, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion.

Principle ...

between parties who were really not in contest with each other." This rule has been embodied in the Indian Evidence Act. *Bakhunissa* v. *Fazl Huq*, 26 A. 262 (283). So under this section the defendant is entitled to show that the decree is obtained by fraud. *Ibid*, see also *Hara Krishna* v. *Ramesh*, 62 Ind. Cas. 962 = 6 P. L. J. 373.

S. 4

ties to a suit tenders or has n 40, 41 or 42, it is open to the

lays down that any party to a suit or *judgment, order or decree which is relevant under s. 40, 41 or 42*, and which has been proved by the adverse party, was delivered by a Court not competent to deliver it, or was obtained by fraud or collusion. *Prayag Kumari* v. *Siva Prosad*, 93 Ind. Cas. 385 = A. I. R. 1926 Cal. 1 = 42 C. L. J. 280. This section was construed by *Maclean C. J.* and *Banerjee J.* in the case of *Rajib Pondey* v. *Lakhan Sendh*, 27 C. 11 = 3 C. W. N. 660 and it was held that a party to a suit can show that a decree

Bose, 30 C. ... id is sought

a judgment, order or decree as barring a second suit or trial; section 41

S. 44. case of fraud or collusion will have to be specifically alleged and substantiated by the party setting it up. *Baikantha* v. *Mohendra*, 1 C. L. J 65. To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in i[illegible]
by that contrivance. *Bishe*[illegible]
R. 1926 Lah. 177. Where a [illegible]
fraud or collusion, such fraud or collusion as is contemplated by [illegible] the Evidence Act, must be raised in the defence. *Ambika* v. *Kala Chandra*, 10 C. W. N. 422 (424). Where a party seeks, under section 44 of the Evidence Act, to avoid a judgment on the ground that it was delivered by a Court not [illegible]

[illegible]
111 Ind. Cas 762 = A. I. R. 1928 Pat. 675.

Not competent. The words "not competent" in this section refer to a Court acting without jurisdiction. *Kettilamma* v. *Kelappan*, 12 M. 229 [illegible] "Jurisdiction may be defined to be the power of a Court to hear and determine [illegible]

[illegible] "jurisdiction", which has [illegible] stated to be "the power to hear and determine issues of law and fact, [illegible]

[illegible] v. *Benary* [illegible] . 193. This jurisdiction [illegible] circumstances Thus, [illegible] to place, value, and [illegible] and may be exercised within [illegible]

[illegible]

pronounced by a Court without jurisdiction is void. *Ibid.* [illegible] void and a nullity it is not only the duty of the Court which passed it to [illegible] *Mohan* v. [illegible]

[illegible]

Lal, 17 A. 478; *Haji Musa* v. *Purmanc*[illegible] *Vaithinathu*, 38 M. 682; *Roop Narain* v. [illegible] *Narendra* v. *Gopal*, 17 C. L. J. 634. One must [illegible] fundamentally [illegible]

[illegible]

pronounced, for the power to decide necessarily carries [illegible]

decide wrongly as well as rightly. *Ih* W. N. S. 723 = 31 C. L. J. 482. In *Mallarjun* (347) = 5 C. W. N. 10, *Lord Hobhouse* said: wrong

Moomraj, 45 C. L. J. 24.

The plea of *res judicata* can be satisfactorily met by showing that the *judgment*, in which the issues pleaded were decided, was delivered by a Court

To sustain an objection that the Madras Insolvent Court's order is a nullity conferring no title to the debtor's estate on the Official Assignee, it is obviously not sufficient to prove that the order was wrong. To hold otherwise would virtually erect into a Court of appeal from the Insolvent Court, not only this Court, but every Court in which the (and would be inconsistent with section 41 Act What, then, is the test of wheth

unless there is a ...

S. 44. Mere delay in raising it cannot itself be fatal objection when a fresh execution sought. *Sheo Tahal* v *Binack Shukul*, 1931 A L J 643 = A I R 1931 All 689, see also *Panchkari* v *Girdharimel*, 89 Ind Cas 347, *Veerav Maga* 39 M

thereof
nullity, a

made by a Court
41 and 44 of the Ind
proof that the marr
271 (F B)

un quam co habitatu' (Fraud
It vitiates the most solemn proc
ey, *C J* in the *Duchess of Kingston*
Case, 20 How St Tr 355 It avoids all judicial acts, ecclesiastical or temporal *Ibid*, see also *Shedden* v *Patrick*, 1 Macq 535 But the difficulty is that no definition is given in the Act of the word "fraud" This section provides that any party to a suit may show that any judgment was obtained by fraud "It is clear" says *Martin C J* in *Bhikaji* v *Balwant*, A I R. 1927 Bom 510 Bom L R 1046, 'that some limitation must be put upon that section For instance if party A, and his witnesses in a particular suit came into the box and committed deliberate perjury on material points, that is clearly fraud On the other hand if a decree is eventually passed in favour of that party, even on the perjured evidence, it ca to the opponent to start a new action exactly the same eviden
wrongfully believed by
doctrine of *res judicata*
party might alternately
Consequently the authorities show, I think, that if the case merely in effect, a re-hearing of the previous suit on substantially the same evidence then the Court will not hear the second suit. On the other hand it is to my mind clear that in a proper case the Court has jurisdiction to set aside a decree which has been obtained by fraud practised on the Court. If, for instance, the existence of certain evidence has been stoutly denied by one party and the Court has been ... to ... decree on the basis that that evidence ... of such

circumstances are looked at, that in that case the Court would original decree '

In Nanda Kumar v. *Ram Jiban*, 41 C 99 = 19 C L J 457 = 23 Ind Cas 3 7 = 18 C W N ... *C J* said The jurisdiction ... raised by

the decree being the principal point in issue, it is nece investigated it by proof before the propriety of the prior decree can be investigated Decrees may be (1) by consent, (2) *exparte* or (3) after contest, apparent or real and though each is liable to be attacked for fraud, the character of the fraud would vary with the circumstances of each case One who seeks to impeach a decree passed after contest takes on himself a very heavy burden and it is to the conclusion that the
on in the former suit was
not be upset on a ... ere
where, and it is that ...
k, 1 Macq ...

S. 4

L. R 754=37 A

motion and acting in ord
for the purpose of actually a
fraud, must be fraud which
and that mere irregularity,
investigation of these righ
is not the kind of fraud which will authorise the Court to set aside a solemn decision which has assumed the form of a decree signed and enrolled" *Per Lord Cairns L J.* in *Patch* v. *Ward*, L R. 3 Ch 203, see also *Crew* v *Jhonston*, 2 Sch & Lef 308

In *Fowler* v. *Lloyd*, L R 10 Ch. D
Baggallay and *Thesiger L JJ*, the suit was d

to have been sub
. nt question would
in the affirmative
action brought out
could be set aside
n to interrogatories,
of a process had
which the evidence
other wilfully and
corruptly perjured In this case, if the plaintiffs had sustained on this appeal the judgment in their favour the present defendants, in their turn, might bring a fresh action to set that judgment aside on the ground of perjury of the principal witness and subornation of perjury

proved that a
which judgm
These observa
Mohomed Go
"The principl
obtained by a fraud practised upon the other side by
from placing his case before the tribunal which was called upon to adjudicate

S. 44.

Both the defendants contended that the Will was a forg... probate was induced by fraud. *Held* that the second defendant was barred by the decision of the District Court in the revocation matter from raising again the question in the Court of the Subordinate Judge. Further *held* that as regards...

he does not raise these questions by his pleading, although he ... common cause with the second defendant in his defence .... As regards the second defendant, although he had a *locus standi* to make an application, his right is now at an end by reason of the unsuccessful result of his application for revocation. That being so, it appears to us that the first defendant has no defence to this suit. ... of all ...

The fact that the defendants have be... land in the village implies a decision ... respect of any of the lands included in that village... decree of Court under section 11 of Regulation III of 1872. *It is* open to ... plaintiff to avoid the effect of such ... 25 A or sub-section (1) of section ... procedure laid down in section 24 o... interested to bring forward in the Settlement Court, ... any ... to make to any part of such record ...

... to the record ... *I*, 19 C. L. J 29; see also ...

... t XIV of 1882) can only ... against whom an order ... If he was ...

...he fraudulent nature of the ... the order passed upon it in any proceeding ... strength of that order. *Chumma* v. *Ram* ...

16 Bom. L. R. 648.

Judgment vitiated by fraud, whether *the same* should be set aside ... Whenever a party seeks to avail himself of a former judgment, fraudulently ... entered, the opposite-party may show the fraud, and thus avoid the judgment ... *Whart. Ev.* § 797. Now the question is whether *fraud* can be collaterally set up ... directly or ...

and cannot resort to a ... *Whart. Ev.* §§ 797, 798. So according to *Burr Jones* also "domestic ...

SJ 4

other words (confining our attention to so

from a provision such as the plaintiffs contend it is intended to be merely

ct on makes the same provision for aud that it does for avoiding a Now there can be no question

Sib Saran v Rameshuar, 60 Ind Cas 640=1920 Pat 363=2 P L T 40, Kuaram v Banomali, 29 Ind Cas 838 The case of Bansilal v Ramu Lal

collateral proceeding." "In applying this rule it matters not whether the impeached ju Highest Cou every Court,

tes had fraudulently taken place under in Ireland obtained by collusion between person in whose favour a charge had

S. 44. been created, and the purchaser, and where the interests of the tenant in remainder had not been probated, the Court of Chancery in Ireland on the ... of on a bill filed to

estate of mortgagor. *Nistarini* v. *Nundo Lal, ubi supra*, see also ... v *Ramesh Chandra*, 2 Pat. L. T 528 = 62 Ind Cas. 962 = (1921) Pat. 209 It is competent for every Court, whether superior or inferior to treat as null ... any judgment which can be clearly shown to have been obtained by manifest fraud *Maung Kyaw* v *Ammul*, 62 Ind. Cas 53 = 13 Bur. L T 198, *Manchha ram* v *Kalidas*, 19 B. 821; *Krishnabhupati* v. *Ramamurti*, 16 M. 198; *Admony* v *Aimunissa*, 12 C 156

Compromise decree—Fraud Where a decree is alleged to have been obtained by fraud and misrepresentation it is competent to a party to show under section 44 of the Evidence Act that this amount was obtained by fraud and misrepresentation, and a separate suit is not necessary to set aside the ... Cas. 639 Where ...

v. *Panchi Dasi*, 32 Ind Cas 849.

Pat 375 = 9 P. L T 375. Foreign judgments *in personam* ... fraud of a party to the suit in foreign Court cannot be enforced by him in an action brought in an English Court. *Nistarini* v *Nundo Lal*, 26 C 591 (91 ... see also *Abouloff* v *Oppenheimer*, L R. 10 Q B D 295, *Vadala* v *Lawes*, L R. 25 Q B, D. 310, *Codd* v. *Dela*, 92 L. T 5 10; *Hip Foong* v *Neotia*, (19... A. C 888; but see *Robinson* v *Fenner*, (1913) 3 K B 835

In *Abo*... B. D 295 it was held that even though ... gated in th... committed, ... an action claiming the value of goods and brought upon ... whereby the defendants were ordered to return to the plaintiff the goods ... judgment was obtained by ... at the goods ... the plaintiff ... Lord Coleridge ... it must be taken ... foreign Court and that

that the allegations of fraud were brought before the ... the foreign Court came to a conclusion against the defendants, and whether that conclusion was right or wrong on the matters of fact the question of the plaintiff's alleged fraud could not be tried in the Courts of England, says ... state the arguments for the plaintiff also in somewhat different words, namely that although the Russian Courts at *Tiflis* were led to decide ...

defendants through believing a false the plaintiff, nevertheless the defendan S. 4

l to a foreign judgment it obtained in an English ught. There may be a difference where it is sought to enforce by the process of a Court a judgment of that very Court, because if that judgment has been obtained by improper means the objection does not arise in a new action brought on that judgment, but it arises with regard to the process of the Court to enforce a judgment of its own In a case of that kind it was perhaps formerly necessary to proceed in a Court of Equity in order to get rid of the judgment, but I doubt whether it was necessary, because, at least in my opinion, a Court of Common Law would have in the exercise of its own jurisdiction set aside a judgment procured from it by deception"

In the case of *Vadala* v *Lawes*, L R 25 Q B D 310, in which an action was brought by the plaintiff in the English Courts upon a judgment obtained Bills of Bills were t without

in equally general language, is perfectly well settled, is that when you bring

Foreign judgment—how impeached under Indian law In India a foreign judgment shall be conclusive as to any matter thereby directly adjudicated

law in force in *1908)*

Collusion No definition of the word "collusion" is given in the Act. two some nent in It *may be of two kinds—(1) when the facts put forward as the foundation of* the judgment of the Court do not exist, (2) when they exist, but have been corruptly preconcerted for the express purpose of obtaining the judgment." *Wharton Law Lexicon cited in Field Ev 7th Ed* p 170 No doubt a decree can be avoided on the ground of fraud or collusion under this section But

S. 44. there is a great
made the victim of
discovered the fr
a point of defence
collusion is a m
is a point which could and might have been raised before the decree was p
on the last occasion. A third party can undoubtedly avoid a decree on the ground that it has been obtained collusively, but it is clear that a party to a collusive decree can not avoid it on that ground. *Sahib Rai* v *Bal...* I R (1927) All 494=101 Ind. Cas 765, *Chenur Appa* v. *Puttappa*, 11 B *Varadarajula* v *Srinivasulu*, 20 M. 333; *Kandeti* v *Nukamma*, 31 M. M. L J 576; *Venkataramanna* v *Viramma*, 10 M 17. That such a decree by the case of *Rangammal* v *Venkatachalam*, A. I R. 1927 All 528=101 Ind Cas rtgage decree was made more than absolute. After the decree absolute was judgment debtor transferred his equity judgment-debtors, though served with the application

questions and adduce evidence to prove the facts stated *Kama*
18 C L. J 261

Who can plead fraud or collusion. The language of this section is enough to allow a party to the suit in which the judgment was obtained, to that it was obtained by the fraud of his antagonist, though the judgment y to set up his own fra *ndian Code Vol II* h under the Engl such judgment is the suit in which it is *Aswani* v *Banamali*, 21 C W N. 594; *Taylor* § 1713; *Phip Ev* 7th Ed In England a party to a suit would not be allowed to defeat a judgment showing that it has practised an upon the Court *Anglo Ind Code* Vol II p 829 In

, 27 C 11 st a judgment. *West* v *Ves Sen* 244, *Ahmedbhoy* v *Vullubhoy*, 6 B 703; *Prudham* v *Phillips*, 763 The rule that fraud can only be proved by an innocent party apply, however to probate [*Birch* v *B*, (1902) p 130], or divorce [*B*, (1892) p 402] cases.

Party cannot plead his own collusion or fraud Section 44 of the Evidence Act, no doubt allows a judgment or decree, otherwise relevant, to be shown to have been obtained by fraud or collusion But the doctrine that a party cannot plead his own collusion to avoid a decree supported by numero L R 177=3 Ind 1179; *Bhawabal* v W. R. 157, *Nundo Lal*, 26 C. 891 705; *Varadarajula* v *Srinivasulu*, 20 M. 333 (338), *Kondati* v *Nukamma*, 31 M. 485 (487)= T. 331. A party cannot ask for relief against a fraudulent conveyance by him and which has been successfully used by him to defraud a creditor *Banku Behary* v. *Rajkumar*, 4 C W N 289=27 C 231, *Gobardhan* *Ritu Roy*, 23 C. 962; *Kali Charan* v *Rasik Lal* 23 C 962 N "The maxim *in pari delicto potior est conditio possidentis* is as thoroughly settled as any tion of law can be. It is a maxim of law established, not for the

it is made the antagonist of his executor (ancestor ?) and *cessante ratione legis*

decree had been obtained by frau

fraud was their predecessor in ti

The principle that a party to

1151=22 C L J 197=29 Ind Cas 699

Suit to set aside judgment obtained

section where a judgment has been obtained

decree, an *ex parte* decree or a decree passed after contest, is liable to be vacated on account of fraud *M A Maistry* v *Abdul Aziz*, 5 Rang 46=101 Ind Cas. 431=A. I R 1927 Rang 130, *Raman Menon* v *Madhava*, 98 Ind Cas 176=A I R 1927 Mad 96 To set aside a decree on the ground of fraud, it is not sufficient to prove constructive fraud, but an actual positive fraud, a meditated and intentional contrivance to keep the parties and the Court in ignorance of the real facts and obtaining a decree by that contrivance *Bishun Singh* v

S. 44.

decree is whether there was fraud practised in relation to the proceedings

sufficient ground for setting aside a decree *Kasisuar* v *Aminuddin*, ... N 133=47 Ind Cas 84; *Baikuntha* v. *Prahlad* 31 C W. N 560, ... v *Hari Mandal*, 24 C W. N 133=5... T 735=60 Ind Cas 124, *Kripa* v *Nan*...
But a decree can be set aside which

8 S L R 81

To sustain an action to set aside a decree on the ground that it was obtained by fraud, the fraud must be extrinsic to the proceedings before the Judge ... must be in the conduct of the suit by keeping the plaintiff out of Court ...

by him *Madda Pedda* v *K...* ... Ind Cas 498=21 L ...

Suit to set aside an exparte decree A suit to set aside an *ex parte* ... on the ground that the claim was a false one and the decree was obtained by perjured evidence will not lie, where the prior suit is a contested one or ... decree was passed after service of summons *Nalini* v *Hari*, 29 C. W ... 325=86 Ind. Cas 779=41 C L J 281=A I R 1925 Cal. 663, ... *Prohlad*, 30 C. W. N. 560 The mere fact that an *ex parte* decree has been passed does not show that there was no service of summons on the d... ... Court passing the decree ...

S. 4

P L T. 239=(1920) Pat. 209=56 Ind Cas 615; *Nagendra* v. *Parbatty*, 20 C. W. N. 819, *Gendu* v. *Saddi*, 44 Ind Cas. 983.

OPINIONS OF THIRD PERSON WHEN RELEVANT.

might be more accurate and sound than mplation of law, a matter of no consequence. in the most unequivocal manner, that the

It was for the jury to form opinions, and draw inferences and conclusions, and y, or the Judge, the the witness spoke whether to believe then the jury were to judge of their import and their tendency The witness was not to say that he

centuries, and it was but slight before the present century In a sense, all testimony to matter of fa from phenomena and Courts or in common lif

is not really to be called opinion evidence in the sense of the rule It has been said, judicially, that there is, in truth, no general rule requiring the rejection of opinions as evidence' (*Hardy* v *Merrill*, 56 N. H. 227, 241). Without acceding

S. 45.

the case

Matters of opinion—meaning of. I
phrase "matter of opinion" fails to repr[illegible]
definite conception. As used in the law of e[illegible]
[illegible] shou[illegible]
[illegible]gical
[illegible]es applies to the use of the rea[illegible]
[illegible] of opinion there relating to facts, is sep[illegible]

whole or in large part, of an act of reasoning, but propositions of belief, n[illegible] able of verification religious views, political principles and the like, as to w[illegible] certainty is practically impossible These are the matters of endless de[illegible] of argument pure and simple In cases of these debatable questions, the [illegible] of the trial, *res gestae* or probative, are in no way involved *Chamberlayne's E[illegible]* 1791, 1792

Why opinion evide[illegible]
evidence was a matter of t[illegible]
tions In *Wright* v. *Tatha*[illegible]
concede, though, it is not, [illegible]
opinion of a witness even on oath is, as such, admissible evidence o[illegible] question of competency. When you can bring the decision of that quest[illegible] you sometimes may, to depend upon deductions from scientific premises [illegible]

at the same time that this principle is becoming recognized, or [illegible]

there occurs a general recognition of what seemed at the time as an exception to it—the use of skilled witness *Wigmore* § 1917 'Though the witnesses can in general speak only as to facts, yet in questions of science persons versed in the subject may deliver their opinion upon oath on the case proved by other

on the subject in dispute" *Peake's Evidence*, 142 Like other exclusionary rules in the law of evidence, that which undertakes to reject 'opinion' may be a

rfectly
nent of
is not
The
equate

knowledge on the subject His declaration, therefore, is said to be rejected as opinion *Chamberlayne's Ev* § 1793

person who had to be received by way of exception to that notion Thus, when an ordinary lay witness took the stand, equipped with personal acquaintance

ge, the circum
and expressed
oper It would

not occur to any Judge that this witness was doing a wrong thing In short, it was only 'opinion' as a mere guess and a belief without observation which they

3 Burr 1905, 1918 *Lord Mansfield* said "Mere
t opinion as an inference or conclusion from
did not think of disparaging That this was the
ver will appear from the following passages
hich witnesses speak from judgment and opinion,

ich he witness may form Mr *Espinasse*
... 2 ... 5.7 (Am)
when the early
had in mind

the case of the lay ncluded in his testimony an opinion or inference based on these data —as in the leading instances (used by those writers and Judges) of handwriting character, and

now an
witness
propose
made at
this op

before the jury and they were as competent as he to draw an inference It must

ory,
It
r to

be no English rulings which indicate that the opinion rule has there been

S. 45.

bar *Wigmore* § 1917.

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giving
witne

nature It simply endeavours to save time telling the witness: "The tribunal is on materials of information as yourself, thus, as you can add nothing materials for judgment ... is unnecessary, and ... encumbers the pro ... applied in each ... the principle" ... *Mansfield* in *Carter* v *Boehm*, 3 Burr. 1905, 1918 ... rightly formed, could only be drawn from the same premises *from which* ... Court and the jury were to determine the cause, and therefore *it is improper* ... irrelevant in the mouth of a witness"

Opinion and fact, how to distinguish. Accurately to distinguish "matter of fact" from "matter of opinion" is not less difficult than *to distinguish* ... from "matter of law" In all supposed statements of fact the *witness* ... testifies to the opinion formed ... upon the pre ... senses Statement of opinion is th ... fact. 1 *Whart Ev* § 15 An ... "opinion" is found in cases wh ... intangible to permit a correct or effective individual ... produced ... permitted to state simply the impression, such phenomena produced ... minds This apparently is simply another method of stating facts *Best Ev.* *8th Ed* p 473, *Corn* v *Sturtivan*, 117 Mass 122, 133 So also *if we look* ... the process of the ...

sense this may be said to be a statement of opinion—*that is*, ... the witness's mind upon a state of facts presented to his senses—and in the ... in question there was sufficient doubt as to the nature of the statement to ... the objection to be raised, yet the Court held, and quite *properly*, that ... speaking th ... *Indianapolis* ... *Ct Ry. Co* ... cases which ... the witness ... in several ways, and sometimes the use of one word will ...

S. 4

... not even have been raised, had the witness used, instead of the word "acknowledged" the word "said" *Hauter* v *Davis*, 128 Iowa 216 = 103 N W 573 A witness may not be asked whether there was any room in a car for other men, but may state whether there was any vacant or unoccupied space in the car *Chicago Terminal T ...*

... knowledge on the part of the witness testifying What he thinks in respect to the existence or non existence of a fact in issue is matter of opinion, and he cannot state it It is for him to put before the jury the facts as he has perceived them by his senses,

... t of the robbery they recognized him by his ... The testimony was objected to as opinion The Court treats the question as follows The statement by the witnesses for the prosecution of a fact which they ascertained through the sense of hearing was not the statement of mere matter of opinion, but the statement of a conclusion reached directly ar...

A witness can learn and ... faculties—his five sense... *Prof Wigmore* no such ... principle", says the lear... out of the question and considering only principle) that there is no virtue in any test based on the mere verbal or logical distinction between 'opinion' and 'fact' Further more, an examination of the so called opinion rule, as applied in its various instances shows that the opinion element is in the very law itself, a merely superficial and casual mark and not the essential feature" *Wigmore* § 1919

Entire Elimination of Inference Impossible The impression which first arises to the mind upon hearing the ideal position of the witness thus stated is a conviction of the impossibility for any one to satisfy such requirements ... of the simplest fact ... itive recognition of ... ning Observation ... by the aid of the ... a that of inference or reasoning viz, intuition so instantly and intuitively that the mind is seldom conscious of the process These sense-impressions are seized by the reasoning powers and the mind becomes aware of the concept rather than a mere percep-...

when those original sense perceptions have become so overlaid by inference ... experiment that the re action of each upon the other can no longer be di... guished ... *from the* ... *practically* ...

Involution of Reasoning, (1) Inference While the entire elimi... inference is impossible, something may fairly be said as to the relati... tion which observation and inference bear to each other in cert... classes of mental re ult However distinct these classes may be fr... in broad outline they present the ordinary difficulties inheren... where one class shades into another by almost impercepti... distinct line is frequently difficult to draw Nor can it be ...

S. 45. approximate certainty as to how far the state of the case, or other [illegible] considerations may influence a Court in making rulings even on a [illegible] similar set of facts It may be [illegible]
fication [illegible]
which [illegible]
the vi[illegible]
suggest[illegible]
of obs[illegible]
obnoxi[illegible]
divide t[illegible]
according to the proportion [illegible]
these mental acts or proc[illegible]
(2) Conclusion, and (3) Judgment

Inference—In the first of these classes, that of *Inference*, the element of observation is at its maximum The [illegible] facts of th[illegible]

[illegible] reasoned [illegible]

is [illegible]
by [illegible]

A reasoned infere[illegible] red to the satu[illegible] not instantly [illegible] reasoning more [illegible] [illegible] intervenes between the phenomena and the "making up," as it were, of the mind A theory, simple, perhaps; but still a theory. The mind is conscious of a distinct step, although, it may be, a short one *Chamberlayne's Ev* § 1802

Invol[illegible]

[illegible] under such a definition an intuitive inference [illegible] of bankruptcy [illegible] a neighbouring [illegible]
migh[illegible] conclusion [illegible]
that [illegible] reasoning is then seen to be based, in a greater or less degree, upon the existence of facts not verified and frequently unascertained—*Chamberlayne's Ev* § 1803.

[illegible] result is styled a hypothetical [illegible] [illegible] rrives is referred to as his Judgment. [illegible] [illegible] termed an expert".—*Chamberlayne's Ev* § 1804.

Credibility of intuition The administrative reason for rejecting the S.

trustworth
operation
statements,
rience shows that instinctively acting the normal human mind tends to observe
correctly and report
neous statement is
reasoning is not

almost as a matter of course, one more reasoned in its nature can be admitted only upon the exhibition of some satisfactory administrative necessity for so doing For the reception of a conclusion a still more imperative necessity is required Inability to offer other evidence or to prove a case without using this species of proof culminates when a judgment is offered *Chamberlayne's Ev* § 1806

omenon observed by the witness
d to the tribunal wherever possible,
cies
by
nds

essential, in the second place, that the substituted evidence should be both objectively and subjectively relevant to the existence of some fact in the *res gestae. Chamberlayne's Ev* § 1808

Scope of the rule rejecting the opinion of witness "The opinions of any person, other than the Judge by whom the fact is to be decided, as to the exis-

"The opinion of a competent person is
s in the
case of 'hearsay', there is an . *the rule*
may be stated as follows (1 express
ive an
. doubt
45-50
person

is not allowed to express an opinion that a fact which is being enquired into exists (save and except in cases mentioned in 45-50), he is right in his statement of law But if his lordship meant that a fact-witness is debarred from stating his opinion in any case, when on the stand, his statement of law is evidently erroneous Observation and reason being practically inseparable, the real administrative problem is not as to whether reasoning shall be excluded in *to to* but rather in determining whether a particular involution of a given quantum of reasoning is necessary under the facts of a particular situation As facts become more complex, more compound, the proportion of reasoning almost of necessity, grows greater So intimate, in many cases, is the blending, that the

S. 45 Court is compelled to accept or reject the whole, despairing of success in separation *Chamberlaynes Ev* § 1837 In this connection the observation of *Foster, C J* in *Hardy* v. *Merril*, 56 N. H. 241, should be borne in mind "All evidence is opinion merely unless you choose to call it fact and knowledge as discovered by and manifested to the observation of [illegible]
to me quite unnecessary [illegible]
admission of such evidence, [illegible]
or isolated and arbitrary) to [illegible]
of some books and the [illegible]
rule requiring the rejection o[illegible] [illegible]vidence A general rule can [illegible]
be said to exist, which is lost to sight in an enveloping mass of arbitrary exceptions" *Wigmore* § 1919 The Hearsay rule [illegible]
rule are the product of [illegible]

[illegible] will always
while the Opinion rule [illegible]

Proper scope of opinion [illegible]
his opinion [illegible]

[illegible] good ground for excluding such evidence [illegible] intimately connected with the main issue that its consideration is inevitable (b) So also, if certain evidential material, having a legitimate probative value, tends nevertheless to produce also, over and above its legitimate effect, an unfair prejudice to the opponent, or by virtue of the personality of the witness tends to receive an exag[illegible]
there is good [illegible]

[illegible] position with the witness to draw an inference [illegible] . . . The witness's opinion is excluded, not because inferences as such are objectionable—for a witness's knowledge and all knowledge is made up of inference,—but because the inference under the circumstances is [illegible]

S. 45

of in this
perfluous
essential
e opinion
ition
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ts from which a

be able to separate the facts and indications from which he has formed a conclusion from the conclusion itself *Yahn* v *Ottumua*, 60 Iowa 429=15 N W 257 From the many illustrations given below it will appear that, from the
often be received
ises is that, from the
described in such
language as will enable persons not eye-witnesses to form one accurate judgment in regard to it *Burr Jones* § 360 The opinions of non experts are admissible, therefore, provided they state, so far
n the
opinions are based on questions of
ings,
animals, or hand writing; and of the size
time
and distances; of the mental state o
and

or seemed hostile,
intoxicated They
can state as to who
oded or that a person
appeared rational
person looked excit

matters more within the common observation and experience of men, non-experts may, in cases where it is not practicable to place before the jury all the primary facts upon which they are founded, state their opinion from such facts, where such opinions involve conclusions material to the subject of inquiry In
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Inference—condition of Admissibility—Necessity The necessity for a use of reasoning, more or less great, is practically insuperable. The simplest

S. 45. statement of a fact embodies an element of inference. In theory at least, original sense-impressions received from observations are brought to consciousness by faculty of intuition. The mind, however, seizes upon these material, with such instant avidity as to make the transition to the inference practically unrecognizable. The statement therefore of an observed phenomenon, classed as one of fact, is, in reality, a declaration of what the observer inferred the fact to be. To this use of inference no administrative objection can be taken. Facts can be proved in no other way. ... therefore continue thus to be stated. The necessity, however, for ... larger element of inference, in a mental process somewhat more complex, at once discernible. Not only may the witness be powerless to ... simplest fact without stating his inference as to it. He may be ... state compound facts in the same way. True, it may be quite possible ... to declare certain of the component or constituent facts which go to make the compound fact in such a manner tha...

it without the slightest difficulty ...

facts. Still he may, in most cases, by reason of ... clearest statement of ... any adequate ... whole, was observed by ...

Under such circumstances, judicial administration, *ex necessitate rei*, permits ...

the result to which they have led his reasoning faculties. ...

Ev § 1810

in which t...

of a pers...

evidence, ...

Ev § 1867 ...

... or mental states may serve ... of the inference of the witness as to ... ity is a matter of opinion or belief ... inexplicable and incommunicable ...

a stranger, and there...

Expert and Opinion ...

the voice alone, and ...

the tones of voice in such a manner that from the description ... The testimony of the ...

... on as to the ... ot admissible to ... 148 Cal ...

707. In many instances ...

the act of reasoning is ...

numerous and minute to ...

Chamberlayne's Ev § 186... A person may ... v. *Frith*, (1896) P. 74, *Brooke* v *Brooke*, 60 Md. 529, 533, ... The same ...

Nebr. ... Guderl ...

well ... to give ...

542 ... § 1862.

for the ...

S. 4

it competent in itself as primary evidence It is the experience which he acquires in the ordinary conduct of affairs, and from means of information such

uct of that

icher, 117

an expert

f a thing,

still there

is no rule of law, and there can be non
know of property before he can be
He must have some acquaintance with ,
estimate of its value, and then it is for the jury to determine how much weight to attach to such estimate *Bedell* v. *Long Island R. Co*, 49 N. Y. 367; *Lawson*

be presumed to have a sufficient knowledge of the market value of property from the location and character of the land in question *Pennsylvania, etc. R. Co.* v *Bunnell*, 81 Pa St 426 The best and only legitimate evidence of the value of the land at the time of the sale would be the *opinion* of witnesses who had

founded *Illinois etc. Ry Co* v *Von Horn*, 18 Ill 257; *Burr Jones* § 363 So it is clear that the valuation of land must be arrived at by the tribunal by taking

As regards

urt. *Stiwell*

ates, 2 Story,

421 (Am); *Lawson's Exp & Op. Ev* pp 463 501, *Wigmore* §§ 1940 1941, *Narain Chandra* v *Cohen*, 13 C 56; but see *Dwarka* v *Ludar*, 4 O C, 247 As to how valuation is to be made under the Municipal and Land Acquisition Act *vide Manindra* v *Secretary of State*, 41 C 967; *Harish* v *Secretary of State*, 11 C W N 875; *Wenrick* v *Secretary of State*, 13 C W N. 1058; *Secretary of State* v *Shanmugaraya*, 16 M 369; *Government of Bombay* v. *Meruanji*, 10 Bom L R 920, *Heysham* v *Bholanath*, 11 B L. R 236; *Secretary of State* v *Belchambers* 33 C 108; *Tulsi* v *Secretary of State*, 14 C W N. lxxx, *Ram Sahoy Sha* v *Secretary of State*, 8 C W N 671, *In Esafali Salebhai*, 10 Bom L R 997, *Kailash* v *Secretary*, 17 C L. J. 31

S. 44.

Sanity. The reason for admission of non expert opinion evidence as regards sanity
N. H 144: "
by witnesses a
The opinion
no description
ordinarily he cannot give an adequate description of them' 'The

80 (Am); *Wigmore* § 1934 "To ask
appeared peculiarly or strangely was s
opinion she was insane" *Per Doe J*
opinion of non-professional witnesse
such opinions are based upon their
person's appearance *Burr Jones* § 36

disease in any one" *Tench* v *Mc Daniel* 4 Ired L 455 (*Am.*)
expert witness
person is sick
upon the nature
system of a p
days, however,
upon for their opinion as to sanity or insanity of the testator.
Caughman, 26 S E R 16 (S C); *Wheeler* v. *Alderson*, 3 Hogs Eccl 574
606, *Dew* v. *Clerk*, 3 Add Eccl 79; *Eagleton* v *Kingston*, 8 Ves J
Hadfield's Case, 27 How St Tr 1281; *Lowe* v *Jolliffe*, 1 W Bl 365, *Talam*
Wigmore § 19

might have as to the bearing of the opinion rule *Wigmore* § 1935 capacity as
as to sanity and opinion as to general testamentary or criminal capacity
entirely distinct The latter sort of opinion is inadmissible (when it is) because
a question of law may be involved, and witnesses' conclusions, are not needed
on such points. *Wigmore* § 1937

Opinion from necessity The opinions of ordinary witnesses derived from
observation are admissible in evidence when, from the nature of the subject
the facts can not

This rule, however, has its exceptions, some of which are as well
settled as the rule itself When all the pertinent facts can be so
detailed and described, and when the triers are supposed to be able to

correct conclusions without the aid of exception to the rule is allowed. But case

to deceive purchasers *Macdonald* v *Holland*, 10 S L R 175=41 Ind Cas. 539; *Swadeshi Mills* v. *Juggi Lal*, 24 A L J 975.

45. When the Court has to form an opinion upon a point of foreign law, or of science, or art, or as to identity of handwriting *[or finger impressions], the opinions upon that point of persons specially skilled in such foreign law, science or art, †[or in questions as to identity of handwriting] *[or finger impressions] are relevant facts

Opinions of experts

Such persons are called experts.

Illustrations

(a) The question is, whether the death or A was caused by poison

The opinion of experts as to the symptoms produced by the poison by which A is supposed to have died, are relevant

by
mir
the
relevant

(c) The question is, whether a certain document was written by A Another document is produced which is proved or admitted to have been written by A

The opinions of experts on the question whether the two documents were written by the same person or by different persons, are relevant

knowledge of the facts, and, in the final outcome, withdrew from their consideration any facts of which they had original knowledge, confining them to such facts only as should be presented to them at the trial This left to the jury simply the duty of drawing conclusions from facts presented In many cases it was impossible to present to the minds of the jury, who were supposed to have no

v *Chadd*, (1782) 3 Doug 157, was a case in which an engineer was called to

*The words 'or finger impressions" in both places where they occur in s 45, were added by the Indian Evidence Act, 1899 (5 of 1899) For discussion in Council as to whether 'finger impressions" include "thumb impressions", *see* Gazette of 1898, Pt. VI p 24

†These words in s. 45 were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s. 1.

S. 45. show the effect of an embankment upon the filling up of a harbour. *Lord Mansfield* says: "*Mr. Smeaton* (the witness) understands the construction of harbours, the cause of their construction, and how remedied. In matters of ... *Thornton* v. *Assurance Co.* (1790) Peak ... Camp. 116. In such a case often ... The furnishing of such assistance to the ... while after ...

Principle. An expert *i. e.* a person having special skill ... than the jury to draw in ...

... nces on the subject. ... skilled observer, administration is ... all times imposes ...

for the proof of his case to ... actually tendered is relevant for the purpose ... some cases the expert observes nothing. His proper work is ... reasoning. Tal... witnesses and enumerated ... by them, it is ... they indicate. ... that his reasoning has a tendency to supplant that of the ... instances when administration permits an invasion of the province of the jury, an adequate forensic necessity must be shown for receiving the judgment of an expert. The administrative warrant differs, however, widely from that presented in case of the observer, whether ordinary or skilled. Where one is using sense-perception, the forensic necessity for admitting the secondary evidence of an inference or conclusion most frequently in this, that the original ... ed by the witness as fully to be placed before ... is allowed, after stating such constituting ... ese and those previously detailed into the ... s mind.

In case of the expert, however, the inadequacy which the witness is to supply ... No man can satisfactorily reason ... of art, science or trade ... he necessary data ... both be unknown ...

could properly draw for themselves. *Chamberlayne* ...

When Opinion evidence of expert is admissible. The principle underlying this section is clear enough, but in ... lends to what seem to be inconsistent results. All ... must decide the question on a care... which it arises ...

more accuracy than the jurymen themselves. It is the nature of the subject matter

...f practical everyday matter that the
example, is put before the jury to give
year was a proper time to set fire to
...fe stable for horses, whether a fight is a
'prize fight' or whether the keeping of cows in connection with a hotel is unprofitable, the Court is presented with the question whether, because some

which permits of opinion testimony being given *Mckelvey's Ev* § *134.* In *Ferguson* v *Hubbell*, 97 N. Y. 507, 513=49 Am. Rep 544, the rule in regard to the admission of expert testimony is thus well stated by *Earl J* "It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of enquiry, and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of the enquiry must be one relating to some trade, profession, science, or art in which persons instructed therein by study or experience may be supposed to have more skill and knowledge than jurors of average intelligence may be presumed generally to have The jurors may have less skill and experience than the witnesses, and yet
parties
nature
to them,
to resort to expert or opinion evidence." "The opinions of experts are, in *general, admissible whenever the subject is one, a knowledge of which can only* be acquired by special training or experience When however, it is one upon

his view is to prevail *The Beryl*, 9 P D 137, *The Gannet*, (1900) A C 234, 237, *The Australia* v *The Nautilus*, (1927) A C 145

S. 45. questions of science, skill, trade, and others of the like kind." *Best Princ. of Evidence* § 346. The rule on the subject is stated by *Mr. Smith* in his note to *Carter* v. *B*
appears to be
is admissible,
persons are u
without such assistance; in other words, when it so far partakes of the nature of science, as to require a course of previous habit, or study, in order to the attainment of a knowledge of it. See *Folkes* v. *Chadd*, 3 Doug. 157; *R.* v. *S*
2 M & M. 75; *Thornton* v. *R. E. Assur. Co*, Peake 25; *Chaurand* v. *Angers*
Peake 44. While on the other hand, it does not seem to be contended that the opinion of the witn
matter, the nature

s, the fact that the witness, though
a practising physician, was held to
(1894) 2 Q. B. 766; *Tullis* v. *Kidd*
Ala. 648 (*Am.*); *Greenl Ev.* § 440. "The term 'expert' seems to imply both superior knowledge and practical experience in the art or profession; but generally nothing more is required to entitle one to give testimony as an expert

Shelluson, 8 C B. 819; *Re. Whitelegs*, (1899) P. 257; *Halsbury*
p. 481.

witness must have special ... concerning which

existence of facts capable of being proved or disproved by ... opinion as well as hearsay must be excluded. But this general rule has ... broken in upon by the admission of various classes of exceptions, all ... upon the common grounds of necessity. Such necessity is allowed ... when the facts in issue are not themselves accessible by evidence, being ... future probabilities or mere contingencies, or else actual facts but not

S.

ositive knowledge All of these must, of necessity, be judged of only from ther proved facts known generally to accompany or to indicate these in question, s, for instance, where the facts to be ascertained are inferred from some rule of rt or science, or observed law of nature thus proved; the knowledge by which

may not fall
professional or
cience relating

s frequently a question such as dealers in that article can alone decide There t is a matter of necessity to call in the experienced or instructed opinion of

ship after a storm
udge of those neces-
cts. Thus, also, in
Nesbit, 1 Car. & P.
landsmen to draw

any inference, and experienced
of that kind amount to unjustifiable

, or the likelihood of their
Indeed, it would be more
en, professional or expert,

are not admissible as such, but facts having been proved, *men skilled in such*

His scientific opinion is, in fact, his testimony to a law of nature All these are testimonies to general facts which the jury can ascertain in no other way, and

in words the minute and transient facts observed by the witnesses from the
r in his

ne not
r which
which
Op Ev
herefore
, must be
necessary
second
ssary to
42 (Am);

Burr Jones § 369.

made a study of the subject. On the other hand, he may be an expert although his knowledge has been derived from the study of the subject, and not from actual experience or practice in the business or profession Thus, it has sometimes been held that a physician may give opinions as to matters connected with his profession or with medical science, although in its own practice he may not have had experience as to such matters, and his knowledge in respect thereto is derived from study only, even though he may not have made the disease under

S. 45.

subject, he may be competent as an expert although engaged in some ... occupation, (*Detroit* v. *Van Steinbury*, 17 Mich. 99), or even if he has a... doned the business to which the enquiry relates. *Bearss* v. *Copley*, 10 N. Y. ... It is necessary that the witness should possess the requisite skill ... actual study, experience or observation. The mere opportunity of ... such skill does not suffice. It must be shown that he is skilled or scienti... at least that he has superior actual skill or knowledge in relation to the que... to that possessed by ordinary witnesses or observers. *Page* v. *Parker*, 40 N. H. 47. To prove or disprove infringment of trade mark evidence of men in the trade is not admissible to show whether or not a combination is such as ... deceive a purchase-
41 Ind. Cas. 539;
Lal, 49 A. 92=2
is true "he must, in
the immediate line
differentia of the ...
few experts could be admitted to testify, certainly no Courts could ... capable of determining whether such experts were competent. A gen... the specialty belongs would seem to be ... Ala. 212. The value of the te... the experience or study of the ... *Wells* v. *Leek*, 151 Pa. 431; *Burr Jones* § 368. So "the first question that ... when we are dealing with an important witness who has made observations ... inferences is this: 'How intelligent is he? and what use does he make of ...

... for the Court ...

himself may be ...
subject under en...
may be called ...
give their opinions thereon. ... to his own ... But the expert cannot give his own opinion as to his own ... *Broadman* v. *Woodman*, 47 N. H. 120; *Braham* v. *State*, 143 Ala. 28 ... of the qualification of the ...

In India this practice does not obtain. In the examination ... otherwise his testimony will be ... is purpose he should be examined ... But it seems that he cannot give ... opinion as regards his own qualification. No exact standard by which ... determine the competency of the witness exists, and much is necessarily ... to the discretion of the trial Court. *Forgey* v. *First National Bank*, 66 Ind. ... Courts that the regular ...

"Wh...
tion, ...
the value of his testimony, and not to the Court for ...

his testimony." *Rog Exp Test* 50. The right to a full cross-examination is thus secured; and if, it turns out the witness is not qualified, the Court should
mination
witness,
rr Jones

§ 369.

Mode of examination of experts—Hypothetical questions It may be plainly inferred from what has already been stated that the testimony of those found qualified as experts is not confined to facts within their own personal knowledge, but that they may give their opinions upon an assumed state of facts, indeed, it is probably true that in the majority of cases in which experts are examined
n facts
assumed
Vide,
Raghun
, 15 C
589 Wl
form of
the hypothetical question in such cases, it is clear that the question should be so framed as to fairly and clearly present the state of facts which the counsel claims to be proved, and which the testimony on his part tends to prove. *Cowley v. People,* 83
as regards fact
v *Bell,* 1 C
If the other si

examination being within
is fairly and reasonably con
other words, the hypothet

would be
defeated

Peerage, Le Marchant,
Cd 379 The facts must
on, 69 Mich 400 Where

is of course no basis for the superstructure *Burr Jones* § 371, *Whart* §§ 441, 451, 452

In *Lord Melville's Trial,* 29 How St. Tr 1065, *Lord Erskin L C* said "If you take away the foundation upon which it is made, which is matter for the Court afterwards, there is an end to the superstructure All that the witness has

S. 45. although the facts assumed by counsel to be true are not proved, or although the question does not state the facts as they actually exist The facts are generally in dispute, and it is sufficient if the question fairly states such facts as the proof of the examiner, fairly tends to establish, and fairly presents his claim a theory *Burr Jones* § 371 Although on questions of professional skill he may state in a general form what could be the proper cause to pursue under the circumstances proved (*Sills* v. *Brown*, 9 C & P 601, 603, *Chapman* v *Wa*... 10 Bing 57; *Rich* v *Pierpoint*, 3 F & E 35; *Collier* v *Simpson*, 5 C & P ... may not be asked what his own conduct would have been under the circum- stances (*Berthon* v *Loughman*, 2 Stark. 258, *Hatch* v *Lewis*, 2 F & F 467, ... *Ramadge* v *Ryan*, 9 Bing 333) *Phip Ev 7th Ed* 380

Protection
the jury, it is ...
existence of a fact ... is controverted upon the evidence ...
not be invoked which of the two sets of witnesses is the more credible or regarding the relative probability of antagonistic stories told by ...
tions raised by the ...

science or skill merely ... the case, (b) Where the issue is substantially one ...

cally, but not en bloc, ... the correct course is to put such facts to him hypothetically, and to state his opinion thereon, asking him to assume one or more of them to be true, ... been said that the former question, where, however, the facts are not in dispute, it has though not as of right" *Phip Ev 7th Ed* p 380

Form of questions Policy as well as principle, require the form of the question to be expressly hypothetical, because otherwise the jury, and perhaps the witness, may be misled by the statement as a proved or admitted fact, of that which is as yet ...

considered, and the fol... ... (Del) 512, the form of the question was very ... question was adopted "You have ... ry to be satisfied that the fa... and ... her witnesses, are true, what is ... ... of the alleged crime? ... the prisoner's mind, at the time of the time of ... Was the prisoner in your opinion, at ... and what kind of insanity or delusion ... conduct of a person under such ... ... Rogers, 7 Met (Mass) 500=41 Am Dec ... adopted the following form. "If the symptoms and ...

testified to by other witnesses are proved and if the jury are satisfied of the truth of them, whether in their opinion, the party was insane and what was the nature and character of that insanity, what state of mind did they indicate; S.

and at the same time to exclude their opinion as to the effect of the evidence in

ge as an expert (3)

, or where inferences of facts must be drawn from the evidence, in order to be reasonably certain of the grounds on which an opinion is based, it is usually necessary that the facts should be stated hyp

rule for all cases,

presiding at the trial

or it will be held t

in a hypothetical question may be very numerous, it sometimes happens that

to answer a question which confessedly rest upon no sound basis of fact Substance rather than form is the important consideration with a sound judicial

of its

he jury

It is not deemed objectionable that the proponent uses the actual names as developed in the evidence in connection with his question to the expert Argumentative questions, that is those which involve a favourable argument which is assumed to be true, may properly be rejected *Chamberlayne's Ev* §§ 2489—2494

is the cross-examination of an

test his memory, observation,

stand as a skilled witness, his judgment upon germane matters may be tested by as uming premises and asking his conclusions *Wigmore* § 684 The fact that the expert was not in a fit state of mind or health to form a proper opinion, or is interested, or corrupt

be elicited in cross

v *Royal Exchange*

139) *Phip Ev* 7th

witness's opinion unless the passages to be used are put in cross-examination to the witness, for him to explain them if he can 46 Ind Cas 393-22 C W N 745.

and

ment

that

not testify that he saw a certain person at a certain time and that he was then

S. 45. labouring under an epileptic fit or
strucken down and rendered uncon
Felter, 25 Ia 75, *per Dillon C J*;
C I. R. Co v. *Bailey*, 11 Oh St 3
the witness had been a stranger to the actual facts, it would then have
necessary to assume a state of facts as the foundation of any opinion he
give; but no such assumption, it seems to us, is necessary when the witness
or is properly presumed to be himself personally acquainted with the
facts of the case If an expert may give his opinion on facts testified to
presumably
fact be want
by cross-exam
and by testimony *aliunde*" *Ibid*

An
why a s
parties to
calls him
the scientific opinion which he expresses, not the party by which such e
is tendered *Lila Singh* v *Bejoy Protap*, 41 C L J 300=87 Ind Cas
A I R 1925 Cal 768

Value of experts "Experts are the most important auxiliaries of
investigating officer, in some way or other nearly always are the main fa
deciding a case But everything depends upon knowing how to make
questioned
But it is al
he ought to
ust know wha
re his know
t seize the
moment for putting his question i. e the moment when he is in poss
sufficient material to ren

"Every Investigat
problems, seeming to
experts in ph ocess traces
chemical exp once furnished the
with certain been cut with a
encouraging feature of judicial enquiries in the present
increasing appreciation of the application of science to proof. *Ibid* p 331

a foreign country, the Court
the Code as best as it can and it should not rely on the outside opinion
eminent, as to the interpretation of that Code *Ibid* But in England
law cannot be proved by produ
as matters of fact. *Mostyn* v
11 Cl. & F 85; *Brenans Case*,
Moo P. C. 481 In England

here the evidence is co . . . . S. 4
reeman, 10 Moo P.
ew York, 96 L J. K. 1
ot by mere certificates
dmissible, for being
n authority. *M'Cormu*
. 157; *Westlake* v *Westlake*, (1910) P 167; *Re Arton*, (1896) 1 Q B 509; *Barter* v *Barter*, (1907) P 333 Another reason for this is that the law is continually liable to change. *Phip Ev 3rd Ed 342* So foreign law is to be proved by expert testimony. The main controversy is whether a witness to foreign law must be by profession an advocate, attorney or Judge or whether a layman, if he claims knowledge may be trusted to speak as to the state of the law The earlier practice in England seems to have been very liberal. *Vide Sussex Peerage Case*, 11 Cl & F 117-134; *Venderdunct* v *Thellusson*, 8 C B 12, 824; *R* v *Dent*, 1 C & K 97 But in *Richardson* v *Anderson*, 1 Camp. 6, *Lord Ellenborough* insisted on the necessity of a professional character in the witness, see al , (1917) 1
K. B. 359; *Brad,* *more* § 564
But the decision have been
held competent — the Courts
f his own coun . *Hanson* v
Dixon, 96 L T 3 non-lawyer,
v *C K* 1900 P 65). A colonial
to the law of his colony (*Sussex*
oldinge the office of coadjutor to
n marriage law A French Vice-

marriage law *R* v *Savage*, 10 East 281 But a mere tradesman in a foreign country can prove the law of that country *R.* v *Brampton*, 10 East 287, *R.* v. *Naguib*, (1917) 1 K B 359 C C A A person to become competent to
expected to know the law from
11 Foreign law on particular
idha, A. I R 1926 M 218 A
Ibrahim 47 A 823 89 Ind
Cas 690 So also his opinion of Hindu Law is admissible *Nara Sinha* v *Rangaya*, 29 M 437

ral, foreign laws are
they can be verified by
it respects the oath
f an individual (*Church* v *Hubbart*, 2 Cranch 237) The usual mode of authenticating foreign laws (as it is of authenticating foreign judgments), is by an exemplification of a copy, under the Great Seal of a State, or by a copy proved to be a true copy, by a witness who has examined and compared it with the original, or by the certificate of an officer properly authorized by law to give the co
Hubba
aws,
by par f
competent witnesses, instructed in the laws, customs, and usages under oath. *Church* v. *Hubbart*, 2 Cranch 237, *Dalrymple* v *Dalrymple*, 2 Hagg. Consist.

S. 45. App pp. 115—144, *Brush* v. *Williams*, 4 Johns Ch 520 ... Cowp 174 Sometimes, however, certificate of per ons in high author ... been allowed as evidence, without other proof" *Story on Conf of Law* 647; *Greenl Ev* § 486; *In re Dormoy*, 3 Hagg Eccl. 767; *R* v *P...* Howell's State Tr. 515—673 When foreign law is allowed to be proved ... of experts, he is allowed to refer to accredited authorities on the ... refreshing memory. *Nelson* v *Lord*, 8 Beav 527

As regards proof of foreign law, *Vide Gangadhar* v *Swaminath* ... Cas 112 = A I R 1926 Mad. 218.

systematized, and has obtained method, relations and the forms of law ... *Davis J* in *Atchison & Co* v *U. S*, 15 Ct Cl. 140 Expert t... usually thought of in connection with enquiry as to technical or ... scientific questions—questions requiring, as an essential to ... judgment, a special training of the mind—and this is the f... which the usefulness of such testimony is most often felt. The ph... of human body, and the condition and operation of any of ... tions, have been a fruit-field for this class of testimony *Young* v *M...* 103 Mass 50, *McKelvey's Ev* S 138 So on questions of science or ... relating to some art ... may give their opinions ... to cause death, the o... J L ... of th... sible ...

testimony called for from medical and surgical practitioners, and ... details of the various branches, upon which such evidence has been cal... and received, will disclose only portion of the area covered by the num... cases which increases with every discovery in either medicine or surg... opinions of physicians and surgeons may be admitted to show the ph... condition of a person, the nature of the disease, whether temporary or pe... nent, the effect of disease or physical injuries upon the body or mind, as ... in what manner or by what kind of instrument they were made, or at what ... wounds or injuries of a given character might have been inflicted, which ... would probably be fatal or actually did produce death, the cause, sympt...

a physician how certain wounds or injuries were actually given, ... treons ... may be asked by what ...

ment or medicines (*Matteson* v *New York C S Co*, 35 N ... be proper treatment under a given state of facts (*Wright* v *Hardy*, 22 W... the probabilities of recovery from the effects of an injury [*Hall* v ... Watts (Pa), 227]; what, under certain circumstances, might cause d... *...ell*, 7 N J L 2... ...c. March. R, D... ...ity is real or feigned ...

v *Hayden*, 51 Vt. 296), and whether or not great mental anxiety and ... would tend to develop insanity, where there is an hereditary pre... (*Dearnette* v *Commonwealth*, 75 Va. 867) Upon the question of the ...

edical practitioner testifying in mental cases, there is a diversity of decision, S. 4
American Courts, the preponderance of authority being in favour of accepting
educ
ecial
prac
inch
nce with the subject may always be inquired into to enable the jury to estimate
weight
perience
ssessed
is grou
stimony
the causes, nature and effects of disease among animals *State* v. *Sheets*, 89
C 543 As a preliminary question as to his qualification as an expert, a
edical witness may be asked whether the examination made by him was careful

ate whether the injuries he is a speaking of amount to grievous hurt or not, but
ly to describe the nature of the injuries *Empress* v *Balwant*, A W N 1885,

edical man that has not seen the corpse, can give only expert evidence

ortem examinati
oticed by him
leher Ali, 15 C 5
erson is in issu
om wl
edical
hould
nd to whom extracts might be put *Shea Bahadur* v *Beni Bahadur*, 6 O L J
78=51 Ind Cas 419

Testimony of physicians and others as to poisons Toxicology is regarded
n some jurisdiction as part of scientific knowledge of physicians, and to a
ertain extent this is justified by the course of education of medical men Thus
is t
erien
nd t
ician
resen
equisite knowledge of chemical science Although it is usual for experts to
ubject compounds to a chemical analysis before testifying whether they are
oisonous, or as to their ingredients, and although this has sometimes been
eld indispensable, the better rule is that the opinion may be received, although
his test has been omitted, it being a matter which affects the weight rather
han the competency of the testimony *State* v *Slagle*, 83 N C 630, *Burr*
Jones § 379.

Mechanics and machinists as experts When a witness shows himself
expert in any particular art or craft, to admit of an examination properly
addressed to persons of skill in that department of industry, he is competent
to give an opinion upon matters of which the jury could not be expected to
judge accurately from the mere detail of facts *Cole* v *Clark* 3 Wis. 323
Hence it is that the opinions of machinists and artisans may be received as
e with the
coming to
opinions are

S. 45.

(*James* v *Hods*
value of labour,
Cook, 69 Ill 581
v *Naglee*, 17 Cal
such work (*Shut*
such manner a
(U S) 167), or
by certain mach
certain force of n
certain mode of
machine itself w

Experts on agriculture As illustrations of the same principle the op of those skilled in farming and agr ... be received as to the pr mode of probable stances, probable as to value, age, and weight of domestic animals and as to the ... proper management of stock Milk experts are competent to testify wh certain liquid exhibited to them looked and tasted like milk and water *Burr Jones* § 382

Insurers and insurance The opinions of persons specially skilled ... are admissible on questions *Expert & Op Ev* 31, *Thornto* *Beckwith* v *Sydebotham* 1 admitting the evidence said say whether, upon such and such symptoms a person whose ... could at the time of the insurance have been in good state of health ... can testify as to the average duration of life with respect to the value ... annuities *Rowley* v *London*, L R 8 Ex 221

admissible —

Turn

Knight, 43 Me 27

"*Book-keepers*—As to the meaning of an entry in a bank book ... difficult to decipher *Knox* v *Savings Bank*, 93 Mich 19

"*Botanists*—As to whether the working of coke ovens near a park ... the trees in the neighbourhood *Salvin* v *Coal Co*, L R 9 Ch App 705

"*Chemists*—As to the effect of a particular poison ... Park. 319

"*Engineers Civil*—*Eggers* v *Hoges*, 37 Pac. R 1037

"*Engineers, Electrical*—As to the imperfections of contrivances by ... *Street*, 57 N L J ... tank was ...

rail road was finished ...

or quantity exists on the ...

in question

"*Inventors*—As to the value of the case of certain inventions ... stock cars *Burton* v *Burton Stock Car Co*, 50 N E. R. 1029

"*Photographers*—As to the genuineness of a signature to a note ... *Barnes*, 16 Gray 161

"*Post office—Inspectors*—As to whether a document is written in feigned S. 4
r natural hand *R* v. *Cator*, 4 Esp 187, *Revett* v. *Braham*, 4 T R 4 97.
"*Surveyors*—*Grand Rapid S R Co* v *Chesboro*, 74 Mich. 766
"*Veterinary Surgeons*—That a horse has blind staggers *People* v *Bain*, 3 Mich 453" *Lawson Op & Exp Ev* pp 7—9

Handwriting The genuineness of hand-writing, including under this

ire, however, co

he law deems
aid that the ge

imples of the use of circumstantial evidence extrinsic to, outside of, a docu-

thought, habit, character, as these, tend to develop each from the other, in this order, as a result of mental action In other words the tendency of mental, physical or metaphysical impulses to express themselves in physical action is the basis on which rests the probative force of resemblance in
es himself into his hand-writing To
Naturally, this can, as a general rule,
formation of physical habits. Practi-
l as it were,
trained eye
er. On this
the inference from resemblance is based

not have seen the person in question actually write. (*Chamberlayne's* Ev §§ 2177—2179)

An opinion c
disputed writing
English common
fully in *Doe* v
divided (*Lord Denman and Mr Justice Williams* favouring and *Justices Coleridge and Patteson* opposing) upon the question of admitting the testimony of an expert who had made an examination of admittedly genuine specimens on the first day of the trial, and was called to testify on the second, and at that time stated that he thought he had acquired a knowledge of the

S. 45. handwriting in question sufficient to enable him to tell whether the particular specimen was genuine. The Judges, however recognize with unanimity the established English common law doctrine that comparison of hands by the jury or by witnesses will not be allowed upon specimens introduced for that purpose. For purposes of comparison it is held that only original specimens may be used, press copies will not do. *Lord Denman*, in this case, speaks thus of this class of evidence "On the question whether handwriting, looked at by itself, is genuine or forged, the cases appear to me to have justly exploded the notion that bare inspection by the most skilful person can form an opinion

in point of reason ... evidence. "But where," says *Mr W. D. E*

... with the imme... is aided by the compari...

... mind may be supposed to have acquired from the previous perusal of these very writings or even from the casual inspection of a single act is received and acted upon without objection" *Mr W. D. Evans, Notes to Pothier*, II, ...

That note was written by ... the scientific aspects of ... great Judge like *Lord Cole* ... the learned Judge said ... not to the formation of the latt...

... has been selected, (still) ...

§ 1998 "T... as to the general ...

... corresponded with him" *Wigmore* § 1998.

Objection based ...

... with an admitted specimen placed before him. Therefore an ...

S. 4

genuine
additional
as to be
essential
lly stated
by *Lord Coleridge J.* in *Doe* v. *Suckermore*, 5 A. & E. 706: "If the

of for the purpose of the trial ...
of *Lord Colerid,e* is based on the assumption that the first of these modes, as indicated by *Prof Wigmore* is the only one which is proper and possible and

S. 45.

§ 2000 But the better way to avoid ... second mode of evidencing genuineness, ... proving it to the Judge. In *University of Illinois v Spalding*, 71 N H. ... 51 Att. 731, *Remick J* thus said: "The third objection—that to permit comparison with specimens not otherwise in evidence, and admitted for the ... purpose of comparison, would introduce collateral issues and confuse and distract the jury—is when applied to specimens neither admitted by the par...

... undoubted evidence This involves, indeed a marked departure from common law It does away with the common-law limitation of comparison ...

exceptions *Wigmore* § 2000

Thus stood the law in ... Procedure Act of that year (17 ... of a disputed writing with any ... to be genuine, shall in civil ... such writings and the evidence of witnesses respecting the ... submitted to the Court and the jury as evidence of the genuineness or otherwise ... years later a section in precisely the ... Evidence Act, 1865 (28 & 29 Vi...) ... ference between the rules governing ... and criminal cases no longer ex...

Wills' Cir Ev p 233

Basis of expert testimony for proving handwriting "Manifold as are the points of difference in the infinite variety of nature in which one man ... from another, there is nothing in which men differ more than in ... and when a man comes forward and says, 'you believe that such a man is ... and gone; he is not; I am the man,' if I know the handwriting of the ... supposed to be dead, the first thing I would do would be to say, 'sit down and write that I may ... of the man ...

... handwriting of the defendant, and to compare it with that of ... *Roger Tichborne* and with that of *Arthur Orton*" *Tichborne Trial* ...

S. 4

Nisi
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ient i
rom fix
Environ
ormatic
lmost automatic succession of acts stimulated by these habits Thus, a person's style of writing, in most details, becomes as fixed as the habit, and serves as a continuous inseparable mark of that one person Moreover the imitation of one style of writing by another person becomes difficult, because the other person cannot by mere will-power reproduce in himself all the muscular combinations
to this that modern apparatus,
f details, characteristic of the
, the imitator (For a complete
of handwriting, the reader is
referred to the following masterly treatise *Albert S Osborn*, 'Questioned Documents')

"Thus the data of graphic science make it possible to assert almost the universality of the proposition No two persons' handwritings are normally
This proposi-
finger-prints
and as such
rship of docu-

investigating

as a standard to

ermination of this skill must of
. Courts as applied to the circum-
5 Various forms of test have
lute. In *Doe* v *Suckermore*
ess must be conversant with the
of a Court of Justice to be
012 The following persons
itters of handwriting —(1) Post
Ic 4th Ed p 556; *Last Ec* §
246), (2) Bank clerks, and (3) Lithographers. A solicitor can also give opinion as an expert if he has made a special study of the subject. *R* v *Silverlock*,

S. 45. Act V of 1899,
has been appli
parison being m
An expert may
his evidence But he cannot go on and assert his mere opinion or belief as
it were a fact within his knowledge. In this respect an expert witness is
different position from a direct witness of fact. The value of ordinary or
expert oral evidence mainly rests on the credibility of the witness—his
and capacity, for telling the trut
skill of the witness—the extent
Emperor v *Saldeo*, 3 N. L R.

same combination of types, it has been said that the chances of a single
marks showing the same pattern as another's are as, to about 64 millio
hence the c
another ten
of the scienc
p 118, see also *Public Prosecutor* v. *Virammal*, 23 Cr L J 694.

The accused was convicted of theft. He had three previous conv
The previous convictions were denied by the accused, and, in order
slips, and the
pressions of the
finger impr
sheets he produced from the finger impression bureau, he declared
accused m
produced
not person
the sheets he produced *Held*, the previous convictions of the accused
on the slips were not proved by the mere production of such slips.
King-Emperor, 4 L. B R 125=7 Cr L J 406. Where the thumb impr
on a document were blurred, and many of the characteristic marks were
from clear, rendering it difficult to trace the marks enumerated by an
witness as demonstrating the correspondence between the thumb impr
in the document and those made by the accused in Court, *held*, that
circumstances of the case the evidence was not reliable and the jury
is not acc
Hamid, 32
eyes and

no two human beings have the same thumb-markings, and, if

S, 4

o is charged with having forged a document purporting to have been executed
l of the Act, if their
Empress v Fakir
en cross-examined
he had put a parti-
lue and weight to
ed by applying to it
ected Sarwar v.
finger print expert
and subjected to
oss examination in open Court *Pitam* v *Baboo Singh*, A I R 1924 Nag 183
Court should be very chary in accepting an opinion of Finger Print Expert
hen such
itself so
pears on
e document *Ramlakhan* v *Dharamdeo*, 97 Ind Cas 335=A I R. 1926
at 575 Under this section the opinion of an expert formed by comparison
the thumb impression of an accused taken in Court under Act XXXIII of
920, s 5 with his thumb impression on deeds is admissible in evidence.
uperintendent v *Kiran Bala*, 30 C W N 373=43 Cr L J 79=93 Ind Cas
=A. I. R. 1926 Cal 531 It cannot be laid down as a rule of law that it is
nsafe to base a conviction on the uncorroborated testimony of a finger print
xpert. The true rule seems to be one of caution, that is to say the Court must
ot take the opinion of the expert for granted, but it must examine his evidence
order to satisfy itself that there can be no mistake and the responsibility is
l th
are
05;
kin
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mp
s not objectionable *Public Prosecutor* v *Kandasami*, 50 M 462=98 Ind. Cas.
9=A. I R 1927 Mad 696

Principles of Judicial Proof p 123

Value of expert evidence generally
considered to be of slight value, since
unwittingly, biased in favour of the side
to regard harmless facts as confirmation of preconceived theories; moreover
ly be multiplied at will'
C. & G 116, 128 *per Lord*
shton, L. R. 17 Eq 373.
deserving of notice is that
elf veracious and
He combines
witness—truthful,

S. 45. false, dogmatic, opinic-... more bully this man ... truth You can no ...

...tenacity of opinion is his weakness I... give up his opinion " *Richard Harris H...*

"It is known, for example' says *Prof. Wigmore*, "that the receipt of fees by experts tends to bias that kind of witness, as it would bias any... and that in judicial trials incompetent persons who falsely pose as e... can often be obtained for hire. It is known too, that the selection and c... of expert witnesses by the parties, instead of their selection by the Judge, ... to create a partisan bias" *Wigmore's Principle of Judicial Proof* p. 334.

...th considerable ca... *...chu Mondal* v *E...* ...s are not bindi... , that the determin... a matter to be ... ndness of the re... W. N. 465 In *B.* v *B*, 42 L Jo 402, the Court accepted the evidence of a wife as to the pa... of a ten months child, inspite of the unanimous opinion of several do... A tribunal should not accept the mere untested opinion of experts in ...ference to direct and positive testimony as to facts *Poynton* v *P*, 37 I... T 54; *Aitkin* v. *Mc Meikan*, (1895) A C 310, *Newton* v. *Ricketts*, 9 A. L. J... The evidence of a skilled witness, however eminent, as to what he thinks ma... may not have taken place under a particular combination of circumsta...

...taken by his own side Besides it must be remembered that an exp... called by one simply and solely because it may be ascertained that he h... views favourable to his interest. *Hari Singh* v *Lachmi Devi*, 3 Lah. L... 110=59 Ind Cas 220; *Boisagomoff* v *Nahapiet*, 29 C 32 Where the... called expert witnesses give no data in support of their opinions ... opinions should be rejected *Pirbhu* v *Secretary of State*, A. I. R. 1931 L... 364. An opinion of an expert witness not based on any well ... inexorable laws of nature cannot be taken as decisive especially where the... direct evidence opposed to it. *Mansel* v *Emperor*, 96 Ind. Cas. 641=27 Cr. L. J 977=A I R 1926 Lah 313 See also A. I R 1928 Pat. 568=161 Ind C... 698 "I am convinced" says *Prof Wigmore* "that the belief that such per... must be the best witness, is false, at least as a generalization ... have had such experience with expert witnesses, and most of us have ... observed that they often give false evidence because they treat the ... in terms of their own interest and are convinced that things must h... according to the principles of their trade However the event shapes itself ... ...inally implies their own appr...

... Every witness must be produced at ... trial, unless and until it is proved either to be actually impossible to pro... him or to be difficult to do so, that it is under the circumstances unrea... ...es such as those to ... ...nal ...

Gill v *Emperor*, 2 O W. N. 377=12 O. L J. 497=83 Ind. Cas ... L J. 1232=A I R. 1925 Oudh 616. But it is not satisfactory to exa... expert witness on commission and not in the presence of the accused. The evidence of an expert has always to be carefully weighed but, when ...

commission, its value is considerably reduced. *Nur Din* v. *Emperor*, 10 Lah. L. J. 235 = 108 Ind. Cas. 369 = 29 Cr. L. J. 377 = A. I. R. 1928 Lah 533 S.

the person whose
medical witness whc
as to the nature of t
In re K. Venkatar
Code does not precl
witness, that has ... elucidation,
. *Roghuni*
...al case the

certificate by itself is not a
person who gave it as a wit
L. R 893 = 47 B 74 = A
Cr. L J. 339. See also *Sa*
80. The certificate of a
in the form prescribed in th
His report on a case by
in evidence without proof of the truth of its contents *Raghunath* v. *Kurseong. Municipality*, 76 Ind. Cas 394

Deposition of Medical witness. Section 509 of the Criminal Procedure Code lays down . "(1) The deposition of a Civil Surgeon or other medical witness, taken
taken on con
enquiry trial
...is deposition" S 509 does not
witness admissible at the trial
before the Court of Sessions it should be recorded by the Magistrate who is

even in the absence of the witness. 38 Ind Cas 764 = 18 Cr. L J 250

Report of chemical examiner Any document purporting to be a report under the hand of any Chemical Examiner or Assistant Chemical Examiner to Government upon any matter or thing duly submitted to him for examination or analysis and report in the course of any proceeding under this Code, may be used as evidence in any enquiry; trial or other proceeding under this Code. (s. 510 Cr. Pro. Code).

S. 45

The report of a chemical . . .
the signature of the Examin :
App 112=15 W. R. 49; 2 We
before the institution of proc
in person 50 Ind Cas 26=20 Cr. L J 266 Chemical examiner's
does not require formal proof, but it must be tendered as evidence and
such It can not for the first time be used in appeal 21 A L J 859–
Cas 904, but see 98 Ind Cas 177=5 Bur L J. 100=A I R 1926 Rang
Failure by prosecution to adduce evidence connecting the parcels con-
the blood stained clothes which reached the Chemical Examiner with

Cas 485=28 C. W N 561.

Report of experts The reports of experts are not legal evidence
, and are examined by parties in respect of
7=20 P. L R 125, 15 C. W N 728 Op
t evidence 76 Ind Cas. 425=1 Rang
Expert opinion given for the purposes of a previous suit is not substan-
evidence and its evidential value is very little 110 Ind Cas 810=A. I R
Lah 921

Palm impressions Palm impressions are akin to finger impressions
expert evidence relating thereto should on the whole be admitted rather
excluded, to be weighed by the Court and the jury for whatever it is
Emperor v *Babu Lal* 52 B 223=29 Cr. L J 410=30 Bom L R 321=
Cas 508=A. I. R 1928 Bom 158

invol
exper
stated by the Supreme Court of Ohio in *Clark* v *State*, 12 Ohio,
"Medical testimony is of too much importance to be disregarded When
with caution, and without bias in favo
speculation and favourite theory, it
even intelligent juries from following a
on inconsistent and unsound principles
and received with utmost caution, and, like the opinions of neigh
acquaintances, should be regarded as of little weight if not well
reasons of facts that admit of no misconstructions, and supported by
to which the judgment of

Qualifications of a medical witness. If the judge be satisfied that
witness is competent to give an inference helpful to the tribunal, it is
essential that he should be able to produce a diploma to be engaged
practice or even to h school The rule is the
in case of a specialist.
the witness, th
the fact as to wh
however must

ask
in murder, the defence was insanity, the judges were all of op ment, such

opinion on the very point which the jury were to decide, *viz*, whether, from other testimony given in the case, the act charged was, in his opinion an act insanity. *Wright*, R & Ry 456, 1821, on the authority of which *Park B* owed a medical man, who had heard a trial for cutting and maiming, to be owed symptoms of insanity it in *Mc Naughton*, 10 Cl & F 2 Russ Cr 2262 (h) See the t words of the Judge's answers In *T Mason*, 7 Cr A. R 67=76 J P 184= T. L R 120 (1911) murder it was held that an expert who has not seen the ly, but has heard its condition described by the witnesses in their evidence, y state his opinion that death was not self inflicted *Roscoe Cr Ev* p 170, . *Reg* v *Newton*, Shrewsbury Spring C Sess Pap 374; *Doe d Bainbridge* v *on*, ib 149, *Sills* v *Brown*, 9 C & P asonable principle" says *William Wills* such, shall be permitted to testify only such matters of professional knowledge or experience as have come within to such proved, so that testing

tness should be. "Assuming an injury of such and such a kind to have been flicted, what is your opinion as to the nature of the weapon by which it was ssibly or probably inflicted" *Roghum* v *Empress* 9 C 455 It is a settled questions entitled to be laid by *erwaji*, 10 an L R 907 (913) For questions to be put to medical witness, vide Achariar's 'ills' Cr Ev App II

The most legitimate, valuable and wonderful application of expert evidence on charge of poisoning where poison is extracted from corpse by means of emical analysis *Best Ev* § 514

Medical Inferences—Probative weight Many considerations may, as is atural, affect the weight ... he inrence of a s not cently made bative rce which drawn om it In h part, pon the truth of the statements made to him by the patient or by others is garded as impairing, to a certain extent, merely the weight of his testimony either a jury nor the trial judge is presumed to have such technical knowledge pass upon the improbability of

y an examination ian those reached by itness toward the ay, e g that the witness is interested to support his present contention in other onnections *Chamberlayne's Ev* § 2030

Medical I

In many instan- This being so; they

S. 46. are received by
case of any other
although the wit
men who have ob
value from the
facility and obvious incentive for accurate observation, and that their
would fit them to appreciate and describe what they observed *In the g*
Goppesser Dutta, 16 C W. N. 265 (273) But as regards expert w
has already been said that "Tenacity of opinion is his weakness. He
sacrifice truth itself rather than give up his opinion." Medical witness
be carefully watched in these respects. They are witnesses of theory
are most tenacious of their opinions. *Hints on Advocacy by Richard Har*
pp 84, 97, 117 The following observation of *Mr Justice Norman* in
v *Ahmed Ali*, 11 W R 25, is very pertinent: "The evidence of a me
man or other skilled witness, however eminent, as to what he thinks
or may not have taken place under a particular combination of circum
however confidently he may speak, is ordinarily a matter of mere opi
Human judgment is fallible, human knowledge is limited and imperfect
and previously unobserved phenomena which till they have been record
suppo
easy to
had he
comme
accepte
much
42 L J
a ten months child, inspite of the unanimous opinion of sever
Ev 7th Ed. p 375

Where the age of a party has to be decided for purposes of
No doctor can give the precise age of
o determine the exact date of that
Lah 250=10 L L J 183=113 I
by a doctor that a person is of 21 years
and he ... voice and teeth of that per
opinion
P C
of the
W N 577=45 I A 284 P C =49 Ind Cas 580;
56 Ind Cas 313 Opinion of a doctor as to the physical condition of
patient on a future date, is hypothetical and cannot be relied upon
against people who saw the person concerned on the said future date
v *Nilapagandu*, 83 Ind Cas 616=26 Bom L R 625, see also
Sudhir, 50 C 103; 9 A W N 74 The mere presence of semen
loin cloth of the woman, is not sufficient to prove, that she was con
party, especially in the absence of any spermato zo in the vagina.
v *Emperor*, A I R 1925 Lah 94=6 L L J 474.

Facts bearing upon opinions of experts.

46. Facts, not otherwise relevant, are relevant if th
support or are inconsistent with the opin
of experts, when such opinions are relevant

Illustrations.

(*a*) The question is, whether A was poisoned by a certain poison.

The fact that other persons, who were poisoned by that poison, exhibited
certain symptoms which experts affirm or deny to be the symptoms of
poison, is relevant

(*b*) The question is, whether an obstruction to a harbour is caused

relevant.

S. 4

it the round about way of stating that the
rroboration or rebuttal The illustrations
, for this purpose, *res inter alios acta* is
eivable *Nort Ev p 225* So this section embodies a general rule which
s down that evidence of collateral facts cannot be received. *Vide Taylor Ev*
37. For purposes of corroboration, the proponent of the inference commonly
kes use of the text book statements at the stage of exmination in-chief
sting by means of them usualy takes place on cross examination. *Chamber*

oponent uses it to enhance and corroborate the force of what his expert says
ie right of a proponent, who has submitted an inference, conclusion or
dgment of a skilled witness to corroborate within reasonable limits, its proba-
re effect by showing the sound nature of the reasoning upon which it is based
ems unquestionable *Ibid* § 2528. The authority of the text writer can not
used as proof that the statements contained in the work are true The
arsay rule forbids the use of the declarations in their assertive capacity At

e same as that which it has on direct. In other words the statements contained

nto employing in their probative capacity This result the judge may attempt
o reach by mean
hey may use

by ss. 57 and 60
killed an expert

that madness is often of an hereditary character, evidence tending to show that none of the defendant's ancestors or near relations had been insane, would be admissible in support of the negative proposition; and on a question of disputed paternity, after proving as a matter of science, that children are apt to inherit the features or general appearance of their parents, evidence will be received of personal resemblance between the party in question and his alleged father.

S. 47. *Bagot* v *Bagot*, 1 L R Ir 308, *Tay Ev* (9th Ed) § 337. An expert w himself paralysed in the arm and leg may support his opinion as to the e of such paralysis by testifying to its effect on himself *Chicago R C Lambert*, 119 Ill 255 (Am)

an ; 157 up of a harbour, and e of the wall, proof that ... bankments, had began to be choked about the same time as the harbo question, was admitted, as such evidence served to elucidate the rea on th

Wi

Mr Smeaton's (the expert) opinion, but as to harbours in which there embankments, we think it was improper, since *litem lite resolvit*"

47. When the Court has to form an opinion as to the pe son by whom any document was written signed, the opinion of any person acquaint with the handwriting of the person by who it is supposed to be written or signed that it was or was n written or signed by that person, is a relevant fact.

Opinion as to handwriting, when relevant

Explanation—A person is said to be acquainted with th handwriting of another person when he has seen that person wr or when he has received documents purporting to be written b that person in answer to documents written by himself or und his authority and addressed to that person, or when, in the ordinar course of business, documents, purporting to be written by th person have been habitually submitted to him.

Illustrations.

The question is, whether a given letter is in the handwriting of A merchant in London.

B is a merchant in Calcutta, who has written letters addressed to A received letters purporting to be written by him C is B's clerk, whose was to examine and file of B's correspondence D is B's broker, to wh habitually submitted the letters purporting to be written by A for the purp adv ing with him thereon.

The opinions of B, C and D on the question whether the letter is in handwriting of A are relevant, ... nor D ever saw A wr

Principle distinct kinds the act of writi act, secondly, evidence of the kind of handwriting ... the establishment

mode, there is always an inference from the type to the ... ation is

S. 4'

of an inference. The difficulty
has not been over the relevancy of
dwriting traits to show the authorship of writing but over the mode of
lencing them by circumstantial evidence, and that is by examining one or

cause when the specimens to be used are themselves before the jury, they may
imine them to form an opinion as to the standard or type of writing, and
ice the opinion of a person of ordinary experience only, based upon these
ecimens, being no better than that of the jury themselves, is not needed, and
excluded by the opinion rule, and hence the only persons whose aid need be
ted in studying these standards are those who have some special experience
er and above that of the jury Thus,
ses whether the person whose aid
ne skill not possessed by the jury"

"The rule as to the proof of handwriting, where the witness has not
cument in question may be stated generally
the party write on some former occasions
and the transactions have taken place between
g to have been written or signed by
supposition, the witness is supposed
, not so much of the manner in

specimens, but to the general character of the writing, which is impressed on
is as the involuntary and unconscious result of constitution, habit, or other
ermanent cause, and is therefore itself permanent. And we best acquire a

ainedly, but in his natural manner" *Per Coleridge J.* in *Doe* v.
uckermore, 5 A & E 703.

he latter is to be regarded as genuinely an instance of the type in question.

S. 47. How to evidence the type of specimens—is a different matter. the mode of proving it by testi that he is acquainted with the typ situation the witness (1) must [illegible] of writing with which [illegible] the adequacy of this knowl[illegible] [illegible] witness properly claim that opportunities of observation have been such as to give him a fair knowl[illegible] of the general type or character of the person's hand *Wigmore* § 693 ordinary methods of proving handwritings are (1) calling as a witness a p[illegible] who wrote the document or saw [illegible] [illegible] qualified to express [illegible]

[illegible]

hand This section deals with opinion evidence of non expert w[illegible] prove handwriting A person is considered qualified to testify to handwr[illegible] when he has seen the person whose handwriting is in question (1) wr[illegible] (2) in the ordinary course of business, has become familiar with such per[illegible] handwriting through the receipt of communications purporting to be wr[illegible] by him, or (3) when in the ordinary course of business, documents purp[illegible] ing to be written by that person have been habitually submitted to h[illegible] *McKelvey's Ev* § 145 This section lays down another real exception to the rule excluding hearsay evidence. The reason for the exception is p[illegible] Unless a signature or writing has been made in the presence of a witness [illegible] can afterwards identify it, the only possible proof of handwriting is op[illegible] evidence, and opinion evidence of person specially qualified to testify [illegible] have thus in proof of handwriting the same two classes of expert test[illegible] which have been before referred to,—that which is based on observation [illegible] that which is based on special training, or education upon a particular [illegible] There is some difference of opinion in the authorities as to just how m[illegible] familiarity from observation wil[illegible] to give his opinion as [illegible] handwriting The general rule h[illegible] once specially qualifies a person [illegible] *Varian*, 54 N Y 395; *Taylor* § 18[illegible]

21 Wend (N Y) 557

[illegible] There should [illegible] *Wigmore* [illegible] uld control [illegible] the mrk is hab[itual] [illegible] & Ma. 516; [illegible]

his signatu initial amounts to a S,
signature Re Emerson, 9 L
R I. 443; E indwriting includes
everything Webster, 5 Cush 301
(Am); Sayo ether "mark" can

) saw

ether
m v

writing,' we th
with his hand,

When he has seen the person write—Ex visu Scriptionis A person is acquainted with the handwriting of another when he has seen that person write whether often or seldom, much or little, recently or long ago *Lawson Op & Exp Ev* Rule 47 In *De La Motte's Case*, which took place in 1871, *Mr Justice Buller* said to the jury "The counsel on the part of the prisoner has just objected that similitude of handwriting is no evidence They certainly are right in the argument, but the objection does not apply to this case Similitude of
body that has
nce is made
), but that is
the papers
which you have heard read; they have all been proved by persons who were

knowledge they say they believe the letters and papers are of his handwriting That, gentlemen is the only evidence that can be given of handwriting; except it happens that there be a person who saw the prisoner actually write the papers" *Hensdy's Case*, 19 How St Tr 1341 In *Hoper* v *Ashley*, 15 Ala

rule that seeing the per
Wigmore § 694 *Garrells* v
William v *Warrall*, 8
Warren v. *Anderson*, 8 Sc

S. 47. write on any other occasion The Court admitted his evidence *Garrels* v *Alexander*, 4 Esp 37 The question is whether a paper is in B hand C seen him write only once His opinion is admitted *Horne Toke's Case* 25 H St. Tr 71, *Wellman* v *Warrall*, 8 C & P 380; *Warren* v *Anderson*, 8 Scot. A was sued on a note which he denied ever having signed To prove signature, B, who has seen A write but once, and then only to receipt which B had paid to him,

that case the Court observed

called to prove the handwr

large number of times Handwriting, like the countenance, form gait gesture of a party, is recognized by some more readily than by other

more decisive and obvious peculiarities than

ascertain whether the witness has been

he knows to be that of the party and

he must, upon his oath, declare if the writing exhibited appears to him that of the same party The weight to be attached to such testimony depend upon the ordinary tests of knowledge, the capacity of the witness his disposition to tell the truth, and the means that have been afforded whether from the intrinsic nature of the subject itself or the familiarity of the witness with it, to acquire the information he assumes to have The witness to the genuineness of the defendant's signature to the note was therefore properly admitted" See also *Hartung* v *People*, 4 Park C C 319, *Do* v *People*, 6 Park C C 120, *Lawson Expt & Op Ex* p 336 *Mr Evans* 'I have known the admission of this evidence carried so far as for a... after the failure of other attempts, to stand up and swear to a knowledge the writing of the opposite party from having once looked over his... when ... *Evans's Pothier Vol II*, 160, see also

In *Powell* v *Ford*, 2 Stark, 164 where the witness had seen ... his name only once, on which occasion he did not write it at length, but ... the initial of his Christian name, *Lord Ellenborough* said that "if the ... had seen the defendant ... at full length although but once ...

Christian name, and that it was as necessary to prove the ... as well as the surname to be in the defendant's handwriting, and that ... was not to be inferred from the other, any more than the rest of the name ... could be inferred from proof that one or two letters were in his handwriting ... But ten years later, in *Lewis* v *Sapio*, M & M 39, *Chief Justice* ... to be bound by this ruling In this case, to prove the defendant to be ... ... that he had seen him ...

is the foundati

"When I first c

ton, 8 Ves. 424

Courts, was this

party write. If he s

enough to introduc

be his handwriting

to go to the jury If he refused to answer to his belief, he was ... too much, to form a belief, but if he would not go to the ...

seen him S.
subsequent
. and if he
ht go to the
ture of all
& E 793,
Patteson J said: "All evidence of handwriting, except where the witness sees
o belief which a
an exemplar in
vledge may have

13 W. R 191

The question is whether a certain paper was written by T W, who has not seen T write for nineteen years, is called, and his testimony is received *Horne Tooke's Case*, 25 How St Tr 71, see also *Warren* v *Anderson*, 8 Scott 384, where the witness has seen the writer to write ten years before So in *Smith* v. *Walton*, 8 Gill 18 (*Am*) a witness was allowed to depose after six years In that case the Court observes "The impression made on the mind of a witness who has seen a party write his name only in a single instance may be exceedingly faint and imperfect, but it is nevertheless testimony, provided the witness

more vivid and lasting impression from the examination of a single signature

—an assumption
be acquired after
comes important

S. 47. to testify as to the genuineness of a signature where his knowledge was d
o him purporting
saw her wri
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the letter
Thorpe v
v *Fry*, 1 C
Bl 384; *Municta* v *Wolfhagen*, 2 C & K 744; *Southern Ex Co*
41 Miss 216, *Parsons* v *McDaniel*, 62 Ga. 100. *Lawson Exp & Op Ev*
The question was whether a document was in T's handwriting B had re
letters purporting to come from A, and had answered one of them, but
received no reply thereto B was held not qualified to prove A's handwr
Webb v *Manro* Morris (Iowa) 411. "The witness in the present instance"
the Court in the above case "had received two letters purporting to come
the defendant, to one of which he had replied Had the correspondence
ld have been so far rebutt

ification that the
Bolinger, 59 Tex 411 In
English case on the legal
hen speaking of the facts rec
to introduce knowledge of handwriting, not from actual inspection but
correspondence I adverted to an expression in frequent use, and which
ha
let
it
the word act done the observation is without foundation
sort is necessary Anything from which the identity of the writer is
may suffice" In *Cunningham* v *Hudson River Bank*, 21 Wend 559,
that a person had re

and that merel
His belief is of
such a reason
that the

The law in *America* on this point is thus
al letters purport

the part of the supposed writer, other than the letters
letters are genuine, and in the handwriting of the person from whom th
to come A person who has heard business correspondence with
upon by both parties, is competent to testify as to the handwriting of
pondent, although he may never have seen him write But wh
have no relation to business transactions, but are letters of merely
in some way

and contents of the letters. The testimony of

S. 4

ffect that he had known the plaintiff for fourteen or fifteen years, did not know whether he had ever seen her write; corresponded with her about fourteen years ago, received about a dozen letters in answer to his own, with her name signed to them; had received no letters recently, had some of the letters with her. The question was then propounded to him: From your knowledge of her

l you know
to be asked,
ld not know

1 W. Bl. 384, per *Lord Mansfield*; *Barnes* v *Trompowsky*, 7 T R 265 *Ovenston* v. *Wilson*, 2 C & K 1; *Murieta* v *Wolfhagen*, 2 C & K 741; *Turner's Case*, 3 Cr App 103, 155 = (1910) 1 K B 346 In the last mentioned case a document of consent signed by the Director of Public Prosecutions was put in In

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of K was clearly competent The witness testified that he had corresponded with the merchant in New York whose signature was to be proved, by writing to him, and receiving letters from him, and in this way he had acquired a knowledge of his signature The objection was, the 'witness had not shown himself qualified to speak of it' It is within one of the above modes stated whereby the competent knowledge may be acquired, and the witness professed that in that way he had acquired his knowledge of his operations."

When in the ordinary course of business, documents purporting to be written etc —Ex Scriptio Olim Visis A person is acquainted with the hand writing of another when, in the ordinary course of business, writings purporting to be written by that person have passed through his hands *Berg* v *Peterson*, 49 Minn 420 (*Am*), *Tuttle* v *Rainey*, 98 N C 513 (*Am*) "The clerk" as *Lord Denman* remarked in *Doe* v *Suckermore*, 5 Ad & El 703, "who con-

by the supposed writer of the paper in question' In Tidford v Knott, (2 John Cas 214) it was held that the sig
person who had been in the habit of se
believed the signature to be his '.
plaintiff's notes, all of which, except o
notes, with his signature to them, une
made and subscribed them If, then

he handwriting, he was
ight to have been asked
handwriting if he
answered that question affirmatively, then the receipts should have been rece
in evidence" Lawson Expt & Op. Ev p 343 Where the genuine
signatures to bank bills is disputed, the evidence of bank officers, th
whose hands similar bills pass daily, is obviously of highest value.

not connected with the bank, but who have frequently received and paid
bills purporting to be issued by it, and who have cashed such bills at the b
are competent to testify to the signatures of the cashier and president on
bills alleged to be forgerie
president write Com v
American Case, "that no
and cashier c
habit of rec
sound one
been in the

to be acqua
official posi
is settled
he can testi
cated with him by letter, although he has never seen him write at all
... knowledge in one

of knowledge of the party's handwriting which enable him ...
genuineness he should be permitted to give to the jury his opinion
subject." ... of the peace may be pr...
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in the off
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N. C 112); a jailor through whose hands letters signed by a prisoner received from him to parties out side have passed, may, from this circumstance alone, form a sufficient knowledge of the prisoner's handwriting *State* v. *Hastings*, 53 N. H. 450; *Lawson Expt & Op Ev* 399 In order to prove the handwriting or signature of another person one must show that he is acquainted **S. 4**

Emperor v *Pande*, 27 Bom L R 1031 = 89 Ind Cas 1042 = 26 Cr L J. 1474 = A. I. R 1925 Bom 429

N Y 398.

Signature of a Partnership firm A witness may be acquainted with the signature of a firm without being able to identify the handwriting of either or any partner *Gordon* v *Price*, 10 Ired 385 "It is of no consequence that the

the witness The substance

witness has drawn the inference that they were made by one and the same individual The strength of his belief will depend on the greater or less degree of similarity He can only testify to his own state of mind on this question. The

S. 47.

belief was properly before

he could not sw
understood by
thereby to limit
to say that the
testimony of a p
that he is of *opinion*, or that he *thinks*, the paper is genuine, yet, it ... step further when the witness will only state that the handwriting is like ... statement which may be perfectly true, but yet, within the knowledge of the witness, the paper might have been written by an utter stranger ... § 1868

Knowledge of handwriting acquired for the purpose of testifying ... ledge of handwriting, acquired for
where it is clear that there was no mot
to manufacture testimony *Reese* v. ... Ind 635 (*Am*); *Lawson Expert & Op Ev Rule* 54 The question at ... a trial was as to the handwriting of A B was offered as a *witness* It appe... that previous to the trial, A had written his name for the purpose of ... B, his mar
Esp 15
because, h
common
ing letter,
handwritin

since the controversy on the subject arose To this general rule ... can be taken *Chamberlayne's Ev* § 2198; see also *R.* v *Rickard*, 13 Cr ... R 140, *Stranger* v *Searle*, 1 Esp 14; *Fitzwater Peerage*, 10 C. & F 193, ... *Suckermore*, 5 A & E 703

... the burden
proof
burde
insufficient to qualify him *Henderson* v. *Bank of Montgomery*, ... *Lawson Expert & Op Ev. rule* 56 In proof of a document a witness ... he was acquainted with the handwriting of the writer, but he was not ... examination-in-chief any question which would elicit any of the several ... indicated in the explanation to section 47 of the Indian Evidence Act ... 1872) The witness was not cross-examined in the point, neither any ... was
Ram
the
exam...
as it stands *Taylor* § 1863 "It appears to us that this is ... of the law in this country also,
expedient that the matters referred t

position to write to a ... the handwriting" Per Jenkins C J in *Sankarrao* v. ...

Therefore, where the witness has not been questioned on the trial as to his means of knowing a certain handwriting, no objection to the want of qualifications so to testify can be made on appeal. *Ibid*; *Berryman* v *Dahlgren*, 6 Rob 188, *Smith* v *Walton*, 8 Gill 81. So the evidence of a witness contained in a deposition that he knows a certain paper to be in the handwriting of a party is sufficient, on appeal, where the opposite party has declined to cross-examine as to his means of knowledge *Wither* v *Gould*, 8 Watts, 485 So where the

Ev 382.

nce The testimony of one witness to a sign the instrument, and whose credi-

the similarity and likeness to signatures of his which they have seen Such

features or their expression remain as we have been accustomed to see them We know the face, though derangement has imparted to it a new appearance, or when distorted by pain or disfigured by wounds and presented in an entire

s the memory The and trees, and to dis- general class We

daily meet those who, with precise kind of fruit it will bea although, if questioned, they between the several species We judge of writings, as of other things, by its individual character as a whole We must take the opinion of those witnesses altogether, and judge of their testimony as under all the circumstances they shall appear entitled to weight, from their opportunity of knowing the *defendant's handwriting, and your estimate of their skill and judgment* A cashier of a bank is entitled to no more credit than any other person of equal skill" The jury found for the plaintiff *Lawson, Exper & Op Ev.* 380.

S. 48. **48** When the Court has to form an opinion as to the existence of any general custom or right, opinions, as to the existence of such custom or right, of persons who would be likely to know of its existence if it existed, are relevant.

Opinion as to existence of right or custom, when relevant

Explanation.—The expression "general custom or right" includes customs or right common to any considerable class of persons.

Illustration

gation no better evidence can be obtained, or the facts cannot ... presented to the tribunal *Lawson, Op & Expert Ev* Rule 63 ... frequently collective where a combination of the known elements ... pressed in the form of a concl... or ...nference. S...h inference is ...

are, so to speak, the depositories of the customary law just as the ... are the depositories of the general law *Jag Mohan Das* v *Ma...* B 528 (543)

Scope of the section In *Bai* ... 20 B 43 (...) ... said "Mere opinion evidence is ... custom must be proved by specific ... failed to adduce (*Rahimat Bai* v ... *Akbar Khan*, 1 A 441 But in a lat... a tribal or family custom excluding a daughter or sister from ... favour of a collateral may be proved by general evidence as to its ex... members of the tribe or family who would naturally be cognizant of ... and ... instances need ...

who would be likely to know of its existence, if it existed ... relevant, but such opinions must be given by witnesses who ... *Maung On* v *Maung Shue Bein* 1 L B R 80, *Hubraj* v *Chandra* ... 1921 Oudh 89=8 O W N 6 So the statements made by persons who ... a position to know of the existence of a custom or usage in the ... admissible under this section *Sanatullah* v *Pran Nath*, 26 C ... on the ex...tence of ...

excluding daughters
papers, directed to be r
usages of this kind of

under s 35 of the Evidence Act, though they had been prepared by the settlement **S. 4**

most important document contained in the official records relating to the village

of inheritance, or, under section 48 as the *record of opinions* as to the existence it" So their Lordships think who holds that opinion should sed on hearsay *Vide Per Lord Davy* in *Gurudhuaja* v. *Suparandhuaja*, 23 A 37=27 I A 238 *supra*. So according to their Lordsl admissible in evidence tion of the section can construction of the wordi lay down certain well is admissible. But these sections are not in any way exceptions to section 60 of the Evidence Act, which lays down that if it refers to an opinion or to the grounds on which that opinion is held it must be the evidence of the person

M L T. 1=5 A L J and customs, public in evidence Section in cases in which the declarant cannot be brought before the Court, whether in consequence of death or from other cause This section refers only to general

has personally known the right or custom exercised as a matter of fact Custom is not a matter to be submitted to the senses It is made up of an aggregated repetition of the same hough a bare opinion is worth *data* on which it is founded; is to be

the limits of a village or t exclusion of others, a right roads, or plant trees, rights of common and the like, will *Nort Ev 227*

Customs A custom is a particular rule which had existed either actually obtained the force of law in not consistent with the general *od*, 6 Q B 50, *Halsbury Vol X* finite limited locality It may *ylor*, 4 Burr. 2305 For further annotations, *vide* p 211 supra

S. 49. Right "It may be difficult, perhaps to define precisely the scope of the word 'right" but I think it was here intended to include those properties of an incorporeal nature, which in legal phraseology are generally called r...

6 C 171 (F B) at p 185 In the same case *Jackson J* said "It seems to

a very wide interpretation to the
has been said that, in section 13 of
refer to incorporeal rights only,
in ss 32 and 48, where the same word occurs in conjunction with the 'custom' it has been used in that sense. In the first place, it is by no m clear that ss
to conceive
that in the ge
confined to that class only". See also *Tippu Khan* v. *Rajoni*, 2 C ... (F B), *Collector of Gorakhpur* v *Palakdhari*, 12 A 1 (F B), ... *Bapu*, 10 B 439; *Lakshman* v *Amrit*, 24 B 591; *Ramdas* v. *Apparu*, 12 M ... *Venkatasami* v *Venkatareddi*, 15 M. 12; *Vythilinga* v *Venkatacha*, 16 M. 1 ...

Person who would be likely to know The opinion must be of the p... who are likely to know of its existence if it existed *Jugmohandas* v *M*... 10 B 528 (542) In *Sariatullah* v *Prannath Nandi*, 26 C 184, the ques... whether occupancy right was transferable by custom In decidin... competent to prove customs ... the Court observed "We in the present case also the
to know of the existence of
F

and I think that the opinion
out by the learned Judges under

custom *Nort Ev* 227. In *Wright* v *Tatham*, 7 A & E ... 5 Cl & F. 720, *Coltman J.* asked: "Where boundary is proved by re... what is the guarantee for ...?" *Mr. Starkie* replied: 'The publ...

v *Sparke*, 1 M. & S 690, per *Baley J.*

Opinion as to usages, tenets, etc., when relevant

49. When the Court has to form an opinion as to—

the usages and tenets of any body of men or family,
the constitution and government of any religious or char... foundation, or

the meaning of words or terms used in particular districts or by particular classes of people, S. 49

the opinions of persons having special means of knowledge thereon, are relevant facts.

Principle The matters mentioned in this section can only be proved by persons having special means of knowledge.

Scope of the Section The kind of evidence contemplated by this section must be the expres
petition of hearsay
the existence of a
information derived from deceased persons *Gurudhwaja* v *Suparandhuaja*, 23 A. 37=5 C W. N. 33 (P. C)=27 I A 238=10 M L J. 267 (P. C)=2 Bom L R 831 Where a certain member of a family accepted a certain interpretation of a clause in *Wajib-ul arz* the fact is admissible in evidence as to how a custom applying to the family is interpreted by members of that family. *Sharfuddin* v *Niamut Ali* 87 Ind Cas 8=A I R 1925 Oudh 688 Opinion

R 6 O. 101.

omitting any reference to the legal effect. *Wigmore* § 1954 But the mere assertion of a "custom" does not involve opinion *Conner* v *R Co*, 146 Ind

The effect is to be determined by the Court. *Hoskins* v *Warren*, 115 Mass 514, 535. "The inquiry . . is not after the opinion of traders and merchants in respect to the law upon a given question, but after the evidence of a fact, to wit the usage or practice in the course of mercantile business" *Allen* v *Merchant's Bank*, 15 Wend N Y 482, 488 So a party may exmine witnesses to prove a particular course of
of facts, but not to show what the law is
145 (149) It is sometimes said that a
specific instances, or must at lea
statement of the general practic
Lord Mansfield and later Judges,
Edie v *East India Co*, 1 W Bl 295 (297), 2 Burr 1216 (1222), *Mansfield L C. J* said "Many witnesses were examined by defendants to prove this

Benson, 7 C. & P 711 (714) *Tindal C J* observed "Is there any general course of business? Let your mind revolve over instances I am not asking you whether it is just and proper, but whether there is any prevailing course of business." "But" says *Prof Wigmore* "there is no rule of exclusion The usage is itself a fact, and the opinion rule does not treat such testimony as an inference from data which can be adequately stated without the inference." *Wigmore* § 1954 This view is in accord with the opinion of *Lord Mansfield*, in *Camden* v *Cowley*, 1 W Bl 417, where he ruled that insurance brokers and others might be examined as to the general opinion and understanding of the persons concerned in trade, though they knew no particular instance in the fact, upon which such opinion was founded So the evidence of a well qualified witness as regards a trade usage, who could not state individual cases is admitted inasmuch as the *factum probundum* is not a single isolated act or

S. 49. occurrence, but the result or conclusion derived from a series of s… or circumstances, creating and establishing in the mind of the witness a c… tion or belief of the complex whol… *Nickerson* 13 All Mass 351; *Wigmor*… of a witness as regards trade usage… section 13, specific instances of usage… this section all usages of trade and… persons having special means of knowledge… 1 Sm L C 546.

long… able. 316,… lished… J. 240; *Lal Gajen*… W R (1864) 20… this section it can b… me. Family custom includes the c… r descent in a family and other customary r…

Tenets of any body of men. This will include any opinion p… dogma, or doctrine which is held or maintained as truth It will s… religion, politics, science, etc *Nort Ev.* p 228.

The constitution and government of any religious or charitable founda… The opinions of… constitution and… vant under this… Thus in *Shore* v… early part of the eighteenth century, had, in the deed of grant, des… objects of her munificence as 'Godly preachers of Christ's Holy Go… it became necessary to determine a few years ago what persons were…

(308) where the grant of land was for a meeting house, … the worship and service of God The trustees and the majority of the … gation having later ceased to be Trinitarian in bel ef a bill to restra… …asking a decree for…

…rases are employ… stood their… And to give…

v *Briggs*, 2 Car. & P 525; "in the Month of October … *Lucas*… Peake, 4… *Russel* v *Beard* … "duly honoured" … 7 Taunt… *Perrin*, 2… convey"…

unless it comes from persons who are shown to have …

There is thus analogy between opinion evidence under this section and hearsay evidence of custom based on hearsay Vide *Per Parke B* in *Crease* v. *Barrett*, 1 Cr M. & R 929, *per Parke B*

S.

50. When the Court has to form an opinion as to the relationship of one person to another, the opinion, expressed by conduct, as to the existence of such relationship, of any person who, as a member of the family or otherwise, has special means of knowledge on the subject, is a relevant fact :

Opinion on relationship, when relevant

Provided that such opinion shall not be sufficient to prove a marriage in proceedings under the Indian Divorce Act*, or in prosecutions under section 494, 495, 497 or 498 of the Indian Penal Code†.

Illustrations.

(*a*) The question is, whether A and B were married.

The fact that they were usually received and treated by their friends as husband and wife, is relevant

(*b*) The question is, whether A was the legitimate son of B. The fact that A was always treated as such by members of the family, is relevant

Principle The question of presumption of relationship by conduct of parties often arises in cases of marriage and legitimacy When the fact of marriage is in issue, subsequent conduct of the man and woman, said to have been the parties to it, is receivable to evidence the marriage This conduct is traditionally spoken of as "habit", and this common source of proof, with the reputation evidence which usually accompanies it, has come to be known by the phrase 'habit and repute" The logical nature of the argument indicates it plainly to fall under the principle, that from the conduct of the man and the woman as married persons may be inferred their firm belief that they were at some prior time made husband and wife, and from this belief may be inferred

Scope of the section This section is taken from section 649 of *Taylor* which is as follows 'Next, *family conduct*,—such as the tacit recognition of relationship, and the distribution and devolution of property,—is frequently received as evidence from which opinion and belief of the family may be inferred, as resting ultimately on the same basis as evidence of family tradition For, since the principal question in pedigree cases turns on the parentage or descent of an individual, it is obviously material, in order to resolve this question, to ascertain how he was treated and acknowledged by those who sustained towards him any relations of blood or of affinity" The presumption in favour of wedlock is another instance of the rule *omnia praesumuntur rite esse acta* (all things are presumed to be rightly and solemnly done) *Fox* v *Bearblock*, 17 Ch D 499 It has its own special maxim *semper praesumitur pro matrimonio* ... 'By the ... as man ... there is a ... professs

*IV of 1869. †XLV of 1860.

S. 50. to be" Per

199; Lyle v

lightly repell

factory or conclusive Per Lord Lydhurst in Morris v Davis, 5 Cl & F ... This was approved by Lord Cottenham in Piers v Piers, 2 H L Cas ... see also Langham v Thompson, 91 L T 680, George v. Thayer, (1901) 1 Ch ... 456, Haynes v. Caster, 94 L T. 431; Cunningham v Cunningham, 2 Dow H. ... [illegible] But according to English La[w] ...

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dead or cannot l

appears to afford a

to prevent any pe

to the religious usage of the party, the names of particular persons recited or omitted during the performance of ceremonies, and the observance ... pollution, are instances of conduct within the meaning of this section and admissible in evidence Ramkrishna v Chinna, 26 Ind Cas 110. When a witness vaguely states that he is related to the parties his opinion is not admissible Mohan Lal v Tulsan, 109 Ind Cas. 774 = A. I R 1928 Lah. 521

Relationship by marriage. "The parties' assertions of marriage ... general reputation of the fact m ... with as much strength ... distinctness by actions as by ... elopement and return as married ... ability was successfully relied ... was dwelt upon as a strong fact by Abott C J in summing up ... the case of Bear v Ward A similar weight was ascribed to the ... husband procuring a woman to be presented at Court as his wife" ... [illegible] ... non-consent, as ...

... [illegible] ... at a prior time ...

by those who have witnessed the exchange of consent, and ... light ... of contrary evidence which would naturally have come to light ... This net result of the sifting of the facts by gossip and by interested ... is summed up on the community's reputation; and this, though it ... ordinarily be inadmissible by the Hearsay rule, is by long ... sible under a special exception to that rule. Now these two sorts of ... habit and reputation, are commonly found available together, and ...

S. 5

commonly offered at the same time. They are admitted on distinct theories, the
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rth
hat
the man and wom
and to stand in the
given by those an
and acquaintances,
habit and repute ar
and reputed to be
combination of circumstances as evidence that consent to marry has been

Khoja Hedayet v Rayan, 3 M I A 295; *Mahabta v Ahmed*, 10 C L R 293

of direct proof, consent may be inferred f
established by reputation But when pr
mainly on reputation the circumstances
some caution because the same word which

Legitimacy as evidenced by conduct. In *Berkely Peerage Case, Sir James Mansfield* remarked, that, " if the father is proved to have brought up the party
legitimate."
e Merchant's
he supposed
his question
(of legitimacy) My Lords, when two women each claimed a particular child as hers, and called upon a person to decide between them, he ordered that the

s. 50 child should be severed in two parts, and that each take half; the true m[illegible] decided, upon that, that the child was [illegible] s? Not, perhaps that mere declar[illegible] declarations, may be made for a temp[illegible] purpose (in that case both women made declarations, and one of course [illegible] false declarations); but it teaches that the conduct of a parent, the feelin[illegible] a parent—those feelings being inferred from such conduct—afford us evidence assisting us in arriving at a right conclusion as to the ma[illegible] controversy It has been argued at the bar that mere declarations of [illegible]

ground for inference, for it comes from the least suspicious source, [illegible] the very individuals who are the most interested to give a different [illegible] If there ever was a case where circumstantial evidence of this description [illegible] admissible, it is this" In the same case

ment is sufficient evidence, if not rebut[illegible] *Wigmore* § 269 So also the concealmen[illegible] husband *Hargrave* v *Hargrave*, 2 C & K [illegible] such child by the person who, at the time of its conception, was living in a [illegible] of adultery with the mother and the fact that the child and its [illegible]

the family appear to have been mentioned in the Will, but [illegible] taken of such person is strong evidence to show, either that he was not the [illegible] the Will (*Tracy* [illegible]

W. N 130 (P C)

[illegible]nduct of parties is very [illegible] *Mullanga* v *Venkatas*[illegible] P 515 Such evidence is also [illegible] *Maharaja Pertab* v *Maharani* [illegible]

3 C. 626 P C = 1 C L R 113

Proviso The proviso is inserted, because in divorce, adultery and [illegible] cases the marriage must be strictly proved, that is, by the evidence of a [illegible] who was present at the marriage, or by the production of the register [illegible] copy of the register, or such other record as the law of the country, [illegible] a class, may provide. *Nort Ev* [illegible] bigamy proof of second marriage is [illegible] *U S.* v. *Miles*, 103 U S 304 But [illegible] *Com.* v. *Jackson*, 11 Bush. (Ky) 679

an indictment or a civil action, the case for the prosecution is not made out **S. 50**

& W. 265; *Roscoe Cr.*
f the marriage, even
Williams v. *Williams*,

in *Morris* v. *Miller*,
hat case the opinion of
r to support an action
or criminal conversation, there must not be proof of an actual marriage'; the
act was, they were married at *Mayfair* Chapel; the register or books could not

plaintiff's power, (2) it was not an actual i e ceremonial marriage *Lord*

action . . . . Perhaps there need not be strict proof from the register, or by a
person present, but strong evidence must be had of the fact,—as by a person
present at the wedding dinner, if the register be burnt and the person and clerk

as before. But an action for criminal conversation has a mixture of penal
purpose by
they are not
an action a
4, 195 From
lear that this
ses of cases,
namely (1) where the charge is a criminal one and (2) in the civil action of
f of a marriage in fact" or actual
c. either by the register containing
of parson clerk or some other person

time, the action of criminal conversation occupied a far more prominent position
and was therefore more liable to abuse. *Wigmore* § 2081. Nevertheless the rule

S. 50. of law as laid down by *Lord Mansfield* in the above two cases is appl[illegible] in common law of England *Catherwood* v *Caslon* 13 M & W [illegible]
le [illegible]
days has

[illegible]

cient to prove a marriage in a prosecution for bigamy or in pr[illegible] a divorce, or in a petition for damages against an adulterer But [illegible] to put it too broadly The marriage and subsequent ceremony upo[illegible] the prosecution is based certainly cannot be so proved but it may [illegible] another marriage becomes material in such prosecution, and such marri[illegible] certainly be proved by a reputation, although it is proving a marriage [illegible] prosecution for bigamy" Thus in the case of *R* v *Wilson* 3 F & [illegible] the prisoner pleaded that when she went through the first ceremony a[illegible]

24 & 25 Vict C 100, § 57, Stat 20 & 21 Vic C 85 § 33 These exc[illegible] rest on the ground that such proceedings, being of a penal nature req[illegible] strictest proof, and a further reason for the exception in the cases of a [illegible]

another, as well as the injury to the progeny by placing them [illegible] without rights of legitimate children Now this deception and [illegible]

to be more cautious and tender in favour of an opponent [illegible] criminal charge in which the opponent has placed himself on a level [illegible] meanness below that of the least meritorious opponent in any [illegible] *Wigmore* § 2084.

Under the proviso to this section, in proceedings of the [illegible] [illegible] not by itself [illegible]

in the ordinary way, *i e*, by other and more reliable evidence [illegible] mere opinion of a person who, as a member of the family or [illegible] especial means of knowledge. *Queen Empress* v *Subbarayan*, 9 M [illegible] 572 This is in accordance with the principle that strict [illegible] required in all criminal cases. *Empress* v *Kallu*, 5 A 233 [illegible] *Empress* v *Pitambar*, 5 C 566 But that principle is [illegible] inasmuch as in criminal cases a rule has grown up that the p[illegible] beyond a reasonable doubt. *Wigmore* §§ [illegible], 2497 But [illegible]

...s section in all prosecutions for adultery under s. 497 Penal Code, the ...rriage must be strictly proved. *Gopal* v. *Emperor,* 4 Bur. L. J. 107= ...I. R. 1925 Rang. 328. So the existence of a legal marriage has to be

...ction under s. 497, Penal Code the actual fact of the marriage between the

...*rem Chand* v. *Hira*, A. I. R. 1927 B. 594.

51. Whenever the opinion of any living person is relevant, the grounds on which such opinion is based are also relevant.

Grounds of opinion, ...hen relevant.

Illustration.

An expert may give an account of experiments performed by him for the ...urpose of forming his opinion.

Principle "The mere opinions of the witnesses are entitled to little or no ...egard, unless they are supported by good ...arrant them in the opinion of the jury. ...lusive, the opinions of the witnesses are w... ...*Harrison* v. *Rowan,* 3 Wash C. C. 587. "Opinion is no eviedence, without ...ssigning the reason for such opinion." *Per Duncan J.* in *Rambler* v. *Tryon,* ...S. & R. 94; *Wigmore* § 1917.

Scope of the section. In all cases in which opinion of experts are receiv...able, the grounds or reasoning upon which such opinion is based may also be ...nquired into *Phip Ev 4th Ed.* 362; *Govt of Bombay* v. *Merwanji,* 10 Bom.

S. 51. that case the Court observed. "The ground on which an expert, a

Court that the witness should be permitted to explain the grounds and of his opinion to the Court and jury, they may readily perceive the force reasoning, the soundness or fallacy of his logic, and therefore ju capacity to give an opinion on the subject and the correctness of his

taken to be true because the witness has stated that he founds it on them, but this is quite a mistake In order to obtain facts the opin

all questions of fact upon competent evidence laid before them

of science they may be aided by the more exact observa experience of the trained expert." *Lawson Expert & Op Ev pp*

CHARACTER WHEN RELEVANT

it is said of a person that he bears a good reputation, mean

S. 5

Chamberlayne's racter which is a on person, which meaning of the

position in this, that the latter is easily moveable, the former of longer ration and more difficult to be moved' I may notice that habit is formed or passion, and that this repetition *Metaphysics* Vol I p 178 Habit *Chamberlayne's Ev* § 3263

Act In explanation to section 55, the cter" includes both reputation and disposi- That actual character" says *Prof Wigmore* and the latter is merely evidence to prove common use of the word 'character' in the

hers, especially the popular opinion, whether favourable or the reverse *andard Dictionary* 'Character lives in a man, reputation outside him" *olland, Gold Foil*, C 19 p 219 "Character is like an inward and spiritual nce of which reputation is, or should be the outward and visible sign"

of opinion arising from the deportment of a man in society As a man's deportment, good, or bad, necessarily produces one circle without another, and so extends itself till it unites in one general opinion, that general opinion is allowed to be given in evidence" *State* v *Lanton*, 76 N C 216; *Burr Jones* § 153.

Scope of Sections 52 to 55 The framer of the Act has dealt with these sections under the heading 'character when relevant." But in the explanation of section 55 he has indicated how the character of a person can be evidenced We have character includes both erroneous. Character and cases the term "general But there are two distinct ommon use of one word

S. 52. for two ideas has caused confusion. (1) Is a person's disposition—... or group of traits, or the sum of his traits—relevant and admissible for purposes? (2) Whenever it is so admissible as an evidentiary fact ... becomes in its turn a propc ... first question is essentially ... in to exclude relevant ch... entirely different quarter, it has nothing to do with character, as an evi... fact, but with the mode of proving character, assuming it to be ... provable either as an evidentiary fact or as an issue *Wigmore* §... far as the first point is concerned, character is offered as an evi... fact—as a basis for an inference as to conduct—in section 52, 53 ... may also be a fact in issue (Vide expla... in the latter contingency, character ... ut character in the sense of "general ch... or "reputation" may also be a fact in issue, as in the cases of ... tion Whenever a party's character is itself a fact in issue, whether ... sense of disposition or reputation, and whether it be in a civil proceeding ... a criminal case, proof of that character is always admissible *Taylor* ... *Best* § *258* So also whenever character is relevant as a basis of any ... inference (than the inference of conduct), it is admissible without ... *Chamberlayne's Ev* § 3307. But when a party's character is requ... proved not as a fact in issue but as an evidentiary fact to prove condu... generally excluded So the general rule is that from a party's chara... conduct can not be presumed. So in civil cases a party's charact... evidentiary fact is wholly excluded Such evidence can be given only ... cases, where the amount of dam...

... good character has been ... But the bad character of a party ... criminal case may also be a fact in issue In such a case of course, ... his bad character is always admissible These are the questions wh... essentially one of relevancy. Now we come to the second phase of the ... i e how the character is to be evidenced Two special proble... second qu... Opinion ... Hearsay, ... on what ...

observations of the conduct of the person under peculiar circu... a man the estimated character, or reputation, of being honest, or ... natured, or passionate, or humane, or cruel—*this general charac er*, as it ... is also a fact; it is the opinion which those who are acquainted with ... proved in respect to his several traits of character This is ... proving real character, which is the object in view *But it is ...* ... the fact its...

sible in more instances than the other," *Per Pearson* ... Jones L 160, *Wigmore* § 52. For further discussion on this point ... under s 55 *infra*

52. In civil cases the fact that the character of any ... concerned is such as to render ... improbable any conduct imputed to ... irrelevant, except in so far as such ... appears from facts otherwise relevant.

In civil cases, character to prove conduct im puted, irrelevant

S. [illegible]

Principle Evidence of a party's character in a civil suit is irrelevant for wo-fold reasons, namely, (1) A party's character is usually of no probative

issues and to

orcefully stated

.9 "But in a

civil suit, where the personal rights of opposite parties are to be weighed in a nicely adjusted balance, no proof except that relating to the facts in controversy should be admitted to turn the scale" Here the rejection of evidence is on the ground of

principal and ev

evidence of good

admissible in evidence, because there is a fair and just presumption that a person of good character would not commit a crime But in civil cases such vidence is with equal good reason not admitted, because no presumption would

would be infinitely

er C

in *Slaw* v *Come*

er is

not in issue, the

and

a very bad man may have a very righteous cause' *Thompson* v *Church*, 1 Root (Conn) 312 (1791) But in civil cases of a quasi criminal nature the reason for exclusion is not so clear in principle and the Courts do not speak

§ 3275 In

concur in

er has but a

been com-

nce is doubt-

ful and nicely balanced, it may then perhaps suffice to turn the wavering scale;

or to form their opinion upon the opinions of others The introduction of such

or bad simply renders his doing a particular act more or less probable It has not the belief compelling power, in reference to the proof of the matter in question, of a probative fact, properly so called *Chamberlayne's Ev* § 3266

words: § 2053 Evidence of good character of a party is not admissible in civil

S. 52. pursuant to a Statute to recover treble the value of property taken the Court said "All the rules of evidence applicable in civils are applicable to this" *Hall* v *Brown*, 30 Conn 551 So in an English case, [*Att Gen* v. *Bauman*, 2 B & P 532 note (a)] the q was squarely presented to the Court The trial was of an information . . . for offering to corrupt . . . w the defendant's character . . . nt the defendant was . . . the crime imputed to him The evidence was rejected *Eyre C B*, say cannot admit this evidence in a civil suit The offence imputed by the . . . tion is not in the shape of a crime It would be contrary to the true distinction to admit it, which is this, that in a direct prosecution for a . . . such evidence is admissible, but where the prosecution is not directly . . . crime, but for the penalty, as in this information, it is not If ev . . . character is admissible in such a case as this, it would be . . . character in any charge of fraud upon the Excise and Custom H . . . *Chamberlayne's Ev* § 3280.

Crimin . . . principle it . . . received as . . . case, the mo . . . such action . . . law of evide . . . and must . . . confusion w . . . relevancy to make it worthy of consideration and to avoid . . . course, similar objections exist in reference to the use of such ev . . . criminal cases, but they are disregarded by reason of the humane pol . . . law in view of the fact that in criminal cases human life and liberty are . . .

Character in action for fraud. Where the nature of a civil action . . . involve the general character of a party, evidence as to that character . . . not be offered to contradict an imputation of dishonesty, or even of fraud . . . transaction presented in an ordinary civil case must depend upon . . . stances, and not upon the character of the parties. In such a case, no . . . how serious a moral delinquency may be involved in a fact and ho . . . the establishment of that fact may affect a party's reputation, he cannot . . . the aid of his previous reputation to disprove the fact. . . . Strob (S C) 372 The doctrine has been announced in a few cases in . . . Courts that, if a party is charged with fraud or other act involving . . . turpitude and the charge is based only on circumstantial evidence . . . rebut the charge by proof of his good character *Henry* v . . . (Ten) 213; *State* v *Beebe*, 17 . . . *Walker* v *Stephenson*, 3 Esp . . . has said "And generally . . . with fraud from mere circu . . . admissible to repel it." *Greenl Ev* § 51 But this view . . . based upon any . . .

be indictible or not is not material *Ward* v. *Herndon* 5 Port (Ala) 382; S. 5
Burr Jones § 154 . .
excluding all evide .
issue or relevant .
tions for robbery.
insurance policy, when the defence was over valuation; for fraudulent burning of the property; for false representation as to the solvency of another; for incurring a debt or other obligation; for maliciously burning property, for assault and battery; for embezzlement for malicious mischief, for fraudulent conveyance of property, for criminal conversation; for false arrest and imprisonment; for malicious prosecution; for divorce on the ground of adultery, and for procuring a deed of fraud. *Burr Jones* § 155 To some extent the reputation of parties is liable to be affected by any litigation; but this is not ground on which evidence of character is held material in such actions as slander, seduction and other . *lunket*, 1 Strob (S C 37 : . stated: If in every may be met by such ev [illegible] might not be introduced; trials would be insupportably tedious, and the result of a trial would as often depend upon the popularity of a party as upon the merits of his case" *Burr Jones* § 155

In criminal cases previous good character relevant

53. In criminal proceedings the fact that the person accused is of a good character is relevant.

[illegible] racter then, as [illegible] harged, is essen- [illegible] of crime arises [illegible] and experience, [illegible] course of conduct will depart from it [illegible] such a person may be overcome by temptation and fall into crime, and cases of that kind often occur, but they are exceptions; the general rule is otherwise. The influence of the presumption may be [illegible] ve testi- [illegible] here the [illegible] vidence [illegible] esump- tion from proof of good character is entitled to great weight and will often be sufficient to turn the scale and produce an acquittal' *Cancemi* v *People*, 16 [illegible]

[illegible]

which is confronted when bad character is sought to be shown *Chamberlayne Ev.* §3277.

[illegible]

S. 53.

only was altogether unsatisfactory to his mind It was said to ... *vitae*, but he had no conception, according to the principle, of sound sense ... right reason, that character could be evidence in a case affecting the l... man, and yet not evidence in a case affecting his freedom, his property, an... reputation" *Wigmore Cas Ev Case No 21*; *Wigmore* § 56 As regar... second limitation that such evidence was limited to doubtful cases only ... following charges to ... St Tr 217 are pertinent ... should have an effect, ... be permitted to operate where a crime is clearly proved, it would ... brought forward; because there is hardly any one who has not at som... maintained a good character .... If the evidence were in even balance, cha... should make it preponderate in favour of a defendant; but in ord... character have its operation, the case must be reduced to this situation ... *more* § 56, see also *R* v *Broodhurs*, 13 Cr. App. R 12... But now it is settled that an accused in a criminal case can always adduce evidence ... good c... *Hardy* (1857) ... (317) (... be per... for he ... general c... it not to prevail a... he defendant cha... prosecutor may ...

Scope. The prosecution in ... accused's bad character as a b... that such evidence is too likely to move the jury to con... his actual guilt of the offence charged *R.* v. *Rowton*, Leigh & C... But the accused himself may always invoke his good character as ... disprove his commission of the offence, no matter what the gra... offence, and no matter how strong the evidence against him ... § 11 (*b*) The character, by whichever party offered, must be as to the ... *trait—e g honesty, violence, charity, etc, involved in the fact c...* *Erskine* in *Hardy's Trial* 24 How St Tr 1076 It has already ... that the rule ... was in early ... Y. 501 (507) ... and it was ... ference that the accused would not have committed the ... that therefore the crime was not in fact committed by him ...

are left in doubt. It is to be treated just as other circums...

is to be
N. Y.
be the
Moett, 23 Hun (N Y) 60, 65 "This
of importance only where there is a
in which case such evidence is entitled
to the ch n *Irish*
Judge sum excellent
character, *ner*, 6
How. St (Mass)
295—52 A question

Against
any times
t is one of
evidence of good characte nce there
principle What is in the
circumstances, evidence of
The very *fact that it is*
McKelvey's Ev § 118 In
latter part of the judgmen
crimes, testimony of good c
to the jury, and a specie
See *Cancemi* v *People*, 16 N
criminal cases is always
given weight except in a

the rules of

, there is a
cter is made
passionate,

confined to those particular traits which have some logical connection with the
nature of th St 55 In *Dovers'*
Trial, 6 How rged with seditious
publication, as a faithful member
of the traine *C J* said Do not
mistake yourself The testimony of your civil behaviour going to church,
appearing in the trained bands, going to Paul's, being there at common service,—
this is well But you are
yet be a naughty man in
King's subjects" In *Tur*
far as my experience goe

58 Ala. 221
"It is needless to dwell on the fact" says *Mr McKelvey* "that the character
the offence
s a limited"
Character
than of the

S. 53. deed in question. This relevancy depends on the assumption that it was substantially unchanged in the meantime Character at the earlier or later time is offered not to prove or disprove the act in question but to prove the character at the time when the deed in question was done All that is required is that the character must relate to a period proximate to the period of the supposed offence. *R* v *Swandson*, 14 How St. Tr 596 Similarly character in one place stands on precisely the same footing as character in another place. The person is the same wherever he is and ...

... reputation in a community other than the prisoner's home may be ... *Wigmore* § 60 So far as this section is concerned which deals with relevancy those questions do not arise and more so as under the Indian Evidence character includes both reputation and disposition No importance can be attached to evidence of good character where the case against the accused is clear When it is doubtful some weight must be given to it *Queen E. v. Nur Mahomed*, 8 B 223.

Effect and operation of evidence of good character Good character should be permitted to operate as a positive, appropriate and substantive defence. No distinction should be made, in application and effect, between evidence to prove exculpatory facts and evidence to prove the character of the accused *State* v *Mury*, 118 Mo 7, 25, ... *Stannard*, 7 C & P. 673 Both rest ... character is a fact making strongly ...

... es, or to ... Under ...

... turn their attention to his good character. [Vide *R.* v *Davison* (1808) ... St. Tr. 99 at p. 217 *per Lord Ellenborough*) It is, however, submitted with deference, that the good character of the party accused, when satisfactorily established, is an ingredient which ought always to be submitted to the ... together w... charge ar... ingredient... any case, ... own conc... previously ... he is called upon to answer' 2 *Russ Cr* 7... The correct rule is ... cases a good character, if proved, to the satisfaction of the jury must be considered *People* v *Van Dam*, 107 Mich 425

... quit if it ...

question of the guilt or innocence of the accused. The jury have ... separate it from the mass of the testimony, and to say that they ... accused has a good character and that therefore they will ... evidence of guilt. *Sweet* v. *State*, 75 Neb 263 But while proof of ... character alone may not be sufficient as against proof of guilt beyond ...

S. 5

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and require an acquittal,
might be convincing, and
If the evidence of guilt
will be justi-
with all the
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d character considered in
ent to create a reasonable
verdict of
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ne accused
evidence
fact that
fact led
a life of honesty during the past, is no reason to suppose that he will not succumb to temptation at the close of his career, but before a man of this type and such antecedents is adjudged guilty, the evidence against him must be of an unimpeachable character *Mangat Rai* v *Emperor*, 10 Lah L J 262=29 Cr. L. J. 740

Trait must be relevant *It is a rule well enforced by reason and sanctiond* by authority that character evidence, introduced for the purpose of laying a

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character should relate to a period proximate to the period of trial *R* v *Swendson*, 14 How St. Tr 696

Adultery In a criminal prosecution for adultery, the previous good *character of the defendant for chastity is admissible in his favour* *Chamberlayne's Ev* § 3289

t nearly relevant is
would most likely
citizen can not be
290

Assault The defendant's good character as a peaceable, law abiding citizen is admissible in his favour in a prosecution for assault with intent to

prosecuted for
the commis-
relevant. For
example, the accused in a criminal action for burglary who had been employed

S. 53. on the police force of a city was not allowed to show by the chief of po... his work had been of a satisfying character *Chamberlayne's Ev* § 3292

Carr ...
peaceable, ...
carrying ...
offence ...

Fraud In criminal actions for fraud or involving fraud, the good cha... of the accused with respect to the trait involved may be shown in his fa... but his personal habits or character for sobriety and morality are irrelev... is likewise his reputation for industry. *Chamberlayne's Ev* § 3294

Homicide Character evidence is probably more *frequently* used on ...
f ...

in such a case to the accused has sometimes led to a liberal construction ... general rule The good character of the accused for peaceableness and q... is admissible even where the instrument of death was poison Exampl... evidence, offered as character evidence on behalf of the accused, wh... been excluded are that the accused was industrious and honest, a g... valiant so... worker *That the deceas...* case of ... may, on the other hand be ... by the ac... v *Biggin* (1920) 1 K B ... *R* v *Macarthy*, Russ Cr. (8th Ed) 1931, n(b)), but not *the fact that* he ... engaged in selling whiskey, was unchaste or that he was a *drinking man* ... there was no evidence that he had been drinking on the occasion in q... *Chamberlayne's Ev* § 3295

Indecent assault The character of the accused for *chastity* is c... relevant in such actions.

... *ere the victim is other than a c*... *y regarded as the only relevant* ... *would seem that other tra*... as cruelty, brutality and their opposites ought often to be *considered* ... view has been recognized in a case of infanticide *wherein the accused* ... allowed to show that he was of a humane and kindly *disposition towards c*... *Chamberlayne's Ev* § 3298

Larceny In larceny cases, proof of character must *likewise* be c... to the *trait* involved in the crime, honesty, being *regarded as such tra*... good character of the accused for truthfulness is not *admissible in h*... nor is his character in respect to sobriety. *Chamberlayne's Ev* § 3299

Libel The reputation of the accused in a *prosecution for criminal* ... for truth and veracity, is inadmissible as is *likewise his reputation* ... peaceableness and orderliness What trait would be *relevant in a l*... appears to ... *Chamberlayne's Ev* § 3300

has ...
Howe ...
establ ... *a rfiry case* ...

Rape The Courts have experienced some *difficulty* ... trait of character of the accused in a prosecution *for rape* is a ... favour His reputation for "morality, virtue and *honesty in his* ... that context ...

commit rape, the defendant's reputation for truth and ...

S. 54

n rejected as was likewise evidence of his general character. The reputation the prosecutrix in rape for chastity may always be shown by the accused as ring on the question of consent It must be observed that proof of character chastity of the female involved in all cases of this general class, which ludes adultery, rape, seduction and the like, is proof of the character of a placed upon proof of character tion by the prosecution in the first berlayne's Ev § 3303.

Receiving stolen property. The trait of character regarded by the Courts relevant in a prosecution for receiving stolen goods is honesty The accused ay introduce evidence of his character for honesty and probity for the purpose raising an inference that he is not guilty of the crime charged but traits her than honesty are not regarded as relevant and are therefore excluded he language, however, which is used to express that general trait may vary, e words probity and integrity, for example, not being objectionable The putation of the person from whom the goods were received as a regular and nest dealer in goods such as those in question is relevant on behalf of the cused Such evidence bears upon the good faith in which the goods were ceived and tends to prove absence of criminal intent *Chamberlayne's Ev* 3304.

Seduction
on may not be
haracter for virtu
rebuttal the t
as accused of the crime *Chamberlayne's Ev* § 3305

Train wrecking In a prosecution for attempting to wreck a train by lacing a tie upon a railroad track, the good character of the accused as a eaceable, orderly and law abiding citizen was held admissible in his behalf *hamber ayne's Ev* § 3306

54. *In criminal proceedings the fact that the accused person has a bad character is irrelevant, unless evidence has been given that he has a good character, in which case it becomes relevant.

Previous bad character not relevant, except in reply.

Explanation 1.—This section does not apply to cases in which the bad character of any person is itself a fact in issue.

Explanation 2—A previous conviction is relevant as evidence of bad character.

quires The evidence is relevant to the issue, but is excluded for reasons of

* This section was substituted for the original section 54 by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 6

S. 54. *Nath*, 10 W. R. Cr. 17; *R* v. *Tuberfield*, 10 Cox. 1; *Amrita l* *Emperor*, 42 C. 957. But after a defendant has attempted to sh character in his own aid, prosecution may in rebuttal offer as evi character. *Wigmore* § 58. The reason for the reception of this evid stated by *Earle J.* in *R* v. *Rowton supra*: "If the prisoner, l character, misleads the Court ... the false impression should b See also *Per A* ... *Shrimp* Cr. C. 322. In ... by gu own character " ... v. *Pen* 333 (339).

Old Section. Before the amendment of the section by Act I s. 6, the section ran as follows: "In criminal proceedings, the accused person has been previously convicted of any offence is releva fact that he has a bad character is irrelevant unless evidence has bee he has a good character in which case it becomes relevant. (*Expla* section does not appl a fact in issue)." ... tions are in every ... had been given of good character or not. *Queen-Empress* v *Kartik* *Das*, 14 C. 721; 2 Weir 760; *Empress* v *Sukha*, A. W. N. 1886, *Roshun Dosadh* v. *Empress*, 5 C 768=6 C. L R. 219. In framing t section the framers of the Act said: "We permit evidence to previous convictions against a prisoner for the purpose of prejudicing do not see why he should not be prejudiced by such evidence, t *Report of the Select Committee* ... see also *Queen Empress* v. *Kartick*

... to rebut such evidence by giving evi..." *Queen-Empress* v *Hughes*, 14 A. 25=A. W. N. 1891, 170.

Scope of the present section As a general rule the badness of th ... ed is not a fact in issue, or relevant to ... that he is of bad character or tha ... tit the same kind of offence as that of ... petent for the prosecutor to adduce tending to show that the accused has been guilty of criminal acts ... the ...

Sir James Fitzjames Stephen in his general view of there ... a weak ...

... it is an inflexible rule of English Criminal Law ... the ... transaction." *Woodroffe's Ev. p. 451.* Under this section the ...

S. 54

...used has a bad character is irrelevant, and cannot be admitted whether ...ited by the prosecution or by the defence. *Mi Myin* v. *King-Emperor*, 6 L. ...R. 4=9 Cr. L J. 576=2 Ind. Cas. 349; see also *Emperor* v. *Wahiduddin*, 54

...ore the passing of the Indian Evidence Act. *Queen* v. *Mahima*, 6 B. L. R. ...) 131=15 W. R 37 Cr; *Queen* v. *Behary* 7 W. R 7. Cr.; *Queen* v. *Phoolchand*, ...W. R. Cr. 11; *Queen* v. *Gopal Thakoor*, 6 W R. Cr. 72; *Queen* v. *Byhunt*, 10 ...R. Cr. 17; *Queen* v. *Kulum Sheikh*, 10 W. R Cr. 39; *Reg* v. *Timmi*, 2 B. H.

...consideration for the ...used was tried, and ...ence for which he was t...

... accused person has not been

... Cr. L. J. 411. Such ...

...it he has a good character or where the bad character of any person is itself a ...t in issue *Wasir* v. *Empress* 7 P R. 1895 Cr Except for the purposes of ... of s. 75, ... Act. III of ... as other ... *Emperor* v. ... L. R. 1034. ...evant fact ...der s. 14 of the Act. *R* v. *Naba Kumar*, 1 C. W. N. 146. In a trial for an

...vidence which is required to prove a motive for the crime which is otherwise ...levant. *Jagua* v *Emperor*, 5 Pat. 63=93 Ind. Cas. 884=7 Pat L. T. 396= ...I. R. 1926 Pat. 232. See also *Emperor* v. *Aloomiya*, 5 Bom. L R. 805=28 ...t. 129.

...cular locality. And in regard to this second question the ordinary rules of evidence do not apply or at least are greatly relaxed. The Indian Law has

S. 54. adopted the policy of lea
discretion of the Cour
no bearing whatever upo
tion; after an accused
charged it is relevant for the purpose of enhancing the sentence to b
on him. *Emperor* v *Nga Ba*, 111 Ind. Cas 453=29 Cr L J
1928 Rang 200 (F. B); see also *Emperor* v. *Ismail* 39 B
Emperor, A I R 1929 Mad 306. So also records of such conviction
put at the end of the trial *Queen* v. *Shiboo*, 3 W. R Cr 38; *Delni*
50 C 367.

Accused person's bad character is relevant The evidence
prove that the accused person's character is such that he is likely to
the act of the cheating
v. *Choun*, 26 P W R
v. *Emperor*, 48 C L J
of the accused in the fi
character *Felsenthal* v *State*, 30 Tex App
rule and practice of our law in relation to evidence of character
deepest principles of truth and justice The protection of law is
the righteous and unrighteous The sun of justice shines alike for
for good, the just and the unjust The crime must be proved, not
on the contrary, the most vicious is presumed innocent until prov
The admission of a contrary rule, even in any degree, would open
only to direct oppression of those who are vicious because they are
and weak, but even to the operation of prejudices as to religion
character, profession, manners, upon the minds of honest and
White, 24 Wend. 574
disposition is not relevant
ole, 1 *Phil Ev* 503
Peckham J in *People* v
N Y 78 (Am), when he said: "Two antogonistic methods for the
investigation of crime and the conduct of criminal trial have
many years One of these methods, favours, this kind of evidence
that the tribunal which is engaged in the trial of the accused may
the whole past
cuces, and
This is
which is pursued in France, and it is claimed that course
to be done where such course is pursued than where it is omitted. The
law of England, however, has adopted another, and, so far as the party
In order to prove

is an exception (which is a peculiarity of precedents
ing *relevant* evidence of a defendant's general and notorious
commit such crimes or torts as that with which he is charged
evidence is relevant, the law acknowledges by receiving in criminal cases
in some civil cases, evidence of a defendant's good character in his
allowing such evidence to be rebutted; and by receiving
character of wit and of other persons. The exclusion
is a plain depar
material eviden
in a usurpation
to mitigate the
way of its operat
given for the purpose of showing that the accused were
they were likely to commit the crime charged But
own and pro

mperor, A I R 1931 Pat 345=12 Pat L T. 471 But evidence is otherwise relevant if it is not rendered inadmissible merely because it shows bad character or the admission of offences other than the offence with which the accused is charged. *Saroj v Emperor*, A I R 1932 Cal 474. **S. 54.**

examined *R* v

B 464=90 L J

man slaughter, it

eed he ran down

nd killed a boy, the accused in cross-examination was repeatedly asked and

was called by the accused for the sole purpose of producing some letters This

was not endeavouring to establish a good character merely because a witness whom he called volunteered a statement as to the appellant's good character not only uninvited but probably also against the appellant's wish, and therefore the

of bal

put his c

(Am),

incident

that he should have the advantage of a character which in point of fact is undeserved *R* v *Routon*, L. & C. 520 (5_9); *Wills' Li 2nd Ed* 85. 150

S. 54. prosecution may rebut the evidence of good charracter either by cross C. & P. 6 App R. 113 only be

prevent the accused person from pleading that the act under consid committed without a dishonest intention. *Emperor* v. *Bakhtawar*, L R. 313 = 102 Ind. Cas. 492 = 28 Cr. L. J. 556. The presumption ar evidence of good character, and of the fact that an accused person is an man of good family connection, which would render it *prima facie* unl he would be guilty of crimes of violence, cannot be pressed too far in of offences originating in extreme political feeling. *In re Lo* 6 M. L T. 17 = 11 Cr. L. J. 30 = 4 Ind. Cas. 700. But in other cases character of an accused person, and the insignificance of the gain wh result from the offence committed by him are circumstances which cases have occasionally great weight, but neither of them can dispo and undisputed facts. *Government of Bengal* v. *Umesh Chunder*, 16 C.

must involv in which the evidence is offered. *Chamberlayne's Ev.* § 3.53. other traits is irrelevant. *Vide* notes under s. 53.

Previous conviction when relevant under other law. Previous c may also be relevant in cases where the accused is liable to enhanced ment; *vide* s. 75 of the Indian Penal Code; ss 221, 310, 311, 511 of the Procedure Code.

Explanation I. This section is not applicable in cases when the bad v. *Emperor*, A. I. R.

of that section. *Sher Zaman* v. *Empress*, 10 P. R. 54 of the Evi

of bad character is admissible. murder to prove that the accused as being evidence of character it is prove habit and association. *Khulauan* v. *Emperor*, 5 O. 1928 Oudh. 430.

Explanation II. Whenever under this section evidence character of an accused is admissible, his previous conviction is also as evidence of his bad character. But in other cases evidence of conviction is not admissible unless accused produces evidence of character. Such evidence of the previous conviction of an amounts to evidence of bad character. *Teka Ahir* v. *Emperor*, 7.6 = 60 Ind. Cas. 331 = 22 Cr. L. J. 219; see also *Bahinu* C. L J. 578; *Emperor* v. *Dunning*, 5 Bom. L. R. 1031. The conviction may be considered in enhancing the sentence proved. *Rahim Bux* v. *Emperor*, 5 O. W. N. 121 = 109 Ind. Cas. strict proof must be given of previous conviction. *Emperor* v. Upon the conviction of an accused, the Court has to determine

award, and, to do this, should take into consideration, not only the nature and gravity of the offence committed, bu ... The bad character of the accused then beco ... f bad character being admissible as affecting ... only general reputation and general disposition and not of particular acts by which reputation and disposition is shown ... exception to this rule Evidence of d ... r the above purpose *Naga Po* v ... he object of this section is to lay down ...

... N 851, see also *Rahim* v

Character of prosecutor when relevant In a prosecution for rape or for attempting to ... cross-examine the p ... as a general bad ...

... may call evidence to rebut it. *Wills Ev 2nd Ed* 86

S. 55

55. In civil cases the fact that the character of any person is such as to affect the amount of damages which he ought to receive, is relevant.

Character as affecting damages

Explanation.—In sections 52, 53, 54, and 55, the word "character" includes both reputation and disposition, but *[except as provided in section 54,] evidence may be given only of general reputation and general disposition, and not of particular acts by which reputation or disposition were shown.

Principle The possession of a particular trait of character or the contrary by one of the parties to ... tion in that regard must often be ... aw of ... The ... larger

*These words and figures in the *Explanation* to section 55 were inserted by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s 7.

S. 55. amount of damages, while a contrary finding may properly result award of damages or none at all. Reputation rather than actual ch usually investigated as that is commonly the important considera ion it is difficult to always draw a line of demarcation between the related (in law) intangible subjects *Chamberlayne's Ev* § 3308.

Scope of the section. In civil cases, good character being pr not be proved in aggravation of damages; but the party attack general evidence of bad character by general evidence of good cha meet evidence of specific acts of impropriety by disproof of sa not by evidence of general good character. *Jones* v *Jam* *Narracott* v *Narracott*, 33 L J P & M 61, *Phip. Ev* 7th Ed obvious that, on the principle so generally accepted for an action of de (*vide infra*), the plaintiff's reputed character may be considered, in of damages, in any other action in which the law of damages rec harm to reputation as one of the elements of recovery This has al conceded for the actions of seduction, criminal coversation, mal breach of promises of marriage, malicious prosecutions, etc see also *Per Pigot* C B in *Bell* v. *Parke*, 11 Ir C L 423, 473

sible an affecting the question of damages, is a point which controverted On, the one hand it is urged, that the admission of such would be cruelly unjust, as it would throw upon the plaintiff,

is not ad
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good name, even by means of the very action which he should him-elf from the effects of malicious slander" *Per Graham B* in 11 Price 235, 256, 269 In the same case *Garrow B* said "If become the law that such evidence should be admissible, the become

tion; that every man who demands compensation for character ought to be prepared to rebut any evidence of character; that the danger of admitting testimony of this kind since the witnesses, on cross-examination, might be grounds of their belief, that, as any failure in the evidence much increase the damages, witnesses would scarcely be support of a decisive case; that the law will not presume

criminal conspiracies to ruin reputations, and cannot be moulded to suit the S. 5

best, if not only, arrive at a safe conclusion on this point, by inquiring what opinion was previously entertained respecting him, by those with whom he was

person of whom they are made, he had a right of action The damage, however, which he has sustained must depend entirely on the estimation in which he was previously held He complains of an injury to his reputation, and seeks to

damages with one of unsullied and unblemished reputation A reputed thief would be placed on the same footing with the most honourable merchant, a virtuous woman with the most abandoned prostitute To enable the jury to estimate the probable quantity
previous character is not only mat
is said that the admission of suc

friends who have known him to prove that his reputation has been good'
Wigmore § 70, *Wood* v
defamation the defendant,
in substance and in fact
Wood v. *Durham*, 21 Q. B .

or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. amount
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Scope of the section. In civil cases, good character being p[illegible] not be proved in aggravation of damages; but the party a ta[illegible] general evidence of bad character by general evidence of good ch[illegible] meet evidence of specific acts of impropriety by disproof of such a[illegible] not by evidence of general good character *Jones* v *James*, 18 I[illegible] *Narracott* v *Narracott*, 33 L J P & M 61, *Phip Ev 7th Ed* [illegible] obvious that, on the principle so generally accepted for an action of [illegible] (*vide infra*), the plaintiff's reputed character may be considered, in[illegible] of damages, in any other action in which the law of damages rec[illegible] harm to reputation as one of the elements of recovery This has al[illegible] conceded for the actions of seduction, criminal coversation, and c[illegible] breach of promises of marriage, malicious prosecutions, etc *Wig* [illegible] see also *Per Pigot* C B in *Bell* v. *Parke*, 11 Ir C L 423, 475

Character evidence in suits for defamation Whether, in an[illegible] ntiff's previous general cha[illegible] , he laboured under a general[illegible] [illegible] d to him by the defendant, [illegible]

is not ad
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good name, even by means of the very action which he sho[illegible] himself from the effects of malicious slander" *Per Graham B* in *Jones* [illegible] 11 Price 235, 256, 269 In the same case *Garrow B* said "If ever [illegible] become the law that such evidence should be admissible, the [illegible] become a much more [illegible] him now, for he [illegible] protection
of his malic
Justice to

to vindicate their characters in Courts of Justice, and thus [illegible] a most dangerous impunity. *Taylor* § 359 To this it is replied [illegible] force, that, though the arguments on the other side would be ent[illegible] weight, if the question respected the right of proving particular [illegible] conduct, they do not apply where evidence is offered of merely ge[illegible] tion; that every man who demands compensation for the [illegible] character ought to be prepared to rebut any evidence of [illegible] character; that the danger of admitting testimony of this kind [illegible] since the witnesses, on cross-examination, might be compelled [illegible] grounds of their belief, that, as any failure in the evidence [illegible] much increase the damages, witnesses would scarcely be [illegible] support of a decisive case; that the law will not presume [illegible]

riminal conspiracies to ruin reputations, and cannot be moulded to suit the onvenience of irrational timidity; that to estimate the extent of the injury which a plaintiff has sustained, and, consequently, the amount of damages to which he is entitled, the jury must first ascertain what was the real value of his haracter at the time when it was attacked by the defendant, and that they can **S. 55**

ecover damages for that injury, and it seems most material that the jury who have to award those damages should know, if the fact is so, that he is a man of no reputation 'To deny this would', as is observed in *Starkie on Evidence*, be to decide that a man of the worst charac
damages with one of unsullied and
would be placed on the same footin
virtuous woman with the most abandoned prostitute To enable the jury to estimate the probable quantity of injury sustained, a knowledge of the party's previous character is not only material but seems to be absolutely essential It is said that the admission of such evidence will be hardship upon the plaintiff,

friends who have known
Wigmore § 70, *Wood* v
defamation the defendant,
in substance and in fact
Wood v. *Durham*, 21 Q. B

umours or
English-
Art 57,
Pea Add
70, *Ellershaw* v *Robinson*, 2 St Ev 641;
Barber, 2 St. Ev 641, *Kirkman* v *Onley*,
tens 11 Price 235 *Waithman* v *Weaver*,
D & R. N. P C 10, *Cornwall* v *Richardson*, Ry & M 307, see also notes under s. 12 at p 176 *supra*. But in England where the defendant does not plead the truth of the libel he cannot give evidence in chief in mitigation of damages, of the circumstances under which the libel or slander was published, or of the character of the plaintiff without the leave of the Judge unless seven

If the general issue is pleaded, the amount of damages is properly in issue, and

S. 55. the result [illegible] pleaded, [illegible]

[illegible] nitting the plaintiff's bad reputation [illegible] l') his general bad reputation alone [illegible] for the particular trait involved in the [illegible] tion, e g. honesty, chastity, etc, or (d''') both may be used [illegible] § 14 (d).

Seduction Character evidence of the daughter is admissible in [illegible] for seduction, for here the disgrace to the father must naturally be lacking if the daughter is already of bad reputation for chastity, [illegible] bad reputation may therefore be shown *Bamfield* v *Massey*, 1 C[illegible] *Dodd* v *Norris*, 3 Camp 519, *Carpenter* v *Wall*, 11 A & E 804, [illegible] § 75 The father's own reputation is immaterial *Ibid* In such an [illegible] element of damage is the wounded sensibility of the injured party, [illegible]

[illegible] shown *Smith* v *Milburn*, 17 [illegible] § 3308, *Phip Ev 7th Ed* p 186. [illegible] character is not admissible under [illegible] *supra*

Criminal Conversation In an action for criminal conversation the [illegible] previous bad reput[illegible] 305 § 75, *Smith* [illegible] reputation is immate[illegible] or character, for this [illegible] well serve in mitigation, in as much as the loss of his wife's virtue [illegible], thus the reputation is here [illegible] *more* § 75; *Bromley* v *Wallace*, [illegible] [illegible] character is in question [illegible]

[illegible] he can claim [illegible] 362; *Jones* v [illegible]

T. N. S, *Narracott* v *Narracott*, 33 L. J. P. & M 61

[illegible] in an [illegible] [illegible] The [illegible] from [illegible]

assault would be less than that of a modest and virtuous woman [illegible] *Work*, 13 R. I. 645, *Wigmore* § 75

[illegible] The bad character of the [illegible] is clearly [illegible] such a [illegible] woman [illegible] [illegible]

unchastity a defence the defendant must not only prove [illegible]

unchaste, but also that he had no knowledge of such unchastity at the time of making the promise to marry. *Foster* v. *Hanchett*, 68 Vt. 319 (*Am*). S. 55

Malicious prosecution In actions for malicious prosecution, the defendant may show the general bad reputation of the plaintiff as known to him when he launched the prosecution *Martin* v *Hardesty*, 27 Ala. 458 (*Am*), *Chamberlayne's Ev* § 3308

Explanation. . . rac-
er cannot include ion.
' That actual charac . . it,
nd the latter is merely evidence to prove the former, ought to be a truism" *Wigmore* § 1608 "The term 'character' when more strictly applied, refers to he inherent qualities of the person, rather than to any opinion that may be
to the
, so that
bject, a
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, as we
ubject are
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parlance,
acter, the
n *Bucklin*
Craufords-
fuses real
s upon a
on may be
on really
re § 1608
rm "cha-
55, has been used in the sense of
to prove the disposition of a person,
e given and to prove his reputation, his

English law Under the English law the term 'character' was normally applied to the actual qualities, and not to the community's estimates of these qualities. *Wigmore* § 1981 In *Thomas Hardy's Trial*, 24 How St Tr 999, evidence was admissible to the effect 'I have always esteemed him as a man of a mild and peaceful disposition"
Trial, 31 How St Tr 186, *Lord Ellenborou[illegible]*.
as to the general character of the accused,
likely to be guilty of
§ 1981, see also *Trial of*
1180 ff, *Fernley's Trial*,
How St Tr 40, *Butler's* .
spoke from personal knowledge alone, and often (though less frequently) from personal knowledge plus reputation, but to speak from reputation alone is regarded in the 1700 S as improper On this point the law in England was afterwards changed and allowed reputation alone *Wigmore* § 1981 In *Jones Trial*, 31 How St Tr 310 (1809), *Lord Ellenborough C J* incidentally said. "It is reputation; it is not what a person knows" But the isolated phrase above in *Jone's Trial* somehow caught the attention of later

[illegible] equally clear when we understand the usage of the term character in this connection *Peake Ev 2nd Ed.* 8 (1802), *McNally Ev* 321 (1814) *Starkie Ev 1st Ed* Vol. II, 366 (1824); *Phillips Ev. 1st Ed* 72, 105 (1814) That personal belief, estimate, or knowledge—under whatever name—was proper and unquestionable testimony to character seem[illegible]
whole period [illegible]
Cox Cr. 25, [illegible]
Cockburn C. J [illegible]

S. 55 that a prisoner is entitled to give evidence as to his gene... What does it mean? Does it mean evidence as to his reputa... those to whom his conduct and position are known or does it m... of disposition? I think it means evidence of reputation only ... h... on put deliberately to a witness called on behalf o... a ... the way, and the only ... his mind ... knowledge ... that ... in which I find the ... d in all the text-writers of authority upon the subject of ... When I consider the question of what in the strict interpretation of th... limit of such evidence I must say that in my judgment, it must be to this *the evidence must be of the* man's general reputation and ... vidual opinion of the witness The witness who acknowledged th... nothing of the general character, and had no opportunity of know... sense of reputation would not be allowed to give an opinion as t... character in more limited sense of his disposition' *Pollock C B* *Blackburn Byles Keating Mellor* and *Shee J J* and *Martin, Ch* *Piggot B B* concurred and *Erle C J* and *Willes J* dissented same case *Earle C J* said 'What is the principle on which ... racter is admitted? It seems to me that such evidence is admissi... purpose of showing the disposition of any party accused and ... a presumption that he did not commit the crime imputed to him. D... cannot be ascertained directly, it is only to be ascertained by ... formed concerning the man which must be founded either on p... rience or on the expression of opinion by others whose opinion ... be founded on their personal experience The question between us is the Court is at liberty to receive a statement of the disposition of ... founded on the personal experience of the witness who attends to g... and state that estimate which long personal knowledge of and acquai... the prisoner has enabled him to form I think that each so... is admissible You may give in evidence the *general rumour* preva... prisoner's neighbourhood and according to *my experience* you may ha... the personal judgment of those who are capable of forming a more ... tial guiding opinion than that which is to be gathered from general ... have never seen a witness examined to character without an ... made into his personal means of knowledge of the character Th... goes to the jury depending entirely upon the personal experience of ... who has offered his testimony Suppose a witness to chara... This man has been in my employ for twenty years I have had ... of his conduct ... I have never heard a human being expre... him in my lif... I have always regarded him with ... esteem and ... that he is ... worthiest me... *Chief Ju*... down would ... where ... To my mind personal experie... evidence ... a statement as, I have heard some persons spea... of h... heard general report in favour of the prisoner' has a ... comparison Again, to the proposition that general character is ... sible the answer is that it is impossible to get at it. Th... as general character it is the general inference supposed to ... a number of separate and disinterested statements in favour of ... But I think that the notion that general character is alone admis... accurate It would be wholly inadmissible to ask a witness ... he has ever heard give his opinion of a particular fact ... I attach considerable weight to this distinction, because in my ... character is that which is the least talked of The argum... upon the branch of the case have commanded my assent. ... confirmed by the case of *Rex v Davison*, 31 ... *Ellenborough* held that the personal experience of a wi... founded upon his personal experience was admissible ... recollection there were thirteen witnesses to character ... five or six gave evidence of very considerable personal ex...

S. 55

prisoner, so as to show the means they had had of forming an opinion upon his disposition. The first witness stated the length of time that the prisoner [illegible] was not [illegible] Then [illegible] ussible. Each of the witnesses was asked as to his means of knowledge and his opinion of the prisoner's disposition, and *Lord Ellenborough* says, 'the correct inquiry is to the general character of the accused and whether the witness thinks him likely to be guilty of the offence charged in the information.' This is very strong proof that the practice is to stop a witness when he refers to particular [illegible]

gave his answer according to the [illegible] that experience But the witness a [illegible] brothers Strictly that specific fact [illegible] involving a very important question, I cannot rest my decision on the particular [illegible]

cular witness, is superior in quality and value to mere rumour. Numerous [illegible]

character, because the prisoner was charged with an offence which would not only be committed in secret if it were committed at all, but would be likely to be kept secret by the persons who were subjected to it Such being the case, [illegible]

Davison's [illegible] fraud?' [illegible] *borough* s[illegible] is the que[illegible] the time y[illegible] the whole [illegible] but of a [illegible] it is not w[illegible] to the po[illegible] attended to In 1794, in *Hardy's Case,* 24 How St Tr. 999, there is a passage in the examination of witness, *John Carr,* which shows what was then regarded as the true rule, and how common it was to disregard it 'How long have you known Mr Hardy? Upwards of twenty years. Have you known him well [illegible] e during that time? The [illegible] —From what you know of [illegible] sturbance, or commit any acts of violence? Never.—*Mr Attorney General.* That is a question never put,

S. 55. that a prisoner is entitled to give evidence as to his general c What does it mean? Does it mean evidence as to his reputa a those to whom his conduct and position are known, or does it mean of disposition? I think it means evidence of reputation only heard of a question put deliberately to a witness called on behalf of a as to the prisoner's disposition of mind; the way, and the only wa his mind knowledge of

in which I find the the word 'character' used and applied in all the bo text-writers of authority upon the subject of evidence When we consider the question of what, in the strict interpretation of the l limit of such evidence I must say that, in my judgment, it must be r to this *the evidence must be of the* man's general reputation, and n vidual opinion of the witness The witness who acknowledged that nothing of the general character sense of reputation, would not be character in more limited sense *Blackburn, Byles, Kealing, Mellor* and *Piggot, B B,* concurred and *Earle C* same case *Earle C J* said: "What rarter is admitted? It seems to me that such evidence is admi purpose of showing the disposition of any party accused, and b a presumption that he did not commit the crime imputed to him cannot be ascertained directly; it is only to be ascertained by the formed concerning the man, which must be founded either on pe rience or on the expression of opinion by others whose opinion be founded the Court founded on and state that estimate wh the prisoner has enabled is admissible You ma prisoner's neighbourhood, the personal judgment of those who are capable of forming a tial guiding opinion than that which is to be gathered from general have never seen a witness examined to character without an character. The

esteem and respect, and have had abundant experience that worthiest men in the world' The principle the *Lord Chief Justi* down would exclude his evidence, and that is the point where I To my mind personal experience gives cogency to the evidence; a statement as, 'I have heard some persons speak well of him', heard general report in favour of the prisoner,' has a comparison. Again, to the proposition that general character is sible the answer is that it is impossible to get at it. There is as general character, it is the general inference supposed to statements in favour of

upon the branch of the case have commanded my In confirmed by the case of *Rex v. Davison,* 31 St. Tr *Ellenborough* held that the personal experience of a man founded upon his personal experience, was admissible. recollection there were thirteen witnesses to character call five or six give evidence of very considerable personal

evidence than that of a witness who testifies to the general repute of this person as to this mental characteristic? His testimony is based upon hearsay, and quite likely rumour and gossip If mental characteristic is a fact, there is no valid reason why this fa . S.
Personal observ
than general reput
others to which
from those who know" *Wigmore* § 1956 Similarly in *State* v *Lee* 22 Minn 400, *Berry J* said "As it is the fact of disposition which is important and material, there can be no reason why this fact may not be proved by any witness who knows what it is There is certainly no reason why general repute is any

Except as provided in section 54 The character evidence as is contemplated in section 51 is not confined to general disposition or general reputation The character or disposition offered whether for or against him must involve the specific trait related to the act charged *Wigmore* § 59 "The object and effect of such evidence is to disprove guilt by furnishing a presumption that the defendant could not have committed the offence and hence the character sought to be proved must be such as would make it unlikely that the party would do the controverted act" *McClellan J* in *Morgan* v *State* 88 Ala 224 (*Am*), *Wigmore* § 59

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i e as a testimonial assertion It may be a part of the very issue, as where the reputation of a plaintiff is in issue to determine the damages in an action
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accusation may have contributed to colour the reputation and render it untrustworthy *Greenl Ev.* § 461 (*d*), *Chamberlayne's Ev* § 3329

Nature and formation of Reputation *In enquiry into the limitations* affecting the nature and formation of a reputation, it must be remembered that

55 reputation is used only by way of an exception to the Hear ay rule it must therefore take such a solid and definite shape as to be worthy of . and to justify the exceptional resort to such evidence Mere rumou course not reputation
of the community as a
but what the community
Scott v *Sampson*, L R 8 Q. B D 491 If the public opinion be d

proportion of them, should have been heard to speak on the subject, it

the person's veracity or honesty or other quality in question is un deemed to be equivalent
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be trustworthy only so
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where he has merely sojourned; the form of the question usually run opinion in the neigl
vary *Greenl Ev*,
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or occurrence, whil
a man's reputation, for example, may declare him honest, and yet rumour may have circulated that this reputed honest man has defaulted accounts *Wigmore* § 1611.

The persons qualified to testify to reputation The witness to must be one who, by evidence in the community, or otherwise, has opportunity to learn the community's estimate, and the preliminary whether he knows the person's reputation, is usually insisted upon v *Norris*, 103 Mass 566 A person who lives out of the neighbourh therefore not qualified and it has been doubted whether a per on express purpose of learning the 4 Esp 102, *Douglass* v *Tou* 236), *Greenl. Ev* § 461 (d), *Chamberlayne's Ev* § 3315.

Cross-examination of a witness to reputation In testing a who speaks of good character, it will expose the untrustworthiness testimony if he admits that rumours of misconduct are known to him, knowledge of such rumours may well be inconsistent with his ass person's reputation is good *Wood* 5 Jur ingly, the propriety of
reputation he has supporte
usually been conceded
tion may be tested on cross-examination by requiring him to specify of his information, and in particular the persons whose remarks have give rise to his assert because there is no other effective way
reputation *Weeks* v
conceded to be proper.
defendant's or other persons' reputation as well as of a
Greenl Ev § 161 (d), *Chamberlayne's Ev* s 3311.

said that the at be agreed If the harmony, the other hand,
impossible to exact unanimity; for there are always dissenters. precisely that quality of public opinion thus commonly described as therefore a difficult thing *Wigmore* § 1612. "A reputation,

putation at all, must be a general reputation It may be eith r one of two S. 55
)posites; for instance, either good or
partly one and partly the other;
ould then be no general reputation
en obviously, it does not exist as a fact
r a partial, limited, or qualified repute The existence of a diversity of
ion is one of the means by which a witness may know there is general
tation, but this means of knowledge, apart from the fact that there is or

actual commission of the crime *In the matter of the petition of Pedda Swa di*, 3 M. 238 = 2 Weir 51

General Disposition Here the character is applied to the actual qualities not to the community's estimate of these qualities The term "general distinguished from the "particular 'character" (i e general disposition showing it) seems to have been original and natural source of the phrase and the orthodox application of In *Layers' Trial*, 16 How St Tr 246, various discreditable facts being

he particular facts to charge the reputation of any witness, but only *in general*

nself" *Wigmore* § 1981 In *R* v *Cobbit*, 2 State Tr. N S 789, 873, *Lord nterden C J* said. "The proper inquiry for a gentleman who has known Mr. many years is as to his general character, not as to any individual or rticular acts .. you may ask wh

rticular witness—such opinion being the result of the witness's personal perience and observation—will also be evidence as to his character But the idence need not show that such general opinion is based on the personal nowledge of the man by his neighbours generally, nor does it show that such neral opinion has been publicly expressed by his neighbours *Duma Singh* v. *ing Emperor*, 5 O C 203

PART II.

ON PROOF.

CHAPTER III.

FACTS WHICH NEED NOT BE PROVED

S. 56. Fact judicially noticeable need not be proved

56. No fact of which the C[illegible] take judicial notice need be proved.

Scope of Part II In part I of the Evidence Act, what fa[illegible] what facts may not be proved in a civil or criminal case has been [illegible] After ascertaining that question, the framers of the Act now propo[illegible] part to deal with the question what sort of evidence must be given [illegible]

the contents of a document, must be proved by oral evidence Oru[illegible] must consist of an [illegible] the fact to the ex[illegible] In [illegible]

been reduced to a documentary form, the document in which [illegible] that transaction, and its contents cannot [illegible] be varied by oral evidence though [illegible] tents of the document Step Dig Ev I[illegible] tion pp xiii, xiv

Proof The terms "evidence" and "proof" are often used in such a [illegible] as to include at one time the media by which facts are established, and at a[illegible] the effect or conclusions produced by the testimony It is true the attem[illegible] frequently [illegible] to distinguish betwe[illegible] terms "e[illegible] more of [illegible] viction, [illegible] accurately, proof [illegible] of proof Best Ev [illegible] produces assurance and certainty Evidence, therefore, [illegible] The words e[illegible] cause from effect Wills Cir Ev 2, 3; Greenl Ev 1 however the lat[illegible] and "proof" are often used as synonymous, in strictness, evidence is that [illegible] an effect of the former 'Proof" is that which convinces, evidence is that [illegible] tends to convince" Jastrzembski v Marxhausm, 120 Mich 677=79 [illegible] 935 (Am); Burr Jones § 4

Scope of Chapter III "The second chapter having decided what fa[illegible] relevant we proceed to show how a relevant fact is to be proved In the [illegible] place, the fact to be proved may be one of so much notoriety that the Court [illegible] take judicial notice of it, or it may be admitted by the parties In either of th[illegible] cases no evidence of its existence need be given Chapter III, which relat[illegible] judicial notice, disposes of this subject It is taken in part from Act II of [illegible]

part from the Commissioner's Draft Bill, and in part from the Law of gland" *Draft Report of the Select Committee—The Gazette of India, July, 1,* '1 *Part V p 273* "W S. 56

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known already, and

ted and reasoned upon without discussion. Often, also, much of which re might, in point of mere theory be a doubt, will, as a matter of established ictice, be allowed by the Court, in the first instance, without formal proof, id there is much which belongs to a dubious and arguable region as to which 'ourt may or may not proceed in this manner *Thayer Pre Ev* 277

In another case proof by evidence may be dispensed with, namely, where opponent by a solemn *infra judicial* admission has waived dispute This known as Judicial Admission *Wigmore* § 2565.

Facts which need not be proved *Stephen* in his Digest of the Law of idence (1st and 2nd editions,) Chap VII originally dealt with "judicial tice" under the general head of 'Proof and the special head of 'Facts hich need not be proved,' as in this Act For this he was taken to task by acute critic (in 20 Solicitors' Journal, 937) who suggested that since *Stephen's* t 93, that whoever desires a judgment to o or non existence of facts which asse not exist,' and since art, 59 bout judicial notice) declares that some facts asserted by a party need not be

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otice, of consciously recalling to the mind a fact known, but not for the moment dverted to, is an act of precisely the same kind as listening to the evidence of a

ted to the Judge's inspection in Court But the true conception of what is

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S. 56. being present [illegible]
proof (i e othe [illegible]
the situation as one where " no proof whatever was offered [illegible] defendant." The Judge was not a witness, and the [illegible] is not ent[illegible] itself [illegible] which the Court take[illegible] notice [illegible] [illegible] here (grant[illegible] [illegible] [illegible] tion of [illegible]

lower tribunal [illegible]
place at the trial, or their view that it is impossible to have [illegible] of exceptions when the trial Court avails itself of "real evidence" [illegible] illustration of "proving that it is raining by telling the Judge to [illegible] of the window, is another instance of the use of real evidence—[illegible] 280, 281.

Judicial notice, meaning of The expression "to take notice of a[illegible] in our ordinary popular p[illegible] [illegible] or remark[illegible]

[illegible] knowledge of a thing [illegible]
the leg[illegible] [illegible] as indicating the re[illegible]
without [illegible]
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change [illegible]
When [illegible]
teenth ce[illegible]
notice, [illegible]
common [illegible]
Neither of the o[illegible] terms [illegible]
inapplicable, for common knowledge is by no means [illegible] judge's function The constant use of this knowledge is equally not[illegible] [illegible] the word "notice [illegible]

said the Court will take judicial cognizance [illegible] they will be taken [illegible] And the importance of the [illegible] in which there [illegible] notice can hardly [illegible]
some matters whic[illegible]
which it is tried, [illegible]
a subject [illegible] *Burr Jones* § 105.

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not, as a part [illegible] a negative S. 5
sense, in th [illegible] s not always
necessary to [illegible] case. The
fact may be [illegible] l not require

Thayer Ev pp 278-280

Principle. Judicial notice is based upon very obvious reasons of convenience and expediency; and the wisdom of dispensing with proof of matters

tion. There is, however no rule of any practical importance which governs [illegible] arises must be decided [illegible] precedents, than the [illegible] words of *Greenleaf*, "Courts will generally take notice of whatever ought to be generally known within the limits of their jurisdiction" *Greenl Ev* § 8; *Burr Jones* § 105 (a) "Courts will not pretend to be more ignorant than the rest of mankind" *Fisher v. Janson*, 30 Ill. App 91.

notoriety, then he would take judicial cognizance of it. It would be absurd to

(2) all public Acts passed or hereafter to be passed by Parliament, and all local and personal Acts directed by Parliament to be judicially noticed: S.

(3) Articles of War for Her Majesty's Army, "Navy or air force":*

(4) the course of proceeding of Parliament and of the Councils for the purposes of making Laws and Regulations established under the Indian Councils Act,† or any other law for the time being relating thereto.

Explanation.—The word "Parliament" in clauses (2) and (4) includes—

(1) the Parliament of the United Kingdom of Great Britain and Ireland;
(2) the Parliament of Great Britain;
(3) the Parliament of England;
(4) the Parliament of Scotland; and
(5) the Parliament of Ireland:

(5) the accession and the sign manual of the Sovereign for the time being of the United Kingdom of Great Britain and Ireland:

(6) all seals of which English Courts take judicial notice: the seals of all the Courts of British India, and of all Courts out of British India, established by the authority of the Governor-General‡ or any Local Government in Council: the seals of Courts of Admiralty and Maritime Jurisdiction and of Notaries Public, and all seals which any person is authorized to use by any Act of Parliament or other Act or Regulation having the force of law in British India:

(7) the accession to office, names, titles, functions and signatures of the persons filling for the time being any public office in any part of British India, if the fact of their appointment to such office is notified in the Gazette of India or in the official Gazette of any Local Government:

(8) the existence, title and national flag of every State or Sovereign recognized by the British Crown:

(9) the divisions of time, the geographical divisions of the world, and public festivals, fasts, and holidays notified in the official Gazette:

(10) the territories under the dominion of the British Crown:

(11) the commencement, continuance and termination of hostilities between the British Crown and any other State or body of persons:

*Substituted by Act X of 1927. †24 & 25 Vict. c. 67.
‡For lists of such Courts, *see* the notifications printed on pp. 372 to 374 of the Western India Volume of Macpherson's Lists of British Enactments in force in Indian States

7. (12) the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and also of all officers acting in execution of its process, and of all advocates, attorneys, proctors, vakils, pleaders and other persons authorized by law to appear or act before it :

(13) the rule of the road *[on land or at sea]. In all these cases and also on all matters of public history, literature, science or art, the Court may resort for its aid to appropriate books or documents of reference.

If the Court is called upon by any person to take judicial notice of any fact, it may refuse to do so unless and until such person produces any such book or document as it may consider necessary to enable it to do so

Whether the list is complete A similar list is also given by *Sir J. es Fitzjames Stephen* in art. 55 of his Digest on the Law of Evidence. As regards that list he remarks "The list of matters judicially noticed in this article is not intended to be quite complete. It is compiled from 1 Ph Ev 455—67 and T E. ss 1—20, where the subject is gone into more minutely [illegible]

[illegible] Courts take judicial [illegible] the ordinary course of nature the meaning of English words, and all other matters which they are directed by any Act to notice, such as, in Bengal, list of land holders who have not made road-cess returns (Ben Act IX of 1879 s 19)

cases that which was already and more widely the law, have occasionally furnished ground for the contention that an intention to alter the general law was to be inferred from the partial or limited enactment; resting on the maxim, *expressio unius est exclusio alterius* But th[illegible]
cases The only inference which a Court c[illegible]
provisions (which generally find a place in [illegible] and idle doubts) is that the Legislature was either ignorant or unmindful of the

*These words in section 57, para. (13), were inserted by the Indian Evidence Act Amendment Act (18 of 1872), s 5.

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real state of the law, or that it acted under the influence of excessive caution and if the law be different from what the legislature supposed it to be the implication arising from the statute, it has been said, cannot operate as a negation of its existence; any legislation founded on such a mistake has not the effect of making that law which the legislature erroneously assumed it to be so.' *Maxwell*, 548. Similarly in *Krishna Kamini Dasi* v. *Nilmadhab*, 73 Ind Cas 312 at p 316 = A I R 1923 Cal 66, *Mr Justice Mookerjee* said "The only inference which a Court can draw from such superfluous provisions (which often find place in Acts to meet unfounded objections and allay doubts), is that the Legislature was either ignorant or unmindful of the real state of the law or that it acted

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shall take judicial notice In the circumstances the proper meaning of the section is that it does not forbid the Court to take judicial notice of any fact which is a proper subject of taking such notice, but the Court must take judicial notice of the facts mentioned in this section and as regards that the Court is not at liberty to exercise any discretion It was pointed out with regard to *the corresponding section of Act II of 1855 that the list mentioned therein* was not exhaustive and the Court was at liberty to take judicial notice of any fact of which English Courts take judicial notice *Queen* v. *Nabadwip Goswami*, 1 B L R O Cr 27, 28, *Woodroffe's Ev 8th Ed* 469 But why should it be confined to facts of which the English Courts ordinarily take judicial notice? The maxim that what is known need not be proved *manifesta (or notoria) non indigent probatione*, may be traced far back in the civil and canon law, indeed it is coeval with the legal procedure itself We find it a *maxim* in English law

set judici, si notum non sit in forma judicii. Per Coke C J in *Crawford* v.

future possibility of the doctrine of judicial notice. Courts may judicially notice much which they cannot be required to notice That is well worth emphasising, for it points to a great possible usefulness in this doctrine, in helping to shorten and simplify trials It is an instrument of great capacity, in the hands of a competent Judge, and it is not nearly as much used, in the region of practice and evidence, as

daily to smother trials

Thayer Prel Treat Ev 30

by Judges? One reason is that they apparently forget that (as *Professor Thayer* says) they might notice much that they cannot be required to notice by general rule made in advance, e g, a rule requiring them to notice always the incumbency of a sheriff's office might go too far, but they may in a given case be justified in declaring a specific sheriff to be notorious; and so on, in a thousand

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7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them The law of the jurisdiction is peculiarly a matter of judicial cognizance It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice ' Burr Jones § 119 The Mahomedan Ecclesiastical law is a law having the force of law in British India and as such will be taken judicial notice of by Courts Whitley Stokes Vol II p 887, Queen Empress v Ramzan 7 A 461 The general rules of Hindu and Mahomedan law do not require proof They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Maulavis Bhagwan v Bhagwan, supra The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved Per Garth C J in Jagat Mohini v Dwarkanath, 8 C 582 (587) But where a custom is judicially recognised it need not be

ham v Zamindar of Pitapur, 23 C

Kalir 93 Ind Cas 321, 78 Ind Cas

I R 1926 Oudh 352, see also

Ramalinga, 12 M I A

customs of any particular community may acquire, by being repeatedly proved in the Court, such a status as to make it unnecessary in any subsequent case for

to prove the existence of a body of customs Assuming that a rule of Ilijasa ilana

hin the term of s 57 of the Evidence Act

operation of customs which necessarily

Acts of Legislature In the case of laws enacted by the Legislature, Courts have to take judicial notice not only of the effect of the rules but also of those facts which are necessary for showing that

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this Act shall be deemed and taken to be Public Act, and shall be judicially

taken notice of as such, unless the contrary be expressly provided and declared by such Act." This provision is now repealed by the Interpretation Act, 1889, 52 and 53 Vict C 63, which provides, by s. 9 that every Act passed after 1850 "shall be a Public Act and shall be judicially noticed, as such, unless the contrary is expressly provided by the Act." So now every personal Act or local Act, should also be taken judicial notice of by the Indian Courts

Clause III. The Court will recognize without proof the Articles of War, whether in the naval, the marine, or the land service, as well as the auxiliary forces,—that is the militia, yeomanry, and the volunteers,—and also the reserve force, (*Taylor* § 5), but not of a book called the Rules and Regulations for the Government of the Army (*Bradley* v. *Arthur*, 4 B & C 304) nor the Regulations of the territorial force (*Todd* v. *Anderson*, [1912] S. C. J. 105)

Clause IV The English Courts take judicial notice of the laws of England and Ireland, including the laws and custom of Parliament and the privileges and course of proceedings of each House of Parliament *Stockdale* v. *Hansard*, 9 A & E 1=2 P & D 1, *Lucas* v. *Gowel* 12 Q B D 271 The Indian Courts should take judicial notice of debates of Parliament *The Englishman* v. *Lajpat Rai* 37 C 760=14 C W N 713 "The proceedings of the Legislature" says *Prof Wigmore* "as shown in its journal are by some Courts noticed, but this is an artificial theory on principle, the proceedings as contained in the [illegible] 2577 [illegible] from [illegible] C W N 713 (720)

[illegible] of the sovereign [illegible] *ingle*, 2 M & Rob [illegible] l and all matters stated under it. *R.* v. *Gully*, 1 Lev 93, *Mighell* v. *Sultan of Jhore*, (1894) 1 Q B 149

Clause VI The English Courts take judicial notice of the Great Privy Seal (*Lord Melville's Case*, 29 How St Tr 707; [illegible] royal proclamation, of the signature of the cler[illegible] *Lewinstein*, 1 R P C 170), seal of the Corp[illegible]

[illegible]

Crown Office Act, 1877, the Seal and the Privy Seal of the Duchy of Lancaster, the Seal and the Privy seal of the Duchy of Cornwall, the Seals of the old Superior Courts of Justice, and of the Supreme Court and its several divisions; the old [illegible] nt office [illegible] nd, the P[illegible] of Stanneries, the Seals of Courts constituted by Act of Parliament, if Seals are [illegible] orce and [illegible] matters [illegible] nd of its [illegible] district [illegible] Court of [illegible] nsolvent [illegible] ency in Ireland, which since the 6th of August, 1877, has been called "The Court of Bankruptcy in Ireland, of the several [illegible] in Ireland, of the Landed Estate C[illegible] of that Court, and of the county Court [illegible] the city of Glasgow is not one of [illegible] judicial notice *In re Henderson*, 22 C 491 Where the seal is not distinctly

7. notice given to this branch of the subject is, that diversity of opinion has existed as to whether certain laws of a private nature were entitled to the judicial notice, and it has therefore become the task of the legal chronicler to mark them The law of the jurisdiction is peculiarly a matter of judicial cognizance It is only on the presumption that the law is known to the Court that there can be any proceedings whatever in Courts of Justice' *Burr Jones* § 112 The Mahomedan Ecclesiastical law is a law having the force of law in British India, and as such will be taken judicial notice of by Courts *Whitley Stokes* Vol II p 887, *Queen Empress* v *Ram an*, 7 A 161 The general rules of Hindu and Mahomedan law do not require proof They can be ascertained by making necessary reference to authoritative text books, judicial decisions as well as from the opinions of the Pandits or Maulavis *Bhagwan* v *Bhagwan*, *supra* The Court can take judicial notice of what the Hindu Law is with regard to Hindu custom, that always must be proved *Per Garth C J* in *Jagat Mohini* v *Dwarkanath*, 8 C 582 (587) But where a custom is judicially recognised, it need not be proved *Jadulal* v *Janki ee*, 35 C 575 *Raja Ram* v *Zamindar of Pitapur*, 23 C W N 173 (P C)=41 M 778 *Tulsidas* v *Takir* 93 Ind Cas 321, 78 Ind Cas 161; *Bagrudi* v *Rahim*, 93 Ind Cas 332=A I R 1926 Oudh, 352, see also
Bap
v *Br*
2 Cl
(192
Sans
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to prove the existence of a body of customs
law is 'a rule having the force of law' within
there is one essential feature in the one
differentiates them fro
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formed nation cannot without proof be recognized as such by the judicial tribunals of other nations until it has been acknowledged by the sovereign power under which those tribunals are constituted (*City of Berne* v. *Bank of* [illegible] belonging to the executive [illegible] to such acknowledgment [illegible] as a fact by other competent testimony, and the existence of such unacknowledged government or state may, in like manner be proved, the rule being, that if a body of persons assemble together to protect themselves, and support their own independence, make laws and have Courts of justice, this is evidence of their being a State *Greenl Ev.* § 4 citing *Yrissari* v *Clement* 2 C & P 223 But the rule in *U S* v *Palmer*, 3 Wheat 610, 634, seems limited to the case of a defendant denying piratical intent by pleading the authority of a government having colourable existence and engaged in a revolution On the general question, the correct rule seems to be the contrary of the statement in *Greenleaf* [illegible] Court will look solely to the action of the Executive where the existence of a foreign nation or government is involved *U S* v *Hutchings* 2 Wheel Cr Cas 543, *Rose* v *Himely* 4 Cranch 241, *Gelston* v *Hoyt*, 3 Wheat 246 [illegible] *Nueces* v [illegible] 193, *Williams* v *Ins Co*, 13 Pet 415 [illegible], *Kennett* v *Chambers* 14 How 38 51; *Mighell* v *Sultan of Johore*, (1894) 1 Q B 149 In the last mentioned case *Kay L J* said at p 161 "The status of a foreign sovereign is a matter of which the Courts of this country take judicial cognizance—that is to say a matter which the Court is either assumed to know or to have the means of discovering, without a contentious inquiry as to whether the person cited is or is not in the position of an independent sovereign Of course the Court will take the best means of informing itself on the subject if there is any kind of doubt, and the matter is not as notorious as the status of some great monarch such as the Emperor of Germany Here the person cited was the *Sultan of Johore*, and the means which the Judge took of informing himself as to his status was by inquiry at the colonial office." Later on the learned Judge said. "The next point is this It is [illegible] his right to immunity, and may [illegible] agree, but how is that to be do[illegible] clear Supposing, by way of illustration, that some well known potentate, such as one of the great European Emperors, were to be sued in a Court of this country, and took no kind of notice of the proceeding; *it would be the duty of* [illegible]

in Council See also *Lachmi Narain* v *Protap*, 2 A 1 (17), *Procani* v *Bombay Baroda*, 9 B 244

While the Courts will take judicial notice of the existence of foreign governments, the rule must be taken with the qualification that it relates only to such governments as have been recognized by the Home Government The Courts will not anticipate the action of the government in this respect, and in case of a rebellion or a revolt in a foreign state, they will consider the former state of things as existing until the proper department of the government recognizes the change *City of Berne* v. *Bank*, 9 Ves 347, *Taylor* v *Barclay*, 2 Sim 213 Who is the sovereign, *de jure* or *de facto*, of a territory is not a judicial but a political question, the determination of which by the legislative and executive departments of any government

57. legible, Courts will not take judicial notice of it *Jaker Ali* v *Raj Chandra* 10 C L R 169 A registered power of attorney was admitted under this section without proof, the Registering
Brown, 11 C 176 But the abo

Court can take judicial not e
Radha Mohun v *Anpendra*
Nath, 105 Ind Cas 422

Clause VII Courts will judicially recognize the political constitution or frame of their own Government; its essential political agents and public office sharing in its regular administration; and its essential and regular political operations, powers and actions Thus, notice is taken, by all tribunals of the accession of the Chief Executive of the nation or state, under who e authority they act; his powers and privileges (*Elderton's Case*, 2 Ld Raym 980), a d
. *Gole's Ex'r*, 4 Marten 6
, and principal officers of
.31) In America the Court
. senator the appointment,
ell, 2 Rob (La) 160) In
Dilman v *Burrow*, 2 Ld
be taken judicial no e
ir deputies *Greenl Ev*
l executive offic rs to al
0 Mart. 196 But the
English doctrine does not extend to this length *Taylor* § 14 So also in

be taken of the signature of a Deputy Commsr of Police *Walchar* v *E*
53 C 718=30 C W N. 713; see al o *Tamor* v *Kalidas*, 4 B L R
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he is acting as such *Rampiban* v *Ahmed*, 5 Ind. Cas 537.

being alike members of the great family
d to recognize each other's existence and
he usual and appropriate symbols of
nationality and sovereignty are the national flag and seal Every sovereign therefore, recognizes, and, of course, the public tribunals and functionaries of
sovereign
ls of State
eceived as
, however
upon a civil war in any country, one part of the nation shall separate itself from the other, and establish for itself an independent government, the newly

public feasts and festivals. *Taylor* § : . . . . S
facts in the case of the average man . . . .
the fact itself; he merely knows wh . . . .
the period of limitation for a suit expires on a gazetted holiday and the plaint is presented on the day the Court re-opens it is not necessary for the plaint explicitly to state that on the day on which the period of limitation expired the Court was closed *Tek Chand* v. *Mt Pilo*, 16 N. L. R 193=76 Ind Cas 926 This clause empowers the Court to take judicial notice of any public holidays notified in the official gazette. *Ibid*

Geographical Divisions Courts, in . . . .
phical features of the country covered . . . . . .
the country as a whole, and of the entire . . . . . .
Courts take judicial notice of political subdivisions of the country as it was made by law, and of the state or territory where they hold their sessions, and of the judicial districts within it. Courts will take judicial notice of the local divisions of the state into counties cities and towns and of the facts that certain cities are in such subdivisions *State* v. *Pennington* 124 Mo 388, *Rogers* v *Cady* 104 Cal. 288 (Am) *Dobell's Case* 4 B & Ald 243, *R* v. *Fly*, 15 Q B D 827, *R* v. *St Maurice* 16 Q B D 908 The Court takes judicial notice of the existence, extent, and geographical position of the British dominions and of the territory of the foreign States. *Halsbury*, Vol 13, p 493 In *Cooke* v. *Wilson*, 1 C B N S 153, *Crowder J* at p 164, held that the Court was bound to take notice of the existence of the colony of Victoria and *Cresswell J* at p 163, that it must recognise that the colony was out of England In *Burrell* v. *Dryer*, (1884) 9. App Cas 345 where the question was whether the words "St. Lawrence" in a p lic. of . . . . confined
to the ri . . . . that the
Court sho . . . . names
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cognizance of the fact that, assuming these tribes to be independent, they do not possess jurisdiction over certain territories. This is a matter which appears to me must necessarily be within the cognizance of Her Majesty, because, for the protection of her lieges in the ordinary way, she should know whether redress should be applied for to the Sultan of Morocco or to the head of the various independent tribes of Suss Sound policy appears to me to require

at p 221 said "The judgment proceeded, not on the question whether the Court should give relief or not, or give discovery or not, and withhold relief, but upon the question whether the King's Court should attend to
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Case, 1821, 4 B & Ald 243, *per Bayley J* and *Best J*) unless such situation is recognised by statute (*R* v *Holborn Union Guardian*, 6 E & B 715) nor of the particular diocese within which any town is situated *R* v *Sympson*, 2 Ld Raym 1379, *Halsbury* Vol 13 p 1 judicial notice that a certain city referred to and the pleadings do not *Wheeler*, 162 Mass 429 (Am) In

state, without proof of the fact. v *Strong*, 42 Ill 148 But in an notice of the fact that *Ilchester* was in the county of *Somerset* *R* v *Burridge*, 3 P Wms 139 196, see also *Thorne* v *Jackson*, (1846) 3 C B 661, *Brunne* v *Thompson*, (1842) 2 Q B 794, *Humphreys* v *Budd* (1841) 9 Dowl 1000, *Church* v *Imp Gas Co*, 7 L J Q B 118 In England the Courts will take judicial notice of the different counties palatinate, and counties corporate in that country *R* v *S Maurice*, 16 Q B D 908, *Deybil's Case*, 4 B & A 248 That a particular colony or place in it, is not, in England need not be proved to an English Court *Cooke* v *Wilson* 26 L J C P 14 The Courts take judicial notice of the leading geographical features of the country, for example the existence and general location of im- portant chan 40 A that that and in *R* v *Isle of I* a divi- sion of a county 2 B & Ald 301 the Court place named Dublin in the world, and therefore refused to construe an allegation in the declaration that a bill was drawn in Dublin as meaning drawn in Dublin in Ireland *Ibid*, see also *Kearney* v *King*, 2 B E Ald 301 But a statement by the Attorney General on the Instructions of the Home Secretary as to whether a certain spot in the British channel was within the limits of H M's territorial sovereignty was held binding upon the Court (The *Farqurness* [1927] p 311, cf *Engelke* v *Mursman* [1928] A C 433) *Phip Ev 7th Ed* 22 Judges are aware, with the rest of the community, of the existence of the prin- cipal lines of railroad which are wholly or in part within the county The common knowledge includes locality, course and direction of such a railroad What places are on the line of a railroad, have stations in it, or constitute its termini, or railroad centres, through what other localities it must pass in order to connect two places, what is the distance between two points on a railroad, within what county these points ar and similar facts pertaining to judicially know But details, [illegible] must be proved [illegible] *Ev* § 741

Clause X ' All Courts of Justice are bound to take judicial notice of the territorial extent of the jurisdiction exercised by the Government whose laws they administer, or if its recognition or denial of the sovereignty of a foreign power as appearing from the public Acts of the legislature and executive although those Acts are not formally put in evidence nor in accord with the pleadings" *Jones* v *United States*, 137 U S 214 (Am) In England the Courts notice the territorial extent of the jurisdiction and sovereignty exercised *de facto* by their own government and the local divisions of the country as arishes, and the like so far as the but not the relative positions of ndaries further than they may be the Foreign Jurisdiction Act, 1890 any question as to the existence or eign country, arising in proceed- ings in a Court in the British dominions or held under British authority, is to be submitted to the Secretary of State, whose decisions for the purpose of the proceedings is final 'If it be true said *Lord Selborne* in *Damodhar* v *Deoram*, 1 B 367 at p 404 (P C) " that the Indian Courts might take judicial notice of the territories of the Queen in India, then, if there has been a cession of terri-

tory, they must take notice of that, and they must do so independently of the Gazette, which is no part of the case, but only evidence of it." S.

Clause XI The Courts take judicial notice of wars with foreign states if a state of war has been declared by the proper authorities *Dolder* v *Lord Huntingfield*, 11 Ves. 292 It is submitted that the law is as stated in the text, although *Lord Eldon* said during argument "You would be obliged upon an indictment for a libel to prove that France is now at war with Austria, not as to the war with this country, the Court taking judicial notice of that with reference to our own country" See also *Halsbury, Vol II* p. 493, *Rex* v *De Berenger*, *Thellusson* v *Cosling* 4 Esp 266, *Hart* v *Murray*, Times March 5, 1868), *Appendix of Is...* (1915) 3 K B 649 658, *Re Love*, (1916) 1 K B 268 *Taylor Ev* § 18 But if no such declaration has been made the fact of a state of war is one to be proved 1 *Hale P C* 164 A war between foreign powers is not judicially noticed *Dolder* v *Lord Huntingfield* *supra* When it is said however, that the Courts take judicial notice of wars with foreign states, it must be interpreted that the Courts take judicial notice of the act of their own executive with reference to war with a foreign state The executive recognition is the warrant for the Court *Gelston* v *Hoyt* 3 Wheat (U S) 246 It is the determination of a political question by another department of the government which is binding on the Judges *Jones* v *United States* 137 U S 214 (190), *Burr Jones* § 107 (a) As regards the commencement of hostilities see *The Teutonia Duncan* v *Koster*, 8 Moo P C (N S) 411 = L R 4 P C 171 = 26 L T 48 Under ss. 6 and 8 of Act II of 1855 the Gazette of India or Calcutta Gazette containing official letters on the subject of hostilities between the British Crown and the Mal[illegible]

[illegible]

Representative v *Peninsular and Oriental Branch Service* (1923) A C 191 = 92 L J K B 112 = 128 L T 546 The statement by H M's Commissioner and Consul General for *Uganda* is sufficient for the Court's taking judicial notice, under s 57 Evidence Act, of the existence of hostilities between *Kaberja*, the King Unyoro and Her Majesty the Queen and the protected states of Uganda. *Imperatrix* v *Juma*, 22 B 54

Clause XII. According to English law under the general principle of recognising domestic officials, notice is taken of the incumbency of other officers [illegible] to the extent to [illegible] ficers, particularly [illegible] *Fullerton's Case*, [illegible] v *Turner*, 6 Q B [illegible] *Wigmore* "It [illegible] ies and authorities to the incumbents, but whether the incumbent at a given time and place is a specific person depen[illegible] notorious, but sometim[illegible] Princip[illegible]

[illegible] not *Wigmore* § 2576 But in [illegible] rule is forced and all Courts must take judicial notice of the names of the members and officers of the Court and of their deputies and subordinate officers and assistants, and [illegible] process, and of all advocates, [illegible] ersons authorized by law to [illegible] Act II of 1855, the Court was [illegible] *Nill unt Chackerbutty* v *Sheo Narain*, 8 W R 276

[illegible]

"law of the road,' was not to be considered as inflexible, since, in crowded streets situations and circumstances might frequently arise, where a deviation from what is called the law of the road, would not only be justifiable, but absolutely necessary Where the defendant was driving on the wrong side of the road, which was of considerable breadth, and the plaintiff's servant, who was on horseback, without any reason crossed over to the side on which the defendant was driving, and on endeavouring to pass, his horse was killed *Lord* ... he plaintiff ... 689 And ... the road, ... if he kept to ... *v* 7,9 As regards rules of road, *vide Leame* v *Bray*, 3 East 593, *Turley* v *Thomas* 8 C & P 104

The Court will take judicial notice of the following rules with respect to navigation,—first, that ships and steamboats, on meeting "end on or nearly end on, in such a manner as to involve risk of collusion' should port their ...

In all cases and also on all matters of public history etc Notorious facts of foreign history will be noticed, whether ancient or contemporaneous The existence of a war in a foreign country, at a given time, will be regarded as a fact of common knowledge But special historical facts of comparatively slight general importance connected with a particular state and the consequen... regarded as commonly known D... importance will be considered in determining what facts of foreign history ... minor Any Court of a nation will know as matters of common knowledge notorious facts in the nation's history Where these are a direct result of legal action the knowledge of the Court may also be judicial,—as in the case of ... imp... jud... imp... suc... of ... ma... state, what was the tenure of office of the succession, chief magistrates ... state, the date of a general or national election need not be established by evidence *Ibid* § 798 The general history of the great—national parties is a fact of common knowledge *Ibid* § 799 When in doubt as to any matter to be judicially noticed the Judge may refer for information to appropriate sources *Phip Ev 4th Ed* p 17 *Taylor Ev* 10th Ed § 21 The Judge may resort to such means of reference as may be at hand, and as he may deem worthy of confidence *Greenl Ev* § 295, *Tay Ev* § 21 The provision that the Court may resort for its aid to appropriate books' is an advance on the English Law under which though an expert called as a witness, will be allowed to refresh his memory by referring to a professional treatise regarded by him as of authority yet th... but see *Willo*...

judicial cogniz... of some matter for his Court's knowledge and notice must frequently ... demand upon him, to which, without some means of reference—or refresh ing hi... ought not be able to respond It does not neces sarily ... when his me... whethe... resolve... happen...

[illegible] concerning matters which have not been referred to in the evidence, in which he is entitled to resort to any source of information which in its nature is calculated to be trustworthy and helpful, always seeking first for that which is most appropriate; sometimes too concerning matters of law, and in either case he may use all proper means for satisfying himself in any way that appears to him satisfactory *Taylor Ev.* § 1[illegible] In a New York case the opinion shows that the Court had referred to various documents and to Pollard's and Greely's histories of the Civil War *[illegible]* v *[illegible] Ins Co*, 37 N Y. 174 In the celebrated *Dred Scott* case *Chief Justice Taney* evidently had [illegible] ordinances and works of history, [illegible] light upon the social and political [illegible] of the country *Dred Scott* v *Sandford* 19 How (U S) [illegible], *Taylor Ev.* § 1[illegible] *Dr Wharton* illustrates the principle thus "The Judge may consult works on collateral science or arts, touching the topic on trial. He may draw for instance, on mythology, in order to determine the meaning of similes in an ambiguous writing He may refer to almanacs (*Page* v *Faucet*, Cro Eliz 227), he may appeal to his own memory for the meaning of a word in the vernacular (*Rex* v *[illegible]* 1 Moo C C 323, *Clementi* v *Golding* 2 Camp 25 *[illegible]* v *[illegible]* L R 7 Ex 70); he may, as to the meaning of terms, refer to dictionaries of science of all classes (*[illegible]* v *Golding*, 6 C & P [illegible]6, *[illegible] Case* 1 Leon 242, *[illegible]* v *Drummond* 1 C & L 210, *[illegible]* v *[illegible]* 9 C & F [illegible]55; *[illegible]* v *[illegible]* Skin 11; *In re St Catherine's Hospital* 1 Vent 149 *[illegible]* v *[illegible]* 1 Salk [illegible]1; *Clementi* v *Golding* 2 Camp 25 he may determine the meaning of the abbreviations of Christian names and others, and of other common terms, as to a point of [illegible] he may consult [illegible] 2[illegible]1, *Mitchell* v [illegible] 811), he may [illegible] v *Lloyd* 1 Man & E 6[illegible]), and *Lord* [illegible] veyancer as to a rule of [illegible] R 772)" *Wharton Ev* [illegible] is called upon to decide as to what particular date in the English calendar a certain date in the Fasli year corresponds with, may resort for its aid to appropriate books or documents of reference, and in such a case an almanac containing the British and Fasli calendars may be referred to Oudh Judicial calendar was not compiled expressly for the purpose of showing corresponding dates in the different eras, and was not an appropriate document of reference in such a case *Raghubar* v *Sheo Churn* [illegible] 1 O C 182 In all those and the like cases where the memory of the Judge is at fault, he resorts to such documents or other means of reference as may be at hand, and may deem worthy of confidence [illegible]

[illegible] of war which were not [illegible] that they ought to have been produced Cited by *Buller J* in *R* v *Holt*, 5 T R 446 But in many other cases, the English Courts have themselves made the necessary inquiries, and that, too, without strictly confining their researches to the time of the trial *Taylor* § 21, *Taylor* v *Barclay* 2 Sim 221; *The Charkieh* 42 L J Adm 17 cited in *Lachmi Narain* v *Raja Pertap* 2 A 17, *Chandler* v *Grieves*, 2 H Bl 606 na *Dee* v *Lloyd* 1 M & Gr 68, *Worseley* v *Filisker*, 2 2 Roll [illegible] follow [illegible] v *Bor*[illegible] *Lachn*[illegible] 516 [illegible] "from producing evidence, it [illegible] make a request for it. Up[illegible] said to declare the fact noticed, or at least to make the investigation which it

deems necessary No doubt, in most instances, the rule of law has the plain consequence of compelling the Judge to declare the dispensation, not to do so would be to err, precisely as under any other rule of law But it must not be supposed that this is universall
numerous topics, near the line
Court may but not must, tak ,
nized, erely authorised the Court to
notice 2568 As regards the meaning
of the and Ali v Zafar Ali, 46 Ind
Cas 114. In a suit for declaration that a church and its properties were trusts and the plaintiffs were its trustees and for possession of the same from defendants certain documents consisting of printed letters of the Priests of the
dated about 75 years ago were ad
of reference to prove the history of
Catholic Mission Held, that, though the books were admissible to prove facts of public history, they could not be relied upon to prove where certain particular Missionaries were living or when they died The Court can dispense with evidence only of what may be regarded as notorious facts of public history Ambalam v J M Barthe (1912) M W N 152=13 Ind Cas 99 A document may be referred to in connection with ancient facts of a pulic nature provided it is an approved, public and general history It is provided by this section
literature science or art the Court may res
books of reference Tira Chainnamal v
the question whether a certain property
wakf property cannot be deemed to be a matter of public history within the meaning of this section, and historical works cannot be referred to for the purpose of deciding the question Sant Singh v Rallia Ram, 126 Ind Cas 741=A I R 1930 Lah 738 "It is to be observed that the section does not say how
any fact histori
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before the suit in which the usage of the institution and its history are described, both being matters relevant to the suit. Augustine v Medlycote 15 M 241 Evidence of the sources of common knowledge, if not its extent may perhaps be obtained by reference to a cyclopædia and the list of text books to be found but detailed information supplied from such sources requires usually to be supplied by experts. United States v St Albans, 131 Ind Cas 771=A I R 1931 P. C 189

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art are relevant facts under s 45
the rule in regard to the admission of expert testimony is thus stated by Earle
'It is not sufficient to warrant the introduction of expert testimony that the witness may know more of the subject of inquiry and may better comprehend and appreciate it, than the jury, but to warrant its introduction, the subject of inquiry must be one relating to some trade, profession, science or art in which persons instructe
more skill and
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reference to them, and draw inferences from them, as witnesses, then there is

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cations, will be judicially noticed, but they must be of such universal notoriety and so generally understood that they may be regarded as forming part of the common knowledge of every person *Burr Jones* § 128 So *Mr. Justice Markby* is not correct in his interpretation of this section when he says "What perhaps it meant is that, though the parties must obey the law as laid down in ss. 45 and 60, the Judge may resort for his own aid to appropriate books without restriction" This principle of the rule contained in this section . *The Corporation of Calcutta*, 22 C. W. N. 745, the Court by the prosecution in support of As regards the admissibility of these bo these books I see that one or mo Magistrate's Court. In my opinion did thereby to make these books and all their contents evidence in the case. The use of such books by the Court is regulated by sections 57 and 60 of the Evidence Act
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ence may be referred to *Hatim* v *Empress*, 12 C L R 86 A Court, *suo motu*, will know whatever every one, as a rule knows about the characteristic properties of material substances, in solid, liqui
Regarding solids, the Court will notice
familiar,—as that certain substances are
the movements of gases The Court w
dynamite are dangerous by reason of their liability to create an explosion So also no proof need be offered of the well known qualities of common forms of matter in a liquid state
specified conditions, to ex
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knowledge *Chamberlayn*
established and notoriou
tribunal The conclusions of such inve
regarding matters of general interest, are c
tions of scientific knowledge, about which
opinion, must be proved, if their truth is to
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of soft coal in ...
mechanical occupations, these and similar facts, so far as popularly known, will be known by the Court upon ordinary principles *Chamberlayne's Ev* § 765.

7. **Facts of Social life** No proof need be offered of facts which are well known incidents of the social life of the community "*Quicquid agant homines*" said *Lord Mansfield*, "is the business of Courts, and as usages of society alter, the law must adapt itself to the various situations of mankind" *Barwell* v *Brooks*, 3 Dougl 371, 373 "It is the duty of Courts judicially to know what is the general course of the transactions of human life." *Duncan* v *Little*, 2 Bibb (Ky.) 424, 426; *Chamberlayne's Ev* § 705

Private Knowledge of the Judge In deciding a case a Judge cannot base his judgment on his own personal knowledge *Durga Prosad* v *Ram Doyal*, 38 C 153 There is a real but elusive line between the Judge's personal knowledge as a private man and his knowledge as a Judge The latter does not necessarily include the former, as a Judge indeed, he may have to ignore what he knows as a man, and contrawise *Wigmore* § 2569; *Chamberlayne's Ev* § 574 That rule was laid down so far back as the year 1406 In arguing a question as to the duty of the Court not to have rendered a certain judgment, counsel put this case "Sir let us put the case that one man kills another in your presence, ... guilty is indicted before you and is

report to the King, to give him
this case, before causing those to appear by whose hands the King was paid *Gascoigne C J* said Once the King himself asked of me the very case that you have put, and asked me what was the law, and I told him just as you say it, and he was well pleased that the law was so" Year Book, 7 H IV, 41, pl 5 cited in *Wigmore Cas Ev* 751, *Wigmore* § 2569, *Partridge* v *Strange*, Plowd 83; *Marriot* v *Pascal*, 1 Leon 159, 161 But *Mr Hawles*, Solicitor General arguing said, 'It is said, though a Judge do think in his conscience a person

at the
behaviour, ...
the truth of such incidents is contested between the parties, he should mention

his private knowledge of such incidents to the parties and he should refuse to be the judge in that case unless both the parties, after he so mentions to them his said personal knowledge of that particular incident, state that they have no objection to his continuing as Judge" See also *Hurjushal v. Sheo Dyal*, 3 I. A. 259=26 W R. 55 P C. Similarly where a case is to be tried by jurors, "the personal knowledge of any juror concerning any probative fact involved in the case under consideration is not to be considered in deciding the case Such a juror should communicate his information to the Court, and if he is not excused from service and it is deemed proper to his cognizance of such a fact in the trial, he must be sworn as a witness and examined, subject to … But any … experience … knowledge … would prove fatal It is common knowledge, also, that a forest tree cut nearly in two at the butt will fall, if a high wind blows against it. If a witness should testify to the contrary to these ordinary phenomena, the common knowledge of the juror derived from his experience in such matters would naturally compel him to discredit that witness Many illustrations might be given where men are normally and legitimately influenced in considering testimony by their general knowledge and experience It is utterly impracticable in the administration of Courts of justice to secure a juror whose mind is totally blank as to questions involved in the ordinary transactions of life Triers of fact cannot, in the nature of things be divested of general knowledge of practical affairs. The Court cannot do otherwise than to direct them to use such experiences as are common *to all men in the decision of questions of fact It is part of the jury system* which cannot be dispensed with" *Per Burnett C J* in *Rostad v Portland* R L & P. Co, 101 Or. 569 (Am), *Wigmore* § 2570

… dicial notice … in standard … *O'Donnell*, … Ald 303), … *Tool*, L R. 3 Q B 197); *Phip Ev 7th Ed* 25 So a Court will take judicial notice of matters of universal notoriety its general knowledge of daily life But a Judge cannot use from the Bench under the guise of judicial knowledge that which he knows only as an individual observer He cannot therefore impart into a case his knowledge of the previous conduct of the accused *Shamburam v Emperor*, 25 S L R 213=132 Ind Cas 176 It would be unfair to the Railway Company to take judicial notice of thefts on the … *Lal*, 111 Ind Cas 523=A I R … judicial notice of the fact that there is … between the arrival of a registered … from the Post Office or in other words that a registered letter takes 24 hours longer than an ordinary letter *Firm of Chaterbhuj v Secretary of State*, 99 Ind Cas 622=A I R 1927 All 215 So also judicial notice can be taken of the course of post, the stamp of post-offices on letters, and the fact that post cards are un… them, and … *Huth v Hut*… repeatedly … *Sano v Pu*… community … be taken ju… 186=A I … 2 O W N … Courts are … *Bux* 93 Ind Cas 332=A I R 1926 Oudh 302 Courts must take judicial notice of provisions of s 24, Paper Currency Act, without defendant having raised the objection in his defence at all *Mirza Hidayat v Nga Kyaing*, U B R (1914) 1st Qr 13=24 Ind Cas 721 A registered power of attorney was admitted under s 57 of the Evidence Act without proof as the registering officer is a Court under s 3 of the Act. *Kristo Nath v T F Brown*, 14 C. 176. In England

7. judicial
Denis v
Universit
8 E & B
domestic animals *Nye* v *Niblett*, (1918)
have also noticed judicially that boys a
Hardwick 32 T L. R 159 H L ; *Williams* v
Smith, 17 T L. R 235, 423 ; *Sullivan* v
Dublin Co, 39 Ir L T. R. 126); *Phip Ev 7th Ed.* p. 25.

Judicial notice of facts transpiring in Court A Court can take judicial notice of facts transpiring in Court. *Chattra Kumari* v. *Mohan Bikram*, 121 Ind. Cas. 337=1931 Pat 114

§ 2567. Since judicial notice is an expedient for hastening the trial and elimina

Books referred to by Courts. The following are some of the books which the Courts often resorted to in order to ascertain the matters of history, literature, science, art, etc.—

(1) Directions for Revenue Officers in the North Western Provinces, promulgated by the Lieutenant Governor and prepared probably by Mr. Thomason ... Rul 29

1 (17)
Forester
Ajmodia.

17 B 448

(7) Buchanan's Journey in Mysore, *Ibid* pp 56, 57

(8) Todd's Rajasthan, *Ibid* pp. 56, 57 ; *Moharana* v *Vadilal*, 20 B. 61 (72)

(9)

(10)

(11)

(12) *Ibid* 29 (82)

(13)

(14)

(15) *Framji Nanabhai*,
7 B H. 443 (444); *Ranga-*
sami v 2
(16) ir, 12 B H C. R
199 (207).

Roman Law. *Jotindra Mohun* v *Ganendro*

Dictionary *Hormasji* v. *Peddar*, 12 B H C R 199 (207).

(20) Domat, 2413 *Jatindra* v *Ganendra, supra.*

(21) Mr. Prinsep's Table *Forester* v. *Secretary of State*, 18 W. R 359 (364).

(22) Seaton's letter. *Ibid.*

(23) Histories, *firmans*, treatises, and even replies from Foreign office *The Charkieh*, L R 4 A. & E. 59; *Phip. Ev 4th Ed* p 17; cited in *Lachmi Narain* v *Rajah Partap*, 2 A. 1 (17)

S.

(24) The collection of treatises originally published by Mr Aitchison, the Secretary to the Government of India. *Lachmi Narain* v. *Rajah Partap*, 2 A. 1 (17)

(25) Aitchison's Treatises. *Lachmi Narain* v. *Raja Partap*, 2 A 1(15).

(26) New Oxford Dictionary. *Dulabhai* v. *Jimsetji*, 21 B. 293.

(27) The work of Grotius, Vattel, Puffendrof, Chalmers, Wheaton, Phillimore and Twiss. *Damodar* v. *Deoram*, 1 B 367 (P. C); *Lachmi Narain* v. *Raja Partap*, 2 A. 1 (23).

(28) Lord Palmerston's speech in the debate on the relinquishment by the British ... *r* v. *Gordhan*, 1 B 380.

... House of Lords on the

... p 387

... Munro. *Venkatanarasimha* v. *Dandamudi*, 20 M. 302

(32) Dewan Bahadur Srinivasa Ayyanger's "Progress in the Madras Presidency" *Ibid.*

(33) Richardson's Manuke. *Mathen Shue* v *Maung Kan Gyi*, U. B R. (1897—1900) Vol. II, 112.

(34) Letter's Manual of Buddhist Law *Ibid*

(35) Kin Wun Mingyi's Digest. *Ibid*

(36) *Wagaru Dhammathat, Dr Forchhammer's*, *Ibid*

(37) Crokes on Caste and Tribes *Mariam Bibee* v. *Sheikh Mahmood*, 28 C. L. J. 366

(38) Risley's Tribes and Castes in Bengal *Santa a* v *Badasuari*, 27 C. W. N 669

(39) Hunter's Imperial Gazetter of India *In the matter of the German Steamship Drachenfels*, 27 C 860.

(40) Encyclopaedia Britannica. *Annu Kumaru* v *Muthupayal*, 27 M. 551 = 14 M. L. J. 248.

(41) District Gazetteer of Bengal. *Lalu Dome* v *Bijoy*, 13 C. 217 = 20 C. W. N. 404.

(42) Hunter's Statistical ... *Badasuari*, 27 C. W N. 669, *Secretary of S* ...

(43) Mandsley's Respons ... *Empress* v *Kader Nath Sha*, 28 C 608

(44) Bucknill and Tuke's Psychological Medicine *Ibid*

(45) Simcox's Primitive Civilization *Rama Sami* v *Nagendra Narain*, 19 M 33.

(46) Notes on Buddhist Law by Jardine. *Mi Me* v *Mi Shue*, 16 C W N 529 (P C)

... *Anna Kumaru Pillai* v *Muthupayal*, 27 M

... Pearl Fisheries and Marine Fauna of the

... Fisheries Ibid

(50) Rajendra Lal Mitter's Buddha Gaya *Jaipala Gir* v *Dharam Lal*, 23 C 60

(51) Martin's edition of Buchhanan Hamilton's Eastern India *Ibid*

... and Custom *Cheru Kuneth* v *Vengunat*,

... l of Malabar *Agustine* v *Medlicot*, 15 M 19 M 31

(54) Dr Lyon's Medical Jurisprudence for India *Ikan Singh* v *Dhan Kuar*, 24 A 445

(55) Medical Gazette *Ibid*

(56) Murphy's Obstet Rep. *Ibid.*

(57) Playfair's Midwifery. *Ibid.*

(58) Treaty with Nawab of Bhopal by the East India Company *Lachmi* ...

... *Damodar* v *Deoram*, 1 B 367 (P. C).

... *abhan* v *Bai Haabhai*, 7 C W. N. 710

... oms and ceremonies." *Ramasuami* v

S. 58. (62) Shakespeare's Dictionary *Gajraj Puri* v *Achaibar Puri*, 16 A 191 (P C)

(63) Ferguson's History of Architecture *Secretary of State* v *Shunmugaraya* 16 M 698 P C = 20 I A 80

(64) Houghton's History of Christianity in India *Augustine* v *Medlicot*, 15 M 241

(65) Stephen's History of Criminal Law of England. *Queen Empress* v *Kedar Nasye*, 23 C 604 (608)

(66) Geographical, Statistical and Historical Account of Orissa by Stirling *Shyamanand* v *Rama Kanta*, 32 C 6, 13

(67) ' India Orientalis Christiana" *Augustine* v *Medlicot*, *supra*.

(68) Wilk's History of Mysore *Jakir* v *Trumala*, 1 M 213

(69) Ibbetson's Census Report *Ghulam* v *Secretary of State*, 6 Lah 269

(70) Wynyords Settlement Report *Byai* v *Bhupendra*, 17 A. 456 (P C).

58. No fact need be proved in any proceeding which the parties thereto or their agents agree to admit at the hearing, or which, before the hearing, they agree to admit by any writing under their hands, or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings.

Facts admitted need not be proved

Provided that the Court may, in its discretion, require the facts admitted to be proved otherwise than by such admission.

Principle A Court, *in general* has to try the question on which the parties are at issue not on those on which they are agreed *Burjorji Cursetji* v *Muncharji*, 5 B 143 (152), *Mc Gowan* v *Smith* 26 L J Ch 8 An express waiver, made in Court or preparatory to trial, by the party or his attorney, conceding for the purpose of the trial the truth of some alleged fact has the effect of a confessory pleading, in that the effect is thereafter to be taken *for granted*; so that the one party need offer no evidence to prove it, and the other is not allowed to disprove it. This is what is commonly termed a solemn—*i. e*, ceremonial or formal—or judicial admission, or stipulation It is, in truth, a substitute for evidence, in that it does away with need for evidence *Wigmore* § 2588 It waives or dispenses with the production of evidence by conceding for the purposes of litigation that the proposition of fact alleged by the opponent is true, *Wigmore* § 1058 " Agreements of this character, intelligently and deliberately made,—whether made by the parties in person, or by their attorneys or solicitors of record,—are encouraged and favoured Their purpose generally is to save costs, and to expedite trials, by relieving from rules of practice which in the particular case are deemed mere hindrances, or the dispensation with mere formal proof, or, as in the present case, the admission of uncontroverted facts, of the existence of which the parties are fully cognizant" *Per Brickel J in Prestwood* v *Watson*, 111 Ala 604 *(Am.)*; *Wigmore* § 2588

Scope of the section No evidence is required of matters which are admitted for the purpose of the trial. Admissions for the purpose of dispensing with proof at the trial which are called judicial admissions must be distinguished from those tendered at evidence,—the former not being usually receivable in other proceedings and the latter not being usually conclusive *Phip Ev 7th Ed 18* This section includes judicial admissions including admissions made in the pleadings. The effect which a judicial admission produces is of course an effect showed in common with certain other legal acts *In the first place*, a pleading may, by confessing a fact, place it beyond the range either of needing evidence or of permitting dispute, and an omission to plead in denial may have the same consequence The distinction between a pleading and a judicial admission seems to consist in the circumstances that the latter may be made after issues joined or trial begun, and may thus counteract or diminish the effect of a pleading, that it is not a part of the required statements defining the parties' issues; and that it is therefore not subject to the rules of time,

form, amendment, and the like, which govern the allegations of pleading. S
Wigmore § 2589 Under this section no fact need be proved which the parties at the hearing or which by any rule of pleading in force at the time they are deemed to have admitted by their pleadings Where a plaintiff admitted, in a written statement in a former suit and in
question, an agreement set up by the defendan
took for consideration not to redeem a moi
the defend
in the face
Maung Kot
to civil as well as to criminal cases *Bhulan* v *Emperor*, 91 Ind Cas 233, *Bansilal* v *Emperor*, 30 Bom L R 646=52 Bom L R 686=A I R 1928 Bom 641 This section has in general no application to divorce cases *Over* v *Over*, 27 Bom L R 251=A I R 1925 Bom 231=49 B 368 This section normally relates to agreed statements of facts made between both parties to save time and expense at a trial But
facts, and no pleading has been put in
admission has been made in his pleadin,
plaint to the contract in suit having n
practices of the office is no indication whatsoever to the defendants that the plaintiffs rely on one of the supposed terms of this "office dhara" in support of their claim, or that one of the supposed terms of this 'office dhara" is an implied stipulation

ful consideration, with regard not only of
, but with regard to the time at which they were made, their use in the action of which they form the basis, their use *dehors* that action, the change
brief by the circumst
making them, includin
knowledge and those
allege matters of fac
evidence against such
272. The admission
relating to the progr

must be some other proof of authority to make the admission *Wagstaff* v. *Wilson*, 4 B & Ad 339

There is another class of judicial admissions, made by the payment of money into Court, upon a rule granted for that purpose. Here, it is obvious, the defendant conclusively admits that he owes the money thus tendered in payment (*Blackburn*
558); that it is due
Bendict, 5 Bing 28;
285, *Huntington* v
to claim it in the character in which he sues *Liscombe* v. *Holmes*, 2 Camp. 441); that the Court has jurisdiction in the matter (*Miller Williams*, 5 Esp. 19 21); that the contract described is rightly set forth, and was duly executed (*Gutteridge* v. *Smith*, 2 H Bl. 374, *Israel* v *Benjamin*, 3 Campb. 40); that it was broken in the manner and to the extent declared (*Dyer* v. *Ashton*, 1 B & C. 3), and if it was a case of goods sold by sample, that they agreed with the sample (*Leggett* v
money into Court
obliged to prove in
Stapleton v. *Nowell*,
Walker, 9 Dowl 21,

58. onceded to be any further or contradict ... s no evidence *Ibid* § 2591 A party or his agent may make admissions for the purpose ... by agreement or otherwise, before or at th... admissions may be made by pleadings ... 226; *Burjor*... the client. ... to a decree ... 6 W. R. 132 ... by referenc...

admission of oral evidence contained in the 4th proviso to section 92 of the Evidence Act *Ibid.* But in the same case *Seshagiri Aiyar J* said: "The rule of law enunciated in *Slatterie* v. *Pooley*, 6 M. & W. 664, which accepted oral admissions of every kind as proving documents, has no doubt been departed from in India [see section 22 of the Evidence Act and sections 59 and 65(b)] ... are in the nature of ...

... proved.

Differ[e]nt kinds of judicial admissions This section deals with admissions ... ion or made voluntarily, or pursuant to a notice ... missions ...

counsels or of shorthand writers, are admissible to controvert the statemen... the Judge. *Reg.* v. *Pestonji*, 10 B. H. C. R. 75(81).

... facts admitted at the ... If it means before the ... ready applies to it. If ... then, in a civil case, no ... the ...

... a plea of not guilty, can ... *rkby* ... "At the hearing", mea... ...an one, the final hearing. Thus where A ... and B at the first hearing orally asserts payment in full, at the final hearing no evidence of title or tenancy need be given. *Whitley Stokes*, Vol. II, p. 889. When an

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that
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810 Where the defendant admits the signature of his father in the mortgage deed, the plaintiff is relieved under this section from any further responsibility of proving the document. *Lakhichand* v *Lalchand*, 42 B 352=20 Bom L R 354=15 Ind Cas 351, *Arjun Sahu* v *Kelai*, 2 Pat 317=71 Ind Cas 150 Where the fact of a prior partitio
parties, the same need not be proved.
is not registered will not make th
purpose *Maung Po Kin* v *Maung Shwe* 1 Rang 405=1924 Rang 155.

facts
be pro
need
before the hearing it is
as evidence, and for this pu
or not Admissions in w
under consideration when the Judge is considering what issues are to be tried
be genuine, unless they are admitted
on given to the Court by the last
isions of the Civil Procedure Code,
at issues are to be tried before the
to allow a party to withdraw his
Markby Ev p 51 Each party
he
are
s §
, 4
isel
has
been held to preclude any evidence on the point *Urquhart* v *Butterfield*, 37 Ch D 357, 369, 374 C A, *Ellis* v *Allen*, (1914) 1 Ch 904, *Phip Ev 7th Ed* 18
Admissions made action,
or by stipulations be with-
drawn if not true, party in
which to prepare his case, and provided such party has not been injured by relying on such admissions *Wallace* v *Mathews*, 39 Ga 617 (*Am*) Such admissions will not be allowed to be withdrawn, however if the situation of the parties has been substantially changed, as by the death of a party or of a witness *Wilson* v *Bank of Louisiana*, 55 Ga 98 (*Am*) If a party desires to withdraw admissions of the character under discussion, he should give full and timely notice of his purpose, so that the other party may have reasonable time to supply the proof *Hargraves* v *Redel*, 43 Ga 142, *Ellons* v *Larkins*, 5 Car & P. 385, *Burr Jones* § 271

Admission by pleading. "Every allegation of fact in the plaint, if not denied specifically or by necessary implication, or stated to be not admitted in the *pleading of the defendant, shall be taken to be admitted except as against a* person under disability" *Civil Pro Code, Order* 8, *rule* 5 That rule states what amounts to admission
defendant must deal
not admit the truth
if not denied in the written statement or stated to be not admitted, shall be taken to be admitted by the defendant (*Vide Mullas' Civil Pro Code, note under rule*

tion of his opponent, or he may state he does not admit the allegation But an allegation which is not specifically denied, or stated to be not admitted, is treated as admitted *Byl* v *Nunn*, 5 Ch D 781 aff 7 Ch D 284, *Green* v. *Nevin*, (1879) 11 Ch D 789; *Collett* v *Goode*, 7 Ch D 842 A refusal to admit must be stated as specifically as denial. *Thorp* v. *Holdsworth*, 3 Ch.

58 D 637, 640; *Hall* v *L* & *N W Ry Co*, 35 L T 849 Leave in a proper ca e may be given to a party to recall admissions which he has made. *Hollis* v *Burton*, (1892) 3 Ch 226 C A Where a document is by reference included in

In revision it was contended that the plaintiffs ha l not proved the notice *Held* that the defendants must be deemed to have admitted notice under order VIII, rule 6, C P Code, and proof was dispensed with under s 58 *Commissioners* fo
a
pr
make the suit triable only by th
however, made over the trial of th
who had no jurisdiction to try it,
Neither party raised any objection on the ground of juri diction and no i sue was raised relating to it The trial proceeded on merits and the subordinate Judge passed a decree for partition in favour of the plaintiffs The defendants in their appeal to the District Court raised for the first time the question of jurisdiction on the strength of the market values stated in the plaint. The objection having been overruled, they appealed to the High Court. Held that as neither party raised any question as to want of jurisdiction arising from the allegation in the plaint, and as they by their conduct and silence treated the market value to be the amount sufficient to give jurisdiction to the Court, they dispensed with proof on the question by their tacit admissions, and thus the principle of law laid down in s 58, came into operation and prevented the result of the statement of the market value in the plaint *Jose Antonius* v *Francisco*, 12 Bom L R 712 Where the defendants in their written statements admitted that they had executed a deed of mortgage on account of an old

the production of the mortgage deed was unnecessary under the provi ions of section 58 of the Evidence Act *Maung Khan* v *Maung Myat*, 11 Ind Cas 840 Plaintiff sued for redemption alleging that he had sold the land in suit out and out to the defendant for Rs 250 less than 12 years before suit but that at the time of sale a stipulation was made for repurchase by the plaintiff at any time on payment of the purchase money *Held* that as the plaintiff had admitted in the plaint the factum of an absolute sale in favour of the defendant it was

makes solemn admissions against his interest in a pleading, they should be treated as admitted facts, and he will not be heard to question the correctness statements

the pleading On this point the case of *Mc Gowan* v *Smith*, 26 L J C the other referred to, seem conclu ive. A Court, in general, has to try the

questions on which the parties are at issue, not those on which they are agreed, **S.**
and admissions which have been deliberately
suit, whether in pleading or by agreement,
mission of any evidence contradicting them
that is by reference incorporated
Evidence, 457) The point is n
ments of the parties a plea or
does not directly put in issue

st object of
what is the
I. App at
the cause
the plaint
or in the written statements tendered in the suit which here contain a full assertion and admission of the execution of the document A by the defendant *Muncherji* But the issues, as they stand, were suggested by the defendant's counsel They waive controversy as to the actual execution of the document, assume it to have been executed, and raise questions only that depend for their
plaintiff is not,
or to put it in evi-
for some purpose

on conside
effect usua
allowed to
But an ad
exists and
that fact subsequent to the date of the admission *Lawson's Presumptive Ev* 2nd Ed 237, *McLeod* v *Wakeley*, 3 C *Lord Tenterden C J* said 'I do not think, can be extended to a publication after its goes down to its date, but not further"

Distinction between evidentiary admissions and admissions by pleadings. There is a distinction between evidentiary admissions and admissions by the pleadings This section governs admissions by pleadings *Sadhu* v *Naa Sigyi*, U B R
sing with proof
evidence, the forn

the fullest sense of the term, is another thing,
and involves a totally d
the necessity of offer
item in the mass of evi
with which this sectio
need of any evidence
course of judicial proce
evidence by conceding
alleged by the opponent is true *Wigmore* § 1058

s of husband or wife lose, as a
they are to be used in divorce
establishes a form of fraudulent
her contracts, the contract of
and argument of the parties,
and in actions for dissolution of this contract, that is for divorce, admissions are closely scrutinized Although the husband and wife are the parties to the

8. consent of and in the manner prescribed by the State It necessarily follows that no admissions by either party to the contract, however collusive upon such party, can be conclusive upon the State in a suit for the dissolution of the contract and that such dissolution cannot safely be deemed unless the admission be corroborated by strong proofs *Burr Jones* § 262 In *Williams* v *Williams*, I Hagg 299, *Lord Stowell* says that a confession is a species of evidence which though not inadmissible, is to be regarded with great distrust, while in *Mortimer* v *Mortimer*, 2 Hagg 310, the same learned Judge announces that a confession

', though in the
upport a charge
ffarris, 2 Hagg
ession perfectly
s and conduct

ranks among the highest species of evidence The suit for divorce has been called a triangular proceeding *sui generis*, in which the government occupies the

allow of an accused admittin

In India

there is nothing to prev
Criminal Procedure o
admissions on matters
seems to be no reason
his presence at the trial so as to dispense with the attendance of witnesses for
the
Rat
case

by consent. *Per Patteson J* in *ibid*, contra, *Phips* 11. When the attorneys on both sides had agreed that the formal proofs in perjury should be dispensed with, and that part of the prosecutor's evidence admitted, *L Abinger C B* said. 'In a criminal case tried on the crown side of the assizes, I can not allow any admission to be made on the part of the defendant unless it is made at the
nhill, 8 C & P 575 (1838),
Queen v *Kazim Mundle*,
Cr 80; *Jeremiah* v *Vas*, 36
ia v Queen Emperor 26

difference Furthermore, I am not convinced that s 58 Evidence Ac does not apply to justify the action of the Sessions Judge No doubt in England

an admission by an accused, which falls short of his pleading guilty, is not taken into account and is not binding against him But section 58 makes no exception in regard to criminal proceedings and while I do not say that it can be availed of to cure a clear contravention of any directions of the Criminal Procedure Code as to the course of a trial yet I think it can apply in a case like this, which relates only to proceedings of an appellate Court" *Bansilal* v *Emperor*, A I R 1928 Bom 241 (24?)=112 Ind Cas 1?0=52 B 686=30 Bom L R 646 But admissions made by a pleader appointed to help the accused in his defence are not binding on him to his prejudice *Per Mirza J in ibid* This above rule is especially applicable in murder cases *Sheo Narain* v *Emperor*, 21 Cr L J 777=58 Ind Cas 457 It is not in accordance with the usual practice to accept a plea of guilty in a case where the natural sequence would be a sentence of death *Hasaruddin* v *Emperor*, A I R 1928 Cal 775, see also *Emperor* v *Bhadu*, 19 A 119, *Laxmaya* v *Emperor*, 19 Bom L R 356, *Emperor* v *China* 8 Bom L R 240 The rule is the same in America *Vide State* v *Max* 78 Conn 18, where *Hamersley J said* "It is true that in the trial of capital offences the Court will and should exercise care and discretion in respect to admissions made by the accused or by his Counsel in open Court, and so even a plea of guilty will not ordinarily be accepted" *Wigmore* § 259?.

Proviso This proviso corresponds to proviso to rule 5 of Order VIII of the Civil Procedure Code Both under section 58 of the Evidence Act and under Order VIII, rule 5 of the Code of Civil Procedure the trial Court has a discretion to require proof of the due attestation of [illegible] withstanding an admission by the defendant [illegible] bond had been duly executed *Munappa* v [illegible] L W 5=25 M L T 19=19 Ind Cas 278 [illegible] as the proviso to rule 5 of Order VIII of the Civil Procedure indicates the [illegible] ht not to be construed [illegible] Order 19 of the English [illegible] rder VIII of the Civil Procedure Code does not contain the proviso There the rule of pleading is very stringent According to that rule a defendant who omits to traverse in his defence any allegation of fact in the statement of claim is not allowed to traverse [illegible]

[illegible] supported by s 58, proviso of the Evidence Act. *Bhagwan Das* v. *Sheoraj*, A. I R 1931 Oudh 321=14 O L J 462

[illegible]

59. namely, the case in judgment, without injury to the general administration of justice *Gresley on Evid in Equity* pp 319, 358, *Greenl Ev* § 206, *Chamberlayne's Ev* § 1210

Future of the Doctrine of Judicial Admissions "The doctrine of Judicial Admissions" says *Prof Wigmore* "has a large future before it, if Judges will but use it adequately In the first place the Judge should apply it to all informal as well as formal admissions by counsel during trial. In the next place the Judge should freely call upon counsel to state whether a fact is in good faith disputed, i e should require admissions to be made, where it seems probable that the fact is not actually disputed By this method, the presentation of evidence will be confined to the
dispute It is easy to see how large a m
be eliminated how much time would
jury would be avoided And this would
an existing principle Already in Eng
scale in the modern practice of settling issues before masters But it can also be used by the Judge at the trial *Wigmore* § 2597

Formal Judicial Admissions, conclusive The formal judicial admission

party, even in an appellate Court or even on a subsequent trial of the same case, unless formal judicial admission shall have been made for a temporary purpose *Chamberlayne's Ev* § 1284

CHAPTER IV.

OF ORAL EVIDENCE

Proof of facts by oral evidence

59. All facts, except the contents of documents, may be proved by oral evidence

Oral evidence Oral evidence is evidence which is confined to words spoken by the mouth *Per Petheram C J* in *Queen-Empress* v *Abdulla*, 7 A 385 (397) F B It includes all statements which the Court permits or requires to be made before it by witnesses in relation to matters of fact under enquiry *Vide* s 3 It is what the English lawyers call "testimonial evidence" Testimony is a species of evidence by means of witnesses The broader term 'evidence' includes that which is given by witnesses or offered by documents *Vide* s 3 In *People* v *Kenyon*, 5 Park Cr (N Y) 254, 288, *Mr Justice Campbell* said 'It may be well to bear in mind that there is marked difference between testimony and evidence The latter is much more comprehensive than the former—
evidence bei
whether by t

produced to a jury from the finding of any issue joined between parties.

"Testimony in legal as well as in common usage, signifies a statement of facts by witnesses, and to disprove the testimony of a witness is to disprove the "facts testified to by him" *Burr Jones* § 11 **S.**

Wordings of the section This section is not very happily worded. Contents of documents may be proved by oral evidence under certain circumstances that is to say, when such evidence of their contents is admissible as secondary evidence *See section 63 cl 5, section 32, cl 8, Nort Ev* 239

Contents of a document cannot be proved by oral evidence It is a cardinal rule of evidence—not one of technicality, but of substance, that, where written documents exist, they shall be produced as being the best evidence of their own contents *Pinomoye* v *Roy Luchmidal* 6 C L R 101=7 I A 8 This section is based on the "best eviden . . . . . . *enleaf* "A fourth rule, which govern . . . . . which requires the best evidence of . . . This rule does not demand the greatest amount of evidence, which can possibly be given of any fact but its design is to prevent the introduction of any, which, from the nature of the case supposes that better evidence is in the possession of the party It is adopted for the prevention of fraud; for when it is apparent, that the better evidence is withheld it is fair to presume, that the party had some sinister motive for not producing it, and that, if offered, his design would be frustrated The rule thus becomes essential to the pure administration of justice In requiring the production of the best evidence applicable to each particular fact it is meant, that no evidence shall be received, which is merely substitutionary in its nature so long as the original evidence, can be had The rule excludes only that evidence which itself indicates the existence of moral original sources of information But where there is no substitution of evidence, but only a selection of the weaker, instead of stronger proofs, or an omission to supply all the proofs capable of . . . . . . Thus a title by deed must be . . . is within the power of the party, . . . is susceptible, and its non prod . . . . tained some matter of apparent de . . . . of the deed itself may be prov . . . . though the other also is at hand And even the previous examination of a deceased subscribing witness, if admissible on other grounds, may supersede the necessity of calling the survivor. So in proof or disproof of handwriting, it is not necessary to call the supposed writer himself And, even where it is necessary to prove negatively, that an act was done without . . . eneral necessary to call . . . *Ev* § 82 In the case of . . . held it very dangerous . . . s proved by the testimony of witnesses, the con . . . he Court . . . Similarly in *Vincent* . . . "I have always (perhaps more . . . rule that what is in writing sl . . . My experience has . . . n of witnesses, how- . . . they may be so easily . . . strict enforcement of . . . C B 942, *Sheridan's* . . . *st Imam* v *Hargobind*, . . . W R 2 (P C)=2 . . . 1 M I. A 19 (42, 43); . . . Oral evidence may suffice to pro . . . W R 155; *Shee Sahayee* v *Go* . . . 79 Oral evidence, if . . . cription. *Meharban* v. . . . without documentary . . . v *Ahma*, 8 W R 366. . . . ased relatives will be admitted in the absence of any registers of births and deaths *Moheedeen* v. *Mahomed*, 1 Ind Jur O S 132=1 M H C R. 92. It is not valid reason to

59. disbelieve the evidence of a witne

. Rajendur Kishore, 9 W R 125, but see *Goluck Chandra* v *Raja Sreemud Buddhadhar*, W R (1864) 136 Oral evidence greement; and, if sufficient, will justify . *Nund Mohun*, 12 W. R 391 A Judge value, without a *pattah* and *kobuliyat* to prove the quanti misdirects himself in *Dinoo Singh* v *Doorg* sible to prove an adj *Ram*, 1 M H of document may adduce oral n v *Gureedhur*, 20 W R 181 d in ruling that, in the absen is not sufficient to

rabji, 1 B H C writing is admissible

Oral evidence, conflicting and whic decisive conclusion, in the case, and w both sides about the truth of which there can be no doubt. This alone can be the true method of arriving at a correct conclusion *Abdul Halim* v *Rajah Sadat Ali*, 108 Ind Cas 817=A I R. 1928 Oudh 155 Statements made by a witness at the trial should be altogether rejected when it is in hopeless conflict with his previous statements P L R. 659=A I R 1925 uncorroborated statement of a 12 years ago and which wa

credit This precaution is nowhere more necessary than in this country It is true that there is no precaution of perjury against oral testimony, but it has, I believe been sufficiently confirmed by a long course of experience that anything can be more dangerous than to act upon such testimony, without testing its

credibility both intrinsically and extrinsically [1]. Where there is contradiction of **S.**
, in order to see
I. A. 103 (107);

of the Judicial
facts tending

stansaction to which they depose, or weakened by the mode in which their
speak, it may on,
to an extrem it
is oral, and un clearly
found to exist. It would be very dangerous to exercise the judicial function, as if no credit could necessarily be given to witnesses, deposing *viva voce* how necessary however it may be always to sift such evidence with great minuteness and care This case was cited with approval in the case of *Emperor* v *Balgangadhar Tilak*, 6 Bom L R 324 (330)=28 B 179, see also *Wise* v. *Sandulooniss*a, 11 M I A 187 (188); *Queen* v *Elahi Bux*, B L R (F B) 482, *Sitaji* v *Chinna*, 10 M I A. 162, *Edu* v. *Behan* 11 W R 345 'But it would be indeed, most dangerous to say that where the probabilities are in favour of the transaction, we conclude against it, solely because of the general fallibility of native evidence. Such an argument would go to an extent which can never be maintained in this or any other Court, for it tends to establish a rule that all oral evidence must be discarded; and it is most manifest that however fallible such evidence may be, however carefully to be watched justice

evidence sub-
st be given to
not be rejected
outed without
v *Kalanthai*,
Nachear, 14 M I A 354, 355 Such rejection if sanctioned, would virtually

Bunuari v *Hitnarain* 4 W R 128 (P C) In the words of *Baron Parke* in *Mir Assabullah* v *Bibi Imaman*, 1 M I A 19=5 W R P C 26, 'there is no
flicting
r, than
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870=A I R 1927 Sind 20
A
of
wor consideration that which he
ought to have entered into it
consideration, where the evidence
but a case should not be decided u
which the parties have submitte

9. W. R 438 Evidence of witnesses though not independent, but not shaken in cross-examination and accepted by the Judge who heard them and saw their told by 91 (P. C)

test for estimony to the same transaction, and concur in their statement of a series of particular circumstances, and the order in which they occurred, such coincidence exclude all apprehension of mere chance and accident, and can be accounted for only by one or other of two suppositions, either the testimony is true, or the coincidences are the result of concert and conspiracy If, therefore, the independence of the

limited, will be c

witnesses or *Starkie on E*

cited in *Nort* 53.

Test of probability—Sir James F That probab lity is the guide of life is an obvio

it is probable to whatever extent it generally resembles the common course of human conduct and of physical nature, that it is improbable deviation therefrom, and that it is impossil upon which all language and thought could be in two places at once and that twi four; that it is nonesense unless it can be in some way represented to the mind

of this disease or that, and yet to treat with contempt the notion that no one

of witchcraft, and to reject all evidence tendered to prove it? Probably no more difficult question can be asked, and I doubt whether there is any which, if fully solved, would be of great practical importance." *Stephen's General View of Criminal Law of England* pp. 192, 193

Other tests of Probability "Evidence to be believed" said *Vice-Chancellor Van Fleet of New Jersey*, "must not only proceed from the mouth of a credible witness, but it must be credible in itself—such as the common experience and observation of mankind can approve as probable under the circumstances. We have no test of the truth of human
knowledge, observation and experience.
to the miraculous, and is outside judicial
37 N J Eq 130, 132 But *improb*
impossibilities. "A case how unlikely and suspicious so ever, in itself, may be irresistibly proved by the force of testimony," said *Sir John Nichol*, "Evidence may be such as to substantiate a transaction, however improbable; for it may be such that the falsehood of the evidence would be still more improbable than the fact which it seeks to establish" *Saph v Atkinson*, 1 Add Eccl 162, 182. In another case the same learned Judge said "It seems hardly possible, on the mere improbability of a statement, to discredit the evidence of a witness of good

59. 213; *Maharajah Rajender* v *Sheopursun*, 10 M. I A. 438 So the doctrine *"falsus in uno falsus in omnibus"* in this country affords a test of little or no value,
a story
at p 29

if the evidence adduced on both
, the matters in issue The parties using such evidence may have brought himself within the penalties of the criminal law, but the Court should no

by that party, or at least against such portion of that evidence as tends to the same
It may perhaps also have the further
ission for the evidence of his opponents
pressed too far, especially in this country where it happens, not uncommonly, that falsehood and fabrication are employed to support a just cause *Goribulla Kazee* v *Goorodas Roy*, 2 W. R (Act X) 99, see also *Rameswar* v *Bharat*, 4 C W N 18 P C, *Casperz* v *Kedarnath*, 5 C W N 858 (861)

Uncontradicted testimony. I
"he who tells nothing exceeding the
that they should believe him who
Johnson "If witnesses come unimpeached in point of general integrity," said *Lord Stowell*, "if any depose with character of fairness in their particular narrations the facts must be received, or *there is an end of all judicial inquiry* Human prudence has done its utmost, has done all that it is capable of doing, in giving every
1 Hag Cons 269,
judicial proceedin

have no safeguard, and the
dress of wrongs, if the unim-
can be overthrown without
City R Co 50 Misc (N Y) 535. So "if the tribunal is permitted to discredit or disregard such testimony

performed, if it would obtain your
ive no right arbitrarily, and without
Harbison, 13 Int Rev 118.

Disinterested witness "A witness of depraved and abandoned character

rule that when a disinterested , testifies to
in conflict
be taken as
not be disregarded by Court or jury." *Kavanogh v. Wilson*, 70 N Y. 177, 179 (Am)

testi-
Starkie
part or

of view of the same thing,
a single incident, Courts expect
minutie of their testimonies,
basis for discrediting their united testimony to
rather to enhance the credit of the witnesses
Haranand v *Ramgopal*, 27 C 639 (P C) = 4 C W
"No two witnesses" said Mr *Justice Van Buren*
in *In re Lyddy* 5 N Y Supp 636
nating in the execution of a p
agreed in their description of t
agreement is all that is required *Nana Narain* v *Huree Punt*, Marshall 436
(P C) It is to be expected that what was
will be differently stated by different
conversation hear or remember all that wa
impressions from what they heard, and
of dates or of th
Moore on Fact
to testify is s
contrariety of
v *Maule*, 4 Hag
The Louther C
is taken *de recenti facto* may very well speak with greater certainty and specifica-
tion as to the facts than other witnesses who testify at a much later time *The*

untruthful nature of the
presumption in England
here the presumption is,
observations of the Privy
Indian Courts in *Ramar*
But however true this may
are more untrustworthy
the fact is to be lamented,
score of this difficulty" *Nort Ev* p 55. Differences are commonly reconciled

without resorting to strained and unnatural inferences in aid of either party.

60. *Moore on Facts* § 839 In a *New Jersey Divorce Case, Chief Justice Beasley* said "To those who know from experience and reflection the laws which regulate the human memory, it does not seem singular that several persons, in speaking of a past transaction, do not each reproduce it in description with the same fulness of detail; but such is not the vulgar notion. Among the ignorant the strongest proof of the truth of testimony derived from several witnesses is the fact that the statement of each is merely identical with that of others Hence, the exact similarity which we often see in the deposition of corrupt witnesses, whose evidence has been prearranged But in the testimony of these two persons now before me, there are none of the usual marks of collusion No two narrations

unlike It certainly has every

currence, observed from different

, 324 (335) (*Am*); see also *Nana* v

Court of New Burns

pre-concert betw en

proves nothing of the

as manufactured, it

witness should vary

the account in order to avoid suspicion" *Corny* v *Caraquet, R Co*, 29 N Burns 425, 436

Sometimes, however, discrepancies are so startling as to make it impossible

more

be detected upon some broad collateral fact, than upon the transaction itself *Brydges* v. *King*, 1 Hag Ecc 256

Oral evidence must be direct.

60. Oral evidence must, in all cases whatever, be direct; that is to say—

if it refers to a fact which could be seen, it must be the evidence of a witness who says he saw it;

if it refers to a fact which could be heard, it must be the evidence of a witness who says he heard it;

if it refers to a fact which could be perceived by any other sense or in any other manner, it must be the evidence of a witness who says he perceived it by that sense or in that manner;

if it refers to an opinion or to the grounds on which that opinion is held, it must be the evidence of the person who holds that opinion on those grounds:

Provided that the opinions of experts expressed in any treatise commonly offered for sale, and the grounds on which such opinions are held, may be proved by the production of such treatise if the author is dead or cannot be found, or has become incapable of giving evidence, or cannot be called as a witness without an amount of delay or expense which the Court regards as unreasonable:

Provided also that, if oral evidence refers to the existence of S. condition of any material thing other than a document, the Court may, if it thinks fit, require the production of such material thing for its inspection.

Principle The first degree of moral evidence, and that which is most satisfactory to the mind, is afforded by our own senses; this being the direct evidence of the highest nature Where this cannot be had, as is generally the case in the proof of facts by oral testimony, the law requires the next best evidence; namely, the testimony of those who can speak from their own personal knowledge It is not requisite that the witness should have personal knowledge of the main fact in controversy, for this may not be provable by direct testimony, but only by inference from other facts shown to exist But it is requisite that, whatever facts the witness may speak to, he should be confined to those lying in his own knowledge, whether they be things said or done, and should not testify from information given by others, however worthy of credit they may be For it is found indispensable, as a test of truth and to the proper administration of justice, that every living witness should, if possible, be subjected to the ordeal of cross examination, that it may appear what were his

known, cannot be subjected to this test, nor is it often possible to ascertain through whom, or how many persons the narrative has been transmitted from original witness of the fact *Greenl Ev* § 98 "The administration of an oath furnishes some guarantee for the sincerity of the opinion, and the power of

value

F 689.

not a party to the suit is not admissible; because such person was not under oath and the opposite party had no opportunity to cross examine" *Swift C J.* in *Chapman* v *Chapman*, 2 Conn 348 *Gresham Hotel Co* v *Manning*, Ir. R. 1 C L 125, *Vide* notes under § 32 pp .464—467 supra.

of any one of ... ust
have received ... wise
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may be given ... s a
recollection of ... called
Recollection, or Memory *Thirdly*, he must communicate this recollection to the tribunal; that is, there must be communication, or Narration, or Relation (for there is no single term entirely appropriate) Now the very notion of taking a human utterance as the basis of belief in the truth of the fact asserted impliedly attributes these three processes to the witness, Perception, Recollection, Narration Whatever principles, therefore, affect the inference from testimonial assertions must have reference to some one or more of these elements

Moreover, in the function fulfilled by each of three elements or processes are to be found in
its probative value
has in some way o
reproduced to us in C
perception, or whatever it be called) should adequately represent, or correspond to the fact itself as it objectively existed or exists The strength of the inference depends on the probability of a fairly accurate perception on the part of the witness Again, the function of Recollection is to retain or recall impressions of observation; and the necessary condition of our trust is that Recollection fairly corresponds with or reproduces the original knowledge or Perception Finally, the function of Narration (or, communication) is to reproduce and express, for the apprehension of the tribunal the Recollected results—themselves lready retained from Perception Thus, the common aim in the varied

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects — *Wigmore's Principle of Judicial Proof* § 147.

Generic Human Traits affecting Testimony But the individual witness' testimony is affected, not merely by the conditions inherent in these three elements of testimony, but also by certain general traits, common to humanity, on which experience has enabled us to generalize These generalizations affect traits common to large groups of individuals, or to a large classes of situations in which any individual may at times find himself. Hence the conditions
be studied under two
Testimonial Capacity
The principle generic
ice; (2) Age, (3) Sex;
erament, (7) Emotion
ciples of Judicial Proof
§ 148

Race "In respect to the three elements of testimony, *Perception*,
observation have thus

in many sense perceptions than literate peoples having a more compl...
of life

"(2) *Recollection* An occasional
particular race or people is all that ha
the truism that primitive peoples, defe
develop an extra ordinary mnemonic
sagas, laws, and revelations by the early Greeks, Hebrews, ...
and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by r
ings, his racial sentiments, and
tation both to save himself by
falsifying in their favour But
(b)

Basheroonissa,
peror v. *Balgangadhar*, 28 B.
en v *Elahi Bux*, B L R (F
B) 482, *Sitaraji* v *Chinna*, 10 M I A 162, *Edu* v. *Behan*, 11 W R 345 But
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Evidence ...

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fruit, and one of its best fruits has been an increasing regard ...

S

them as the same classes in
...ct their existence among their
h El pp XXXI, XXXII.
: "Few people, I think, realize

are the
others
Wigmo
that an
a particular race of people, is likely to be, in the first place, absolutely incorrect as not founded on facts, in the second place, relatively unjust, as assuming a superiority of honesty which can only be hypothetical; and in the third place, unwise, as tending merely to perpetuate ill feeling and misunderstanding." *Wigmore's Principle of Judicial Proof* § 155

testimony,
We possess
become less
keen, and that for recollection the recollection of earlier events becomes more active and that of recent events less active (2) Youthful age, it would seem, is
others In recollec-
n that children below
l imagination, partly
cause of untrained

of Judicial Proof § 156 Certain broad rules

fined situation I
such cases,
f age Love and
hatred, ambition and hypocrisy considerations of religion and rank, of social position and fortune, are as yet unknown to them, it is impossible that preconceived opinions, nervous irritation, or long experience, should lead them to form erroneous impressions, the mind of the child is but a miror that reflects accurately and clearly what is found before it These are great advantages accompanied by certain corresponding draw backs The greatest is that we can-
, it uses indeed the same
ent ideas Further the
ople The conception of
uty and ugliness, of dis-
from in ours, still more
so when facts are in question There is yet another difficulty, the horizon of the child being much narrower than ours, a large number of our perceptions are outside the frame within which alone the child can perceive We are as a rule, too distrustful of the capacity of a child We have rarely found too

60 problems under this head is to determine whether the story as told represents with fair accuracy the object which the witness once observed and now recollects —*Wigmore's Principle of Judicial Proof* § 147.

Generic :.
testimony is

separate heads (1) Generic Human
in General, (2) The Testimonial Eleme
traits can be taken up under the follov
(4) Mental Derangement, (5) Moral cl
(Bias); (8) Experience (acquired skill
§ 148.

of life

"(2) *Recollection* An occasional study of the memory-capacity of a particular race or people is all that has been thus far vouchsafed to us, except the truism that primitive peoples, defending largely upon unaided memory, develop an extra ordinary mnemonic capacity,—as in the oral transmission of sagas, laws, and revelations by the early Greeks, Hebrews, Scandanavians, and others

"(3) *Narration* (A) As to relative racial differences in the capacity of expression in words, little or no occasion arises for examining this subject in judicial proceedings (B) As to veracity of aliens in general, and of particular races, considerable knowledge has been made available for us (a) The alien in general, by reason of his strangeness to the surroundings, his racial sentiments, and his special dilemmas, has often a temptation both to save himself by falsifying and to save his fellow racials by falsifying in their favour. But this

v *Elahi Bux* B L R
. *Behan*, 11 W. R 345 But
any scientific enquiry and
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Evidence
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fruit, and one of its best fruits has been an increasing regard for truth

on mere differences of error which is relatively truthfulness But this All of us know persons probative to us. But we, as knowers of this, must ourselves come before the Court as ordinary witnesses, and how can the tribunal ever be made to believe us and to appreciate the fact as keenly as we do? Moreover, taking as a proved fact this specific trait of veracity or unveracity, is it not the crude abstraction of the layman? Are there not varieties of veracity or unveracity? Can those varieties be discriminated and defined? Can they perhaps be identified in particular persons? If modern psychoanalysis can furnish such data, they will be useful in valuing testimony. *Wigmore's Principles of Judicial Proof* § 159

Temperament But the elements of Recollection and Narration may be affected by other fixed traits than merely that of mendacity or its opposite vera-

also is concerned in tracing the variety of temperaments and their influence in impeding correct narration *Wigmore's Principle of Judicial Proof* § 160

three testimonial elements—Per- some aberration from correct- meant, not merely strong feeling, perception and conscious reason-
ing *Wigmore's Principles of Judicial Proof.* § 161. The physical basis for this effect of emotion or testimony is explained in the following passage "The effect of *desire on bel* we are to come to a con

towards this end As to the way account 'This influence of Desire on Belief often operates by simply diverting the attention from counter evidence The mind is so absolutely preoccupied by certain tendencies, that whatever at all, or, if it does, is imme resistance offered by a me dissolve it But the more often they (i e, such beliefs) are acted upon, the more completely they become incorporated with the original conation so as to become an integral part of it, hence the support they receive from it is increased' With influences Belief that is to say, is by giving pret ideational train sely long for, or especially dread, and by determining the order of ideation to follow, not that of experience, but that which answers to and tends to sustain and prolong the feeling, that its force serves to warp belief, causing it to deviate from the intellectual or reasonable type' Feeling, th n, acts in part by warping the intellectual element in Belief

"Emotion is a great source of illusion, because it disturbs intellectual operations It gives a preternatural vividness and persistence to the ideas answering to it, i e the ideas which are its excitants or which are otherwise associated with it; hence when the mind is under the temporary sway of any feelings as, e g, fear, there will be a readiness to interpret objects by help of images r the control of fear will be apt to ever there is any resemblance to " *Arnold's Psychology Applied*

60. Vhat (2)

Emotion are in general the same as described already in dealing with evidence of human traits generally i.e., external circumstances pointing to the stimulation of an emotion, conduct or words revealing it interior existence, and a prior or subsequent existence of the emotion. The *external circumstances* are of a great variety —interest in the cause as a party or beneficiary, relationship to a party, occupation, such as banker ... But no ... had any ... rds of the ... too, no ... known ... recepts ... emotion on a particular witness' testimony (whether in perception recollection or narration) remains also as a problem for the future. But under both these heads the books abound with recorded observations of the marked effect of emotion on testimony, and of the various data from which that emotion has been inferred' *Wigmore's Principles of Judicial Proof* § 161

Experience By experience is here meant that succession of mental processes which result in expertness. It signifies the frequent repetition of sensations, perceptions, and recognitions of a particular subject so that by concentration the capacity to recognize grows in completeness and accuracy. The growth of this experience may take place casually, through one's habit of life, or by deliberate purpose to acquire skill, as in devotion to an occupation, or still further by systematic education in an organised body of knowledge, as with a scientist or an artist. Now the influence of experience on capacity to make correct testimonial assertions is double and opposite. It may increase the range and accuracy of his perception and narration and it may decrease them. *Wigmore's Principles of Judicial Proof* § 162

(1) It may and usually does, increase them because it enables them to perceive details and relations of fact not cognizable without such experience. There is literally no limit to the possibilities of enlarging and precisioning the data of judicial proof ... ific

topics, to develop a bias or fixed idea affecting the perception on certain topics and to induce in narration an obstinate adherence to conclusions already reached on the particular facts. This tendency of course varies with the individual and the topic but it is always a latent possibility. *Wigmore's Principles of Judicial Proof* § 162

Perception—General Th... ception i e, the direct exercis... must purport to have existed ... life and in historical inquir... M because Y told him ... or a book Z asserted fact ... he ... M But in suc... assertion by ... Y or by Z In ... assertion of Y ... of inference ... separate the two assertions, i e that of X (testifying to the assertion by Y or by Z, and that of Y or Z (testif... Hence the element of sense perception by X is ass... as entering into all testimony ... basis of judicial action If ... in a book the assertion by Y th...

make the assertion, and our further examination is required for Y's assertion S
M Y's assertion is hearsay (in both the
ut we give testimonial consideration to it
is X's — *Wigmore's Principles of Judicial Proof* § 163

Senses – General considerations "The sensation brought to the brain by means of the optic nerve becomes the condition of the representation in consciousness of certain objects distributed in space We make use of the sensation which the light stimulates in the mechanism of the optic nerve to construct representations concerning the existence, form and condition of

of the individual The narrowest, smallest, most particular issuing glance is that of the most foolish; and the broadest, most comprehensive and comparing glance, that of the most wise This is particularly noticeable when the time of observation is short

visual sensations are the most numerous and the most important Anybody who has been pushed or beaten, and has felt the blows, will if other circumstances permit and the impulse be strong enough, be convinced that he has seen his assaulter and the manner of the assault Sometimes people who are shot at will claim to have seen the flight of the ball It is fortunate that, as a rule such people try to be just in answering to questions which concern this substitution of one sense perception for another.

"Still more s
derable importance,
It consists in the
noticeable interruption, when the stimulus does not, as a rule, give rise to that perception . In a case in Court, there was a shooting in some house and an old peasant woman, who was busy sewing in the room, asserted that she had just before the
have come
the person
preceding ones But I am convinced that the witness told the truth The steps of the new arrival were perceived subconsciously, the further disturbance of the perception hindered her occupation and finally, when she was frightened by the shot, *the upper levels of conscions were illuminated* and the noises which had already reached the subconsciousness passed over the threshold and were consciously perceived

Criminal Psychology, 1911 § 35 p 187

Mistakes of senses, Illusions "As sensation is the basis of knowledge, the sensory process must be the basis of the correctness of legal procedure. The

they heard, no harm would be done, but they tell us only what they suppose to be the *meaning*, and hence we get a good many mistakes. *It does seem as if* ... are able to shut their ears to all things ... ly sensory perception is organized according ...

"The determination of auditory power is, however, insufficient, for this power varies with the degree any individual can distinguish a single definite tone among many, hear it alone, and retain it. And this varies not only with the individual but also with the time the place, the voice, etc. It is repeatedly asserted, e g by ... ple do not hear high tones ... hearing of such people is not ... distinguish them with difficu ...

... These data, which are for us q... to many tests *Wundt's* statement has ... which have shown that sounds to the right ... and sounds in the front and below, in front to the right and to the left, and ... least easily distinguished Among the ... *Kries, Munsterberg* All these experiments ... definite mistakes Sounds in front are often mistaken for sounds behind and felt to be *higher than their natural head level* ... hearing is of great importance f... With one ear this recognition is ... by the fact that we turn our heads here and there as though to compare directions whenever we want to make sure of the direction of sound In this regard, too, a number of effective ... determine whether the ...l, it is best to get the ...h ears, and whether he ... who hear excellently ... sound Others again ... skill from practice, sense of locality, etc But in any case, certainty can be obtained only by experimentation

"The differences that age makes in hearing are of importance Bezold has examined a large number of human ears of different ages and indicates that after the fiftieth year there is not only a successive decrease in the number of the approximately normal hearing, but there is a successively growing increase in the degree of auditory limitation which the ear experiences with increasing age The results are more surprising than is supposed . Old women can hear better than old men" *Hans Gross Criminal Psychology, Wigmore's Principles of Judicial Proof* § 168

...e sense of taste is rarely of ...nce it is regularly very significant ... poisoning. *At the same time*, it is necessary, when tests are made, to depend upon general, and rarely constant impressions, since very few people mean the same thing by stinging, prickly, metallic, and burning tastes, even though the ordinary terms sweet, sour, bitter, and salty, may be accepted as approximately constant"—*Hans Gross Criminal Psychology, Wigmore's Principles of Judicial Proof* § 170.

...

know, and that they may learn more by means of them than by means of the ...

60. associations are awakened, they are not ascribed to the sense of smell, but are said to be accidental *Ibid*; *Ibid* § 172.

The sense of Touch. "I combine, for the sake of simplicity, the senses of location, pressure, temperature, etc, under the general *expression* sense of touch The problem this sense raises is no easy one, because many *witnesses* tell of perceptions made in the dark or when they were otherwise unable to see, and because much is perceived by means of this sense in assaults, wounds, and other contracts In most cases such witnesses have been unable to observe the touched parts of their bodies, so that we have to depend upon this *touch* sense alone Full certainty is possible only when sight and touch have worked together and rectified one another" *Ibid*; *Wigmore's Principles of Judicial Proof* § 174

General Theory of Memory and [illegible]
here be used to mean the initial proc [illegible]

[illegible] *Wigmore's Principles of Judicial Proof*

[illegible] association of ideas is our recollection and memory which are only next to perception in legal importance in the knowledge of the witness Whether the witness wants to tell the truth is, of course, a question which depends upon other matters; but whether he can tell

[illegible] variously organized function [illegible] nd much more so when every-

[illegible] gation. We find little instruction [illegible] vell as our mistakes are thereby in- [illegible], *Wigmore's Principles of Judicial Proof* § 192

Differenc [illegible]
men exhibit [illegible]
known, this d[illegible]
promptness of [illegible]
ment of rapid [illegible]
forgetfulness, [illegible]
but approxima[illegible]
the field of greatest memory As a rule, it may be presupposed that a memory which has developed with special vigour in one direction has generally done this

[illegible]

unreliable . . .
memory and can
alarming, and
people have bare

S

al people do, and which
the important point they
e to describe important

Children

witness in the world We hav
the child's mind to wipe out
has made a systematic study
conclusion that the scope of memory is measured by the child's capacity of concentrating its attention

"That aged persons have, as is well known, a good memory for what is long past, and a poor one for recent occurrence, is not remarkable It is to be explained by the fact that age seems to be accompanied with a decrease of energy in the brain, so that it no longer assimilates influences, and the imagination becomes dark and the judgment of facts incorrect . .

as pointed
out i
within the
limits
take in a
matter and partly mechanical, and the educated rarely have the latter kind because they have developed the former at its expense; high mental power is seldom combined with good mechanical memory" *Hans Gross Criminal Psychology*, *Wigmore's Principles of Judicial Proof* § 193.

Narration—General Principles of. The third element forming an essential part of all testimony is the process of laying before the tribunal the witness's results of his Perception and his Recollection, i e the prosess of Narration or communication In this element, as in the other two, there are many opportunities for errors fatal to testimonial trust worthiness As with the elements of Perception and of Recollection so here also, experience has shown that certain dangers are to be looked for What these dangers and defects are depends upon the specific virtue which this
possess Its office is to
recollection of the witness,
useful or trivial Its pri
reproducing and expressing
the witness's Recollection
then, if his Narration or communication fairly represents and corresponds to his Recollection, and is intelligible by
value are complete, but not otherwise
in either of these respects, namely, in
or in intelligibility, then its value d
defects occur in the former respect, i e an absence, actual or probable, of this correspondence between the witness's uttered statement and his conscious recollection which he ought to be stating In the other respect, i e intelligibility to the tribunal of the witness's utterance, comparatively few questions arise *Wigmore* § 210

). Hearsay evidence, meaning of—and why it is discarded The term "hearsay" is used with reference to that which is written, as well as that which is spoken; and, in its legal sense, i
derive its value solely from the
rests also in part on the competen

and seeming exceptions, the general rule of law rejects all hearsay reports of
transactions
witnesses
given to a
tests enjoined by the law for ascertaining the correctness and completeness of his testimony, namely, that oral testimony should be delivered in the presence

heard, or was misunderstood, or is not accurately remembered, or has been perverted It is also to be observed, that the persons communicating such evidence are not exposed to the danger of a prosecution for perjury, in which something more than the testimony of one witness is necessary, in order to a conviction, for where the declaration or statement is sworn to have been made
son who is since dead, it is hardly
imony is an entire fabrication
6 To these may be added consi-

incur in order to rebut or explain it, the
occasioned, the multiplication of collateral issues for decision by the jury, and the danger of losing sight of the main question and of the justice of the case if this sort of proof were admitted, are considerations of too grave a character to be overlooked by the Court or the Legislature, in determining the question of changing the rule *Mima Queen* v. *Hepburn*, 7 Cranch 290, 296, per *Marshall C J*; *Greenl Ev* § 99(a)

Oath One of the objections against Hearsay evidence is that it is not given on oath by the person who has got personal knowledge of a fact. But the utility of oaths in any shape has been strongly questioned *Benth Jud Ev* Bk 2 ch 6 The good man, it is sometimes said, will speak the truth without an oath, while th ... T ... the following
answer has bee
without an oath,
of mankind are
cases of importar
more solemn en
boldly say what
which they mak

they promise, and careful what they assert, puts them upon exactness in every circumstance, and circumstances are often very material things Even the good might be too negligent, and the bad would frequently have no concern at all, about their words, if it were not for the solemnity of this religious act.

Archbishop Secker, as cited in Ram on Facts, Best Ev § 59 'Of the two main facts which impair the probative force of an unsworn statement used as hearsay, lack of oath and the absence of cross examination, probably the latter is, at the present time, Indeed the importance of the oath is n cross exa mination than as a valuab *Chamberlayne's Ev* § 2712

Cross examination and confrontation Another essential requirement of the Hearsay rule, as just examined, is that statements offered testimonially must be subjected to cross-examination But a process commonly spoken of as confrontation is also often referred to as an additional and accompanying test or as the sole test The main purpose of confrontation is for facilitating cross-examination But it also involves a subordinate and incidental advantage, namely, the observation by the tribunal of the demeanour of the witness on the stand, as a minor means of judging the value of his testimony But this minor advantage is not regarded as essential i e it may be dispensed with when it is however the essential object of confrontation, gh to note here that, so far as confrontation is Hearsay Rule, it is merely another name for tion *Wigmore* § 1365 The policy of the Anglo-Indian system of cross examination as a vita for testing the value of no statements (unless by special it has been proved and supplemented lengthening experience Not even peculiarities which are so often found associated with cross examination have availed to nullify its value It is beyond any doubt the greatest legal engine ever invented for the discovery of truth A lawyer can do anything with a cross examination,—If he is skilful enough not to impale his own cause upon it *Wigmore* § 1367

Scope of the section The expression "it must be evidence" in paras 2 3 and 4 of the section means "the oral evidence must be evidence" *Whitely Stokes Vol II p 889* So also the word "it" after the words 'saw" 'heard' or 'perceived' in paras 2, 3 and 4 to' *Neelkanto* v *Juggobandhu*, 12 B L R l II p 889 The first four paragraphs have

not direct whether the party against whom it is tendered objects or not *Whitely Stokes* Vol II p 889 But it was never intended by this section to exclude circumstantial evidence of a thing which could be seen, heard or felt *Karali* v *East India Co* 48 C L J 32 = 111 Ind Cas 792 — A I R 1928 Cal 498 So where a crowd has dispersed without taking any action the intention and common object of circumstances and

section 45 or of

which they are allowed to express their opinion *See ante* The cogency of this section as to t of the only to which the immediate the exploded technical language hearsay A who saw, heard etc, must be produced The fact cannot be proved through the medium of B who did not see himself etc, but is prepared to swear that A told him that he had seen, heard, etc So with respect to the fourth case, opinion evidence, when such is

60. admissible, this section necessitates the production of the witness who holds the opinion, it excludes the evidence of any witness who can merely say that he has heard another express such opinion. *Nort. Ev.* p 210. This section says that oral evidence must be direct. *Kalmther* v. *Ma Mi*, 3 Bur. L. J. 172 = 2 Rang. 400. An act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness. *Ganapathi* v. *Sakharayappa*, A. I. R. 1929 Mad. 187 = 115 Ind. Cas. 147. Hearsay evidence is inadmissible

Sarup v. *Emperor*, 7 Lah L J 264 = 88 Ind. Cas. 22 = 26 Cr. L. J. 1078 = 26 P. L R. 566 = A. I. R. 1925 Lah. 299.

Evidence of a person who saw it or heard it. "The witness must say what he had 'seen and heard; he was an '*oyant et veant.*" *Thayer. Pre Ev.* 524. Thus a favourite passage, found in several works in the last century, is: "It seems agreed that what another has been heard to say, is no evidence, because

said . . . . Hearsay testimony is from the very nature of it attended with all such

Hearsay

rule, and stands or falls according to such other evidential rules as may affect

it. *Greenl. Ev* § 100 But : S.
facts except the contents
must, in all cases be dire
witness that he perceived by his own senses the fact to which he testified" *Steph Intro* p 141 If therefore, A, a witness, had been told something by B, and A were asked what B had told him, the evidence of A would refer to a fact which could be heard, and A is a witness who says he heard it, this section, therefore would not exclude it. *Markby Ev* p 52 A statement made by an accused person immediately after a murder of what the deceased told him is relevant as

Act says that oral evidence must in all cases be direct If a person by merely

about it, he is giving hearsay evidence The man who reads out the document to him would certainly be entitled to give evidence of its contents But another person who repeats what is read out to him is giving hearsay evidence, of what would be legitimate secondary evidence were it before the Court *Kalenther Ammal* v *Ma Mi*, 81 Ind Cas 175=3 Bur L J 17?= A I R 1924 Rang 363
earsay evidence,
Nga v *Crown*,
Queen v *Kali*,
7 W R Cr 2; *Rajoni* v *Asan*, 2 7 W. R.
Cr 25, *Aman Ali* v *King Emperor*, 1 Cr L
J 631; *Queen Empress* v *Nga Ta*, 1 npress v
Viju Bhai, 1 Bom L R 433, *In re Vaithilinga*, 2 Weir 762 In order to
that the com-
it is necessary
ordance with
s 60 of the Evidence Act *Empress* v *Arshed Ali*, 13 C L R 125

It is admissible evidence for a witness to
e of a family custom, and to state as grounds
d from deceased persons But, it must be
the expression o
tion of hearsay
P C A person
that except the pe
Ev p 53 So
opinion must be produced A witness cannot be allowed to say that he has heard another express such an opinion *Nort Ev* 240.

this novel section, however, makes any book of science published for sale evidence, if the author be dead, or under any of the circumstances specified in section 32, which render his production impossible or impracticable *Nort Ev* 240 It must be remembered in regard to foreign law that by s 38, certain books are always admissible. *Markby Ev* 53 Under the provisions of the penultimate paragraph of s 57 and of the first proviso of s 60 of the Evidence Act, *Taylor's Medical Jurisprudence* may be referred to *Hatim* v *Empress*, 12 C L R 86, *Hurry Churn* v *Empress* 10 C 143, see also *Howe* v *Howe*, 25 M L J 594 (F B), *Granade* v *Com of Calcutta* 22 C W N 745=28 C L J 32=46 Ind Cas 593 But in all c
Purno, 28 C W N 579

delay or expense *Cun Ev* 215.

Proviso II. Proviso 2 relates to those cases in which secondary evidence is permitted to be given on account of the great inconvenience or impracticability

60.

ons on walls, monuments, surveyors s or oral testimony *Mortimer* v *Bolton*, 2 Camp 108, *R* v *Fursay* *artholomew* v *Stephens*, 8 C & P *ones* v *Turlton*, 9 M & W 65 But written characters exist on some ts removal for production would be

removable it ought to be pr *Wills Cir Ev* 212. In *Jo* production was required fas . 1 down the law thus "T the case of things fixed in break up his free-hold So power is given to tl not a physical impossibility *Nort Ev* 240.

the interpreter must be called to testify to what B aid to him If, however, B is a party, when admissions egarded as B's agent, and the ag nguage understood by the witness)

Telephone communications Evidence as to what a person holding a conversation over the telephone told the witness was said by the person at the

In any case, the doctrine of admissions may be invoked where one of the If B had sent

of the requirement of personal knowledge is here out of place, and leads to unpractical quibbles" *Wigmore* § 669

Market value Testimony as to market value on information derived from daily communications is not objectionable as being based upon hearsay Testimony of witnesses based upon such reports may be received *Chamberlayne's Ev* § 2708

CHAPTER V.

OF DOCUMENTARY EVIDENCE

Documentary evidence There is practically no controversy as to the meaning of the word document, because a definition of the term is given in this Act (*vide s* 3 *supra*) Stephen defines documentary evidence as "documents produced for the inspection of the Court or the Judge". *Steph on Ev*, Art 1

S.

Documents being inanimate things, necessarily come to the cognizance of the tribunals through the medium of human testimony; for which reason some old authors have denominated them dead proofs (*probatio mortua*), in contradistinction to witnesses, who are said to be living proofs (*probatio viva*). *Best Ev* § 216 ... and in many respects in trustworthiness, ... been noticed from the earliest times, ... The false relations of what never took

...

consequence ... attainment. *Best Ev.* § 60 "I ... er" says *Lumpkin J. of Georgia* in ... h than the strongest and most retentive memory ever bestowed on mortal man" "The memory of men as to facts is not satisfying to the mind as a writing, in an investigation involving p ...

Bunwarilal ...

ton observed ...

oral evident ...

...

cases cast upon it, but where the defence is rested upon a written document as a release, there is an essential difference, for its genuineness, on the contrary may be shewn by many facts and circumstances very different from mere oral evidence; and, moreover, the witnes ...

...

Rep 705, 706 (*Am*)

Three distinct questions with regard to documentary evidence There are three distinct questions which are dealt with in the Act in regard to that kind of evidence which is called documentary First, there is the question how the ...

... sections, but the matter ... s 59 with ss 61 and 64, the result ... document must, in general, be ... , 'primary evidence,' but there are ... otherwise Evidence used to prove the contents of a document which is not 'primary' is called 'secondary' *Markby Ev* pp 56, 57

Proof of contents of documents

61. The contents of documents may be proved either by primary or by secondary evidence.

63 Primary evidence

62. Primary evidence means the document itself produced for the inspection of the Court.

Explanation 1.—Where a document is executed in several parts, each part is primary evidence of the document.

Where a document is executed in counterpart, each counterpart being executed by one or some of the parties only, each counterpart is primary evidence as against the parties executing it.

Explanation 2.—Where a number of documents are all made by one uniform process, as in the case of printing, lithography, or photography, each is primary evidence of the contents of the rest; but where they are all copies of a common original, they are not primary evidence of the contents of the original

Illustration.

A person
printed at one
evidence of the c
the contents of the original

Secondary evidence.

63. Secondary evidence means and includes—

(1) certified copies given under the provisions hereinafter contained ;*

(2) copies made from the original by mechanical processes which in themselves insure the accuracy of the copy, and copies compared with such copies ;

(3) copies made from or compared with the original ;

(4) counterparts of documents as against the parties who did not execute them ;

(5) oral accounts of the contents of a document given by some person who has himself seen it.

Illustrations

vidence of its content
that the thing photo

by a copying machine
t is shown that the copy

evidence of the original, although the
compared with the original

(d) Neither an oral account of a copy compared with the original, nor an oral account of a photograph or machine copy of the original, is secondary evidence of the original.

Scope of the section 61. "This section lays down that *the contents of* documents may be proved either by primary or by *secondary* evidence, and I understand the rule to mean that there is no other method allowed by *law for*

* *See* s 76, *infra.*

proving the contents of documents Section 72 defines the meaning of primary evidence; s 63 describes what constitutes secondary evidence within the meaning 61

... *ghunandan Prosad*, 7 A 738

... rule which exacts original

... no evidence shall be received

... from some other which is withheld *Per Parke B* in *Doe d. Welsh* v *Langfield*, 16 M & W 127; *Doe d Gilbert* v. *Ross*, 7 M & W 102, 106; *Macdonell* v. *Evans*, 11 C. B 930, 942, *per Maule J*; *Best Ev* § 89 *Melius (or Satius) est petare fontes quam sectari* ...

hearsay evidence. *Best* § 89 All private documents must be produced, and the execution of them generally be proved, or their absence must be duly accounted for, and their loss supplied by secondary evidence *Greenl Ev.* 558.

... instrument is to be proved, the primary evidence is the testimony of the subscribing witness, if there be one Until it is shown that the production of the primary evidence is out of the party's power, no other proof of the fact is in general admitted All evidence falling short of this in its degree is termed secondary The question, whether evidence is primary or secondary, has reference to the nature of the case in the abstract, and not to the peculiar circumstances under which the party in the particular cause or trial may be placed It is a distinction of law, and not of fact; referring only to the quality, ... rries on its face no ... out primary And ... , yet if there are ... it is not ordinarily ... secondary evidence can be resorted to *Greenl Ev* § 84 According to the Indian Evidence Act, primary evidence means the document produced for the inspection of the Court (s 62) Where a document is executed in counterpart, each counterpart, being executed by one or ... primary evidence as against ... as against the other parties ... *Vol II p 290* The follow... given by *Lord Esher M R* ... "'Primary' and 'secondary' ... which the law requires to be given first, ... may be given in the absence of better evidence which the law requires to be given first, when a proper explanation is given of the absence of that better evidence"

is that the rule requiring the prodı
evidence, but a rule preferring the thin,
3. which if produced is not primary e...
term tends to conceal the true nature of the rule's effect The other objection is that, so far the term is understood to group together all rules exacting a certain quality of evidence when it is available, it groups rules which are in ... the Attesting ... united On ... to clarify the ... independent

Scope of section 62 Primary evidence means the document itself produced for the inspection of the Court The fundamental notion of producing the primary evidence is that the terms of a writing must be proved by producing it and not by offering testimony about them *Wigmore* § 1232. Where the writing constituting a bilateral transaction is executed by the parties in duplicate or multiplicate, each of these parts is the writing, because by act of the parties each is as much the legal act as another It can make no difference that one party has signed only the document taken ... red tc ... *re*, 2 Camp. ... the counterparts of each other, one of which is delivered to the oppo... both be considered as originals, ... one which is preserved may be received ... the one which was delivered" See also *Doe* v *Putman*, (1842) 3 Q B ..., *Colling* v *Frewick*, 6 B & C 398; *Roe* v *Davis*, 7 East 363 'The earlier practice seems to have been to treat the counterpart of a deed as a copy or secondary as may be inferred from utterances of *Best C J.* in *Munn* v *Godbold*, 3 Bing 292 There the learned Judge said "Where there are two instruments executed as parts of a deed, one of these parts is more authentic and satisfactory evidence of the contents of the other part than any other draft or copy It is prepared with more care than the other copy, and the party who produces it, and against whom it is used, by taking and keeping it as a part of the deed, admits its accuracy The Courts have therefore always required that if one part of a deed be lost, and another part be in existence, it must be produced, but merely as secondary evidence of the part that was lost" *Wigmore* § 1233; see also *Doe* v *Wainwright*, 1 New & P 8 *Burchell* v *Clarke*, 2 C P. D 88, *Mathews* v *Smallwood*, (1910) 1 Ch 777 Formerly a deed was written on parchment commencing from the middle, the other part was written in a similar way, up ...

... primary evidence of the original document. Thus probate of a will of personalty ...

v *Hunt*, 6 Ch D ...
2 Ch 330, and wl...
contained in a will,
only ...

... in writing ... *latterie* v. *Pooley*, ... e applies where ... 155 *R* v *Hunt*,

3 B & Ald 566, *Phip Ev 7th Ed* 518.

Explanation I The expressions executed "in parts" and in "counterpart", in section 62, refer to the mode in which documents are sometimes executed It is convenient sometimes that each party to a transaction should have a complete document in his own possession. To effect this, the document is written out as 61
many times over as there are parties, and each document is executed, i e. signed or sealed as the case may be, by all the parties. No one of these is more the original than the other, and any one of them may be produced as primary
Where there are
by each party both
3 K B 706, 721;
Phip Ev 7th Ed. 516

paper does not differ from a
an alike, therefore, only be
under such circumstances as
e, if the original is shown
, notice
d copy
Watson,
r better
hine at
nber of

in a newspaper,
primary evidenc
Chandra v *Emp*
But if it were
y, but only secondary evidence
conditions which render the
Ev 242 Where the accused
caused 500 placards to be printed and carried away 25 of them for posting, one of the remainder can be admitted to prove the contents of those posted because every one of those worked off are originals, in the nature of duplicate originals
The reason me press, they must all be the
same *R* v *Ellenborough L C J* said,
"An order l *Watson* fetched away 25, by

the ld be great weight in the
obj originals, the manuscript
is the same press, they must
all

carbon copy is no more better signed or executed than a letter-press copy—as a fact, the signature is not always reproduced on the carbon as it is in the press-copy letter which is usually copied after signature But where a document is executed in counterpart, each party signing only the part by which he is bound,

each counterpart, is the best evidence against the party signing it and his privies As to the other party it is only secondary evidence. *Roe* v. *Davis*, 7 East. 362,
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for ma
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same to settle
the possession
of his father, does not make the docu
Hrishikesh, 19 C L. J 546 = A I. I
abstracted in a judgment is not even
cannot be made use of in lieu of
29 Ind Cas 463 = 60 M L J. 13 = A
evidence of a document which is otherwise
ument is lost *Ma Ague* v. *Maung San Yank*,
A I R 1929 Rang 181 A register containing copies and copied directly from the originals is legally admissible in evidence in proof of them *Chandram* v *Sheonath*, A I R 1931 Oudh 1
document, which is not prove
ever existed A defamatory l
was prosecuted as being the
deposed to such a letter ever having been written by the accused
copy of the newspaper was not secondary evidence of the original letter *Ramlal* v *King*
Ind Cas 852 The
question
admitted depends
largely o
conclusion should
not be overruled by the Court of appeal except in a very clear case of miscarriage *Visvanatha* v *Bahibai*, A I R 1931 Bom 105 = 55 B 103

s 76 Copies
sworn copies
examined copy,
in the sense that the original and the copy have been examined or compared together by the witness, either in his own act of transcription or by taking some

Evidence Act, and are used chiefly to prove
corporations and companies, by laws and th
copy of a Will is admissible in evidence
is proved. *Theli Kicherla* v
Mad 345 47 M L J. 906; *Bo*
certified copy of a document
conditions and contents of it, b
Koeri, 82 Ind Cas 306. A
ment, in which there may be references to it, is not the secondary evidence

of the contents of the document, especially when it appears that it is itself based on secondary evidence of the document given by a party who had the original with him *Hira Lal v Ganesh Prasad*, 4 A. 106 P. C = 9 I A 61 = 11 C L R. 100.

Clause (2). ... evidence *In re* ... *Re Stephens*, L R ... *ton* 30 Ir L T. ... secondary evidence, ... wish to prove ... to the first portion of this clause ... So under this clause a copy ...

13. This clause is applicable to blue prints ... 212 Ill 89), as well as to carbon copies as it ... of copy than that taken in the copying press *Burr Jones* § 209 All that is required under this clause is that the copies must be made by some mechanical processes which would ensure the accuracy of the ...

Clause (3) A copy merely as a piece of paper, has no standing as evidence ... qualified ... § 1277 ... is not ... comparison, or as sometimes, two witnesses, one of whom read the original, while the other read the copy, or the reverse But it will save trouble to have the comparison made by one and the same person ... *Ev* 96, *Maung Po* v *Ma Shu* ... *Kim*, 9 C 939 A copy in short, ... of a witness The witness, therefore, must be qualified, and thus the general principle of witness's qualifications have here certain applications A general principle for witness's qualification is that he must speak from personal ... it therefore in ... own personal ... others Upon ...

copy, is rather in the nature of a rule of preference, requiring first the use of an immediate copy, if one is available *Wigmore* § 1274 This view was adopted by *Justice Story* in *Winn* v *Patterson*, 9 Pet 663, 677 where he observed "The ...

with it, for then it is second remove from the original; or where it is copy of a copy of a record, the record being still in existence by law deemed as high as the original, for then also it is a second remove from the record But it is quite a different question whether it applies to cases of secondary evidence where the original is lost, or the record of it is not in law deemed as high evidence as the original, or where the copy of a copy is the highest proof in existence. On these points we give no opinion; because this is not in our judgment the case of a mere copy of a copy verified as such, but it is the case of a second copy verified as a true copy of the original" Under section 57 of the Indian Registration Act, (XVI of 1908), all copies of copies given under that section and signed and

dmissible for the purpose of proving the

r Bhanrao, 78 Ind Cas 865 = A I R

2 W R 303, *Smart* v *Williams*, Comb

ch evidence is thus stated in *Stetson* v *Gulliver*, 2 Cush 494, 499 "When the book of the register would be evidence, a certified copy is entitled to have the same effect; there being very little ground to apprehend any mistake from that cause, and upon consideration of the great public inconvenience which would result from having the books of record removed from their proper custody and place of security," *Wigmore* § 1275

According to the orthodox English rule a copy of a copy is not admissible in evidence in as much as in the words of *Alderson B* "there would be no limit to the reception of secondary evidence if that were so This is but the shadow of the shade" *Everingham* v *Roundell*, 2 Moo & Rob 138; see also *Tillard* v

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Lochan v *Pandit Harinath*, 1 Pat 606, *Chiminaji* v *Dhinkar*, 11 B 320, *Laksh-man* v

Fatima,

of a pa

Madras I

practice

the printing of the High Court paper, that before giving the final order for striking off, it would

A I R 1929 Mad 18

Sanloki v *Rameswar*,

compared with the ori

with the original depo

Pat 61 = 5 Pat 777

Clause (4) Execution in counterpart is a method of execution which is

in itself but supplements the other. *Baidya Nath* v. *Kamini Kant*, 6 C. L. J. 572; *Andrews* v. *Wirral*, R. C. (1916) 1 K. B. 863. 6

Clause (5). The oral account of the contents of a document given by some person who has merely seen it with his own eyes but is unable to read it is not secondary evidence of the document: the word "seen" in section 63(5) of the

Ghore and others v *Chatrapal Singh*, 12 A. L. J. 239 = 23 Ind Cas. 11 So where in order to prove a mortgage the only witness called was an illiterate person he cannot be deemed to
within section 63(5) of the Evid
557 = A I R 1922 All 232
that under this clause only a witness who has seen the document and who could have read the document in its original state is entitled to give oral evidence of it. *Ramji Das* v *Mohan Lal*, 71 Ind Cas 651 = 1923 A 411 But in *Padai Singh* v. *Brij Mangal*, 73 Ind Cas. 651 it was held that as regards the letting in of secondary evidence the word "seen" in section 63(5) includes also "read over" in the case of a witness who is illiterate and as such cannot himself read it If it is read over to him it will satisfy the requirements of the section. *In Mohan Lal* v *Ramji Das*, 80 Ind Cas. 939 = 22 A L J 861, which was an appeal from

v *Chatrapal Singh*, *supra* After hearing the matter very fully argued we have come to the conclusion with great respect to these two Judges, and we are unable to agree The critical words in the section are 'seen it' The result of the decision would be, for example, that a highly educated person knowing
nal document in
contents and had
person who knew
that the English
memory, could not
although, he had

exists The first three sub sections of s 63 refer to copies made from or compared

that if a person has only seen a copy of a document, there are two chances altogether, and therefore evidence given by him could be of a different category to the secondary evidence allowed by law and a person who has seen a copy

evidence of the contents of the
3. L J 172=84 Ind Cas 175=A I
tl P. C... ..l in Ma Ma v

Kalender Ammal, 31 C W N 621 (P C)=54 I
18=100 Ind Cas 1=29 Bom L R 800 S
Allahabad High Court reported in 22 A L
13 and 73 Ind Cas 651 are no longer good law
the contents of a document by some person
clause means oral evidence by some person who has seen those contents, that
is who had read the document Evidence that the witness only saw the
document and heard it read ... the
contents are concerned an
oral evidence generally, *viz*,
evidence of a witness who sa
fact which can be seen on
Raghubir, 112 Ind Cas 310.
Statements of persons who
sible in evidence What is required is an oral
judgment or decree by some one who had read

to a document which is
... document. *Rati Pal* v *Udai*
Bhan, 53 Ind Cas 667 A translation of a document is not secondary evidence
Ambalavana v *Kuppachi*, 4 L W. 330=35 Ind Cas 20; 26 Ind Cas 618;
see also 70 Ind Cas 107 Where in prior proceedings between the parties
one of them admitted the existence and contents of a mortgage deed, such
admission constituted a good secondary evidence within the meaning of this
clause *Bahadur* v *Madho*, 36 Ind Cas 696 An objection to the admission
of secondary evidence, if not raised at the time it is admitted, cannot be
allowed to be raised in special appeal Where the plaintiff attempted to
prove the contents of certain documents by oral evidence, but the evidence
fell short of what is requir... the
witness was not properly q
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24 W R 232 Survey

y evidence of the contents of the
63 or under any other section of the
Evidence Act *Sate* ... 1930 P C 45
Oral evidence canno
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his account books;
the best evidence, must be
24 Bom L R P C 565
have been reduced to wr
66 Ind. Cas 360

evidence "Another
gener ... luction of secondary
evide ... the law recognises
no degrees in the various kinds of such evidence. *Doe* v *Ross*, 7 M & W.
102; *Hall* v *Ball*, 10 L J, C P. 285; *Brown* v *Woodman*, 6 C & P 206,
Jeans Wheedon, 2 M & Rob 486" *Taylor Ev* § 550 In *Doe* v *Ross*, 7 M &
W 102, the question was whether an attested copy of a deed was preferred
... tion in the

to the jury, from whic · · ·
back would be adverse ·
distinction between one ·
case Alderson B said
the nature of the evidence itself If you produce a copy which shows that there was an original or if you give parol evidence of the contents of deed the evidence itself discloses the existence of the deed But reverse the case, the existence of an original does not show the existence of any copy nor does parol evidence of the contents of a deed show the existence of anything except the deed itself If one species of secondary evidence is to exclude another a party tendering parol evidence of a deed must account for all the secondary evidence that has existed He may know nothing but the origin and the other side at any trial may defeat him by showing a copy the existence of which he had no means of ascertaining Fifty copies may be in existence unknown to him, and he would be bound to account for them all Wigmore § 1268 Similarly in *Brown* v *Woolman* 6 C & P 206 *Parke J* said There are no degrees of secondary evidence" See also *Sugden v Lord St Leonards* L R 1 P D 151, *Brown* v *Brown* 27 L J Q B 173, *Doe* v *Cole*, 6 C & P 359, *Fisher* v *Samuda* 1 Camp 193, *Kensington* v *Inglish* 8 East 273 279 But in some of the old English cases the rule laid down was otherwise In *Ludlam's Will* Loft 362, *Lord Mansfield C J* said If you cannot prove a deed by producing it, you may produce the counterpart if you cannot produce the counterpart, you may produce a copy, even if you cannot prove it to be true copy if a copy cannot be produced you may go into the parol evidence of the deed" This rule was also adopted by *Lord Hardwicke L C* in *Omichand* v *Barker*, 1 Atk 21 (49) and in *Villers* v *Villers* 2 Atk 27 The English
no preference is
But in America
om *Prof Leafs*
er the law recognizes any degrees in the various kinds of secondary evidence and requires the party offering that which is deemed less certain and satisfactory first to show that nothing better is in his power, is a question which is not perfectly settled On the one hand the affirmative is urged as an equitable extension of the principle which postpones all secondary evidence until the primary is accounted for, and it is said that the same reason which requires the production of a writing if within the power of a party also requires that if the writing is lost, its contents shall be proved by a copy if in existence rather than the memory of a witness who has read it, and that the secondary proof of a lost deed ought to be marshalled into first the counterpart secondly a copy, thirdly the abstract, etc, and, last of all the memory of a witness On the other hand it is said ounds all distinction betwee that the rule is founded u on its strength or weakness, and that to carry it to the length of establishing degrees in secondary evidence as fixed rules of law, would often tend to the subversion of justice and always be productive of inconvenience If for example proof of the existence of an abstract of a deed will exclude oral evidence of its contents this proof may be withheld by the adverse party until the moment of trial and the other side be defeated or the cause be greatly delayed, and the same mischief may be repeated through all the different degrees of evidence It is therefore insisted that the rule of exclusion ought to be restricted to such evidence only as upon its face discloses the existence of better proof and where the evidence is not of this nature it is to be received notwithstanding it may be shown from other sources that the party might have offered that which was more satisfactory
by the jury under all the circum
(9) The American doctrine
this that if from the nature

believed that the rule laid down in *Doe* v *Ross*, 7 M & W 102, is more

of a document is not ... the contents of the
63. original *Kalenther* ... Ind Cas 175=A I R. 1924 Rang 363 ... uncil in *Ma Mi* v *Kalender Ammal*, 31 C W N 621 (P C)=54 I A. 61=25 A L J 65=5 Rang 18=100 Ind Cas 1=29 Bom L R 800 So the two later decisions of the Allahabad High Court reported in 22 A. L J 864=80 Ind Cas. 937=47 A 13 and 73 Ind Cas 654 are no longer good law The phrase "oral accounts of the contents of a document by some person who has himself seen it" in this clause means oral evidence by some person who has seen those contents, that is who had read the document Evidence that the witness only saw the ...

fact which can ... *Raghubir*, 112 I ... Statements of ... sible in evidence ... judgment or decree by some ... v *Maung Tha*, A I R ... authorized agent in a previo ... against his interest is sec ... *Bhan*, 53 Ind Cas 667 A translation of a document is not secondary evidence *Ambalavan* v *Kuppachi*, 4 L W 330=35 Ind Cas 20; 26 Ind Cas 618; see also 70 Ind Cas 107 Where in prior proceedings between the parties one of them admitted the existence and contents of a mortgage deed, such admission constituted a good secondary evidence within the meaning of this clause *Bahadur* v *Madho*, 36 Ind Cas 696 An objection to the admission of secondary evidence, if not ... nnot be allowed to be raised in spe ...

the penalty of the dismissal ... *gh* v *Int* ... was based on a ... was not exhibited ... of the contents of the ...

is not merely the memorandum of some other fact Thus a witness cann... asked whether certain reso... some papers (*R.* v *O Connell*, Arm & T 16 ... his account books; but in ... the best evidence, must be ... 24 Bom L R P C 565 ... have been reduced to wr ... 66 Ind Cas 360

No pref ... ce "Another general rule' ... of secondary evidence, wh ... law recognises no degrees in the various kinds of such evidence. *Doe* v *Ross*, 7 M & W 102; *Hall* v *Ball*, 10 L J C P. 285, *Brown* v *Woodman* 6 C & P 206, *Jeans* *Wheedon*, 2 M & Rob 486" *Taylor Ev.* § 550 In *Doe* v *Ross*, 7 M & W 102, the question was whether an attested copy of a deed was preferred ... question in the ...

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B. in Regina v Farr,
per are, according to the
per itself, and by that
(per Abbott C J) 2 B &
Leyfields Case, 10 Co Rep
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the Court in two manners:
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And these are the reasons
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r Coleridge J in R v Francis,
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be proved by the paper itself and by that
The rule was so stated by the Judges on
Caroline, 2 Brod & B 286 (182) The only
the following classes (each of which is dealt
document is lost or destroyed, (2) Where it is

Cr Ev 15th Ed. p. 3.

S. 64. philosophical and harmonizes better
jurisprudence of the age on the subject
to curtail and limit the objections
to go to the jury to judge of its weight
party kept back a more satisfactory
have produced and within his knowledg
as he had offered, of less certainty, with the jury *Lewis* v *St Antonio*, 7 Tex 288 (315) (*Am*) *Wigmore* § 1268

Proof of documents by primary evidence.

64. Documents must be proved by primary evidence except in the cases hereinafter mentioned.

Principle A writing is the best evidence of its own contents and must be introduced unless it has been lost or destroyed or its absence is otherwise satis
' The reasons are simple
long experience They
posed literal copy and the
the copyist, whether by
wilfulness or by inadvertence this contingency wholly disappears when the original is produced M
d the copy will
lack, such features of
may afford the
opponent valuable means
the document" *Wigmore* § 1179 In
C J said that though an original may be
is liable to the mistake of the transcriber
recollection, and the original, the added risk, almost the certainty, exists, of errors of recollection due to the difficulty of carrying in the memory literally the tenor of the document *Wigmore* § 1179; see also *Slatterie* v *Pooly* 6 M & W 664; *Doe* v *Ross*, 7 M & W 102, *Taylor* v *Riggs*, 1 Pet 591, 596, *Vincent* v *Cole*, M & M 257; *Macdonnell* v *Evans*, 11 C B 942

were the beginnings, in the endeavour to give consistency to the system of evidence before juries They were never literally enforced,—they were principles and not exact rules, but for a long time they afforded a valuable test As rules

Bliss, 21 N Y p 218, that ' it is a universal rule founded in necessity, that the best evidence of which the nature of the case admits is always receivable '
ciple was the rule about
the rule was older than the
have been a generalization
from the rule, which appears itself, to be traceable to the doctrine of profert That
ent which was set up in
the jury, that a jury
t had been exhibited to
hear testimony from
o speak to the contents
of a deed without the production of the deed itself" *Thayer Cas Ev* 2nd *Ev* 778, 779

Scope of the section "The rule is that the best evidence must be used that can be had, first the original; if that cannot be had, you may be let in to prove it any way, and by any circumstances the nature of the case will admit. This extends not only to deeds, but to records, so far I mean as they may be given in evidence to a jury, for in point of profert it is another thing. But for this

the law requires a proper foundation to be l u l , and two things are necessary First, to prove that such a deed once existe l , and there is sufficient evidence that such a dee l, to a certain intent, di l once exist, by the answer that has been read , which I do not r ly on as evi lence of all the uses of the deed, but as an admission tha' su h a deed and uses something of that n iture once existe l The next step is to show some groun l that the dee l is lo t or being in his a lversary s han ls cannot l e come at." *Per Lor l Chancellor* in *Whitfield* v *Fausset* 1. Ves 387 In *Grant* v *Gould* 2 H Bl p 101, *Lor l Loughborough* said ' That all Common namely, the best evi lence agree ' The rule, as to th rules of common law, but mo lifi l to some extent by the registry system establishe l here by Statute The theory is this that an original dee l in its ppy be 2

S.

Gray 30 (*Im*) 'The gen ral rule was, that the contents of a writing of any document or portable article coul l not be proved without its production or without showing it to be in the possession or power of the prisoner or opposite party, and on notice to him to produce it' *Per Channell B* in *Regina* v *Farr* 4 F & F 336 So the contents of every written paper are accor ling to the well establi he l rules of evi lence, to be proved by the paper itself, and by that alone if the paper be in existence *The Queen's Case* (*per Abbott C J*) 2 B & 284 The reason of the rule is thus st ited in *Dr Leyfiel ls Case* 10 Co Rep 92 (a) And ther fore every deed ought to approve itself and to be proved by others —approve itself upon its showing forth to the Court in two manners (1) As to the composition of the wor ls be sufficient in law and the Court shall judge th it , (2) that it be not razed or interlined in material points or places , (3) that it may appear to the Court and to the party if it was upon conditional limitation or power of a revocation in the deed And these are the reasons of the law t iat deeds pleaded in Court shall be showed forth to the Court" So when the question is as to the effect of a written instrument the instrument itself is primary evi lence of its contents *Per Coleridge J* in *R.* v *Francis* L R 1 C C R 128 (132) But this rule should not be applied so broadly as to require the production of any thing wh ch is not a document The rule is

St Tr 529 5 1196) in som precise cate th though *more* §

well establise l rules of evidence to be prove l by the paper itself an l by that alone if the paper be in exist nce The rule was so stated by the Ju lges on the occasion of the tri il of *Q ee i* v *Caroli e* 2 Brod & B 256 (18) The only exception to with below) in the posse Where it is insists on hi physical gro is of a pul reasons of convenience *Roscoe Cr Ev 15th Ed* p 3

5 Cases in which secondary evidence relating to documents may be given

65 Secondary evidence may be given of the existence, condition or contents of a document in the following cases —

(a) when the original is shown or appears to be in the possession or power—
   of the person against whom the document is sought to be proved, or
   of any person out of reach of, or not subject to, the process of the Court, or
   of any person legally bound to produce it
   and when, after the notice mentioned in section 66, such person does not produce it,

(b) when the existence, condition or contents of the original have been proved to be admitted in writing by the person against whom it is proved or by his *representative in interest*,

(c) when the original has been destroyed or lost, or when the party offering evidence of its contents cannot for any other reason not arising from his own default or neglect, produce it in reasonable time,

(d) when the original is of such a nature as not to be easily moveable,

(e) when the original is a public document within the meaning of section 74,

(f) when the original is a document of which a certified copy is permitted by this Act, or by any other law in force in British India to be given in evidence,

(g) when the originals consist of numerous accounts or other documents which cannot conveniently be examined in Court, and the fact to be proved is the general result of the whole collection.

In cases (a), (c) and (d) *any* secondary evidence of the contents of the document is admissible

In case (b), the written admission is admissible

In case (e) or (f), a certified copy of the document but no other kind of secondary evidence, is admissible

In case (g), evidence may be given as to the general result of the documents by any person who has examined them, and who is skilled in the examination of such documents

Principle The contents of a document must in general be proved by a special kind of evidence, called 'primary evidence' but there are exceptional cases in which it may be proved otherwise *Markby Ev* 57 *The exceptional cases in which secondary evidence is admissible are contained in this section*,

Ibid. "That rule which is the most universal, namely, that the best evidence the nature of the case will admit, shall be produced, decides this objection, for

expression for the idea that when you lose

best in your power The case admits of

you possess, if the superior proof has been

not mean that men's rights are to be sacrificed and their property lost because they cannot guard against events beyond their control; it only means that, so long as the higher or superior evidence is within your possession or may be reached by you, you shall give no inferior proof in relation to it" *Per Porter J* in *Thomas* v *Thomas*, 1 La 166, 168; *Wigmore* § 1192 The various classes of cases with which the following sections d

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Scope of the section Secondary evidence of the contents of a document is inadmissible unless the non production of the original is first accounted for so

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for of the non production of the original *Bhubaneswari* v *Harisaran* 6 C 720= 8 C L R 337 (P C), *Rakhaldas* v *Indra Monee* 1 C L R 155, *Imeerunissa* v *Abedoonissa*, 23 W R 208, 209 (P C)=2 I A 87, *Wazeer Ali* v *Kalee Kumar* 11 W R 228, *Gour* v *Huree Kishore*, 10 W R 338, *Ishan* v *Bhyrab*, 5 W R 21, *Ustoorun* v *Mohun* 21 W R 333, *Roopmunoon* v, *Ramlal* 1 W R 145; *Mafee Zoodeen* v *Meher Ali*, 1 W R 213, *Sheoram* v *Ramlal* 1 W R 248, *Muhammad Abdul* v *Ibrahim*, 3 B H C R A C J 160 A writing is the best evid

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ing, rather than a narrowing rule It meant that the best evidence of which the nature of the case would permit was receivable It has been pointed out by *Prof Thayer* that this rule has been the subject of a very peculiar development (*Vide the origin of the rule*

relating to writings only

to those which relate to

Ev § 272 This section

and thus is a relaxation requires stricter proof in criminal than in ci it was decided that, in the former, the original registers of births, deaths marriages, etc, must be produced and that copies will not be sufficient *Field's Ev 7th Ed* p 218; *Whitley Stokes*, Vol II p 92 The exceptional cases in which secondary evidence

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the possession of the

provides for his

Where an original

pattah relied on cannot be produced, secondary evidence is admissible, but the Court oug the contents of the

document *Sookram Sookul*

v *Ramlal*, document from

record must be satisfactorily accounted for before a copy can be looked at and

before it can be used *Roheelal* v

mbanlal v *Nandlal*, 2 W R Act X.

241, *Asman* v *Doorga*, 21 W R 262.

According to this section the loss of the original must be proved not only in a case where the document is being enforced in a suit but also where it is produced

5. merely as a piece of evidence *Maqbul v. Brijdeo*, 122 Ind Cas 751 = 1930 A L J 765 = A I R 1930 All 539 Where a party relies upon the certified copy of a document before any presumption as to genuineness of the original can be made under s 90 it is incumbent on the party trying to rely upon the document to lay the foundation by leading secondary evidence under s 65 *Gaya Prosad v Jaswanti*, 1930 A L J 1003 = A I R 1930 All 550 = 125 Ind Cas 460

A copy of a disputed document can not be taken as evidence without proof that the original is out of the power of the person producing the copy Admitting the ex

the correctness of the copy

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satisfying the conditions required to

Pershad v Amanutulla 26 C 53 = 2 C

rents where sought to be proved by entries made by *Patwari* in his list as the result of his enquiry and inspection of receipts *Held* that the list would merely

ents of the receipts and that it was inadmissible

made out *Baduna Ram v Akbar Ali*, 103 Ind

Cas 752 = 9 Lah L

executed in Englan

gagee instituted a

only *Held* that the secondary evidence of the mortgage deed was admissible *Herbert Francis v Mahomed Akbar*, 105 Ind Cas 532 This section provides an alternative to the bond holder in cases where for various reasons production of the original is impossible, but if a bond is in existence production is not dispensed with by

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should not be overruled except in a clear case of miscarriage of justice Production of secondary evidence does not dispense with proof of the execution of the original document *Chuha Mal v Rahem Baksh*, 71 Ind Cas 568 Where in a suit on bond, loss of bond was alleged and the defendant denied execution

When no reas . . . S.
mortgage, a suit on .
(1922) *Nag* 119 = 67 .
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Lower Court has rejected it. *Rameswar Lal* v *Raj Kumar*, 5 Pat L W 316 = 45 Ind Cas 888 = (1918) Pat. 156

When a party in possession of an unregistered deed of sale of property less
. roduce it before the Court and was unable to
. *Held*, that secondary evidence of the contents
Domai Bari Mellu v *Keral Kolita*, 62 Ind Cas
a sale proclamation as to the rate
rtised for sale at his instance in
ie sale proclamation is not forth
be accepted as secondary evidence
ation as the rate of rent payable
60 But secondary evidence of
lliani v *Nambiar* 28 M L J 206 =
28 Ind Cas 69, *Nataraja* v *Ramabhadra*, 28 Ind Cas 853, *Emperor* v *Khetal* 45 A 300

ans a document admissible in evidence,"
is section deals with the proof of the contents
Khetter Chander v *Khetter Paul*, 5 C 886
it is inadmissible in consequence of
stamped, secondary evidence cannot
, Vol II p 892

Time for objecting to the admission of the secondary evidence A Court copy of a title deed was filed without objection on behalf of the plaintiff, but objection was taken during the argument that the plaintiff had not shown any of the statutory grounds for the admission of such secondary evidence It was
be marked without objection
The copy should not have
made it receivable *Kistna*
evidence must be made before
ular 70 P R 1866, *Uppera* v.
ihed that no objection
the admissibility of a
e Court below without
any objection *Jiwan* v *Jiwan* 88 Ind Cas 511 = 29 P L R 455 = A I R 1925 Lah 347 *Ma The Nh* v *Mg Ne Pa* 3 Bur L
awa v *Ramappa* 5 B L R 798 = 28 B 91; *Raj*
Vol II 382, *Akbar Ali* v *Bhyenlal* 6 C 666,
T 397 = 67 Ind Cas 628, *Surat* v *Ram*, 59 Ind
14 Ind Cas 539 = 216 P W R 912, *Madhabi* v
Chimnaji v *Dinkar*, 11 B 320, *Kishori* v *Rak*
sanna, 28 C 143, *Sahazala* v *Secy of State* 34
Hasmatulla v *Hiramohan*, 3 . *v Lalla Ru* 1 W R 1?
Gour v *Kanhya* 2 W R 23
v *Mahesh* 2 W R 166,
P L R 196 When the C
certain letters which were no
sibility was taken subsequently *held* that the objection could be entertained, *Prafulla* v *Emperor*, 57 C 1041 = 50 C L J 593

Unstamped documents — secondary evidence of Secondary evidence of the contents of a document which was liable to stamp duty but unstamped, cannot be admitted on payment of a penalty *Kopaya* v *Shamu*, 7 M 440, *Baldeo* v *Jairam*, A W N 1893, 210, *Mathura* v *Peary Mohun* 1 C 250 = 2 C L R 409; *Ma Eun U* v *Maung Aung Hmue*, U B R (1897—1901) Vol II 365, *Sheikh Akbar* v. *Sheikh Khan*, 7 C 256 = 8 C L R 528; *Maung Net* v.

65. *Maung Hmo*, U B R (1897—1901) Vol II, 367, *Sudar Kuar* v *Chandravati*, 4 A 330 = A W N 1882, 55 *Hiralal* v *Shankar*, 45 B 1170 *Suyms* v *Sundard*, (1911) 2 M W N 166, *Doraisami* v *D* 87 Ind Cas 382, *Maung Po* v *Maung Gui*, 101 Ind Cas 198 = A I R 1927 R 109 The provisions made by the Stamp Act for the case of deeds, either unstamped or insufficiently stamped, have no application, when the original deed, which ought to have been stamped has not been produced It is not permissible to pay penalty or require endorsement by Collector on a copy of unstamped or insufficiently stamped document and to offer the same as secondary evidence of the terms of the original *Venkata* v *Sri Junganti*, 4 C W N 117; *Aruna Chellum* v. *Olagappah*, 4 M H C R 312, *Raghavachar* v *Rangachar*, 4 Mys L J 145 A distinction must be drawn between the admissibility of the evidence and the manner of proof

Section 65 and Registration Act, s 49 The admitted existence of an unregistered written deed of relinquishment of one's interest requiring registration precludes the proof of the fact of the relinquishment by any secondary evidence as the primary evidence is itself inadmissible under s 49 *Janardhan* v *Janardhan* 101 Ind Cas 839 = A I R 1927 Nag 214 Where a party comes into Court resting his claim on a written title which the law requires to be

to register, and is, in consequence and say, 'I can prove my title by ... have a compulsory Registration ...ors" *Monmohinee* v *Bishen Moyee*, *Sheikh Shurutoolah*, 1 B L R 58 = 10 W R 51 (F B); *Gongabisan* v *Tukaram*, 5 N L R 70 = 3 Ind Cas 224; *Mahomed* v *Allah Ditta*, 95 Ind Cas 444 = 27 P L R 268, *Kallam* v *Nambiar*, 28 M L J 276 Secondary evidence of a document which is not produced but which in a previous suit was found to be inadmissible as being not registered cannot be given in evidence *Nataraja* v *Ramabhadra*, 28 Ind Cas 853, see also *Kanduru* v *Adam Saheb*, 25 Ind Cas 661

Section 19, Limitation Act—Wheth... acknowledgments lost or destroyed Se... to section 20 of the Limitation Act of 1871, writing containing the promise or ackno... may be given of the time when it was signe... of ... her ... *R*...

which secondary evidence that amongst the ground ...ce was the loss or destruc... to is the evidence ...thing was ... opposite

...871 The language of the ... was necessarily in direct ...g to the Evidence Act, ...locument generally, if the ...f 1871 oral evidence of the ...ble in such a case. The words used are 'When the writing containing the acknowledgment is undated, oral evidence may be given of the time when it was signed, but oral evidence of its contents shall not be received" One branch of the law of Evidence is that already referred to It is contained in 64 and the following section of the Evidence Act and it

determines the cases in which secondary ... S
a document not produced. Another bran
the following sections. It deals with tl
evidence of oral communications, may
effect of a document. The first part of the paragraph before us clearly belongs to the latter branch of the law. And, it would seem the object was to remove any question which might otherwise have arisen whether the rules generally excluding oral ... the effect of documents might not exclude oral
document, where the date is an essential
nt oral evidence of the date of the document
proceeds 'but oral evidence of its contents shall not be received' These words were introduced with a 'but', and they speak not of secondary evidence but of oral evidence. We do not think they ought to be understood as dealing with an entirely different branch of the law of evidence from the earlier part of the sentence, and as repealing s 65 of the Evidence Act, so far as it relates to acknowledgments. We think the words in question are of the nature of a saving clause, guarding against the supposition
idence further
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Wajibun v
Kadir, 13 C 192; see also *Chathu* v *Virarayan*, 15 M 191; but see *Ziaulnissa* v *Motidev*, 12 B 268 This controversy has been set at rest by Act IX of 1908,

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f that statement to be
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Nowroz, 5 P. W. R. 1914=16 P L R 1915.

CLAUSE (A).

Original in the possession or power of the Adversary When a document is in the possession of the adverse party or of some one bound to give up possession thereof to him [e g his solicitor (*Irwin* v *Lever*, 2 F & F 269 *R* v. *Hunter*, 4 C
(*Taplin* v *Att*,
Sinclair v *Ste*
but not a stake
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in this section ar

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the personal custody of the opponent himself ...
third person on the opponent's behalf and subject to the opponent's demand. *Wigmore* § 1200 So wherever it is in the
party and he refuses to produce it after n
R v *Watson*, 2 T R 201, *Makbul Ali* v
Greesh Chunder v *Ramlal*, 1 W R C ...
cases equally with civil *R* v *Elworthy*, 10 Cox Cr 579 582 The reason why secondary evidence is admissible in such a case is thus given by *Buller J.* in *Att*.

65. *Gen* v *Le Merchant,* 2 T R. 201 *note.* "It was likewise said, in support of the motion, that the reason why copies are permitted to be evidence in common

does not produce them is in no fault at all, and for that reason a copy is not admitted. But I do not take that to be the rule; it is not produced upon any

sion of the opponent. It is enough if it is in his power to produce it *Parry* v *May,* 1 Moo & Rob 280 So "the possession of the plaintiff's attorney is the possession of the plaintiff, though they might perhaps be subpoenaed, it is

is a party to the suit, it

J in *Irwin* v *Lever*

of the jurisdiction of

d When a document

of the opponent, very recently, the

R v *Hunter,* 4 C & P. 128.

before notice served be an excuse,

ient, at the time of notice, that he had transferred it *Wigmore* § 1200 *contra, Wright* v *Bunyard,* 2 F. & F 193, 194 Before a secondary evidence is admissible under this section, the opponent's possession of the document in question must be shown somehow, *Knight* v *Martin,* Gow 103, *Whitford* v *Tutin,* 10 Bing 395, *Shape* v *Laul,* 11 A & E 805 Of this fact very slight evidence will raise a sufficient presumption when the documents exclusively belong to him, or regularly ought to be in his custody according to the course of business *Taylor* § 440; see also *Ajoodha* v. *Esharee Dyal,* 10 W. R. 219; *Bhubanesuari* v. *Harisaran,* 6 C 720=8 C L R 337 P C; *Henry* v. *Leigh,* 3 Camp 502. So where a bankruptcy certificate was proved to have been obtained for the defendant, the Court presumed that it had come into his possession *Henry* v. *Leigh,* 3 Camp 502; *Robb* v *Starkey,* 2 C & Kir 143. If papers were last seen in the hands of the defendant, it lies upon him to trace them out of his possession *R.* v. *Thistlewood,* 33 How St Tr 757 The rule is the same in criminal cases *Perry* v *May,* 1 M & R 276; *Langton* v *Reynolds* 18 Jur. 963 The Adversary's possession may also be proved by the admission of his counsel. *Duncombe* v *Duncombe,* 8 C & P. 222. A party served with notice cannot evade its effect by subsequently parting with the document. *Knight* v. *Martin,* Gow. R. 104; *Nort* 246 It would seem that when a party has notice

f the evidence is a

Rob, 366

is sufficient proof

opposite party *Mt.* *Saliman* v. *Hakim Muldam,* A. I R 1928 All 304. This section lays down that secondary evidence may be given, of the contents of a document when the original is shown or appears to be in the possession or power of the person

against whom the document is sought to be proved This section does not **S.** require that in all cases it must be definitely proved that the document is in possession of the other side against whom it is sought to be proved but being

its contents can be given *Dwarka Singh* v. *Ramanand*, 41 A. 592=17 A. L. J. 711=51 Ind. Cas 275; see also *Mussamat Saleha Bibi* v *Oudh Commercial Bank*,

of a notice to produce, unless the original is shown or appears to be in the possession of the person against whom the presumption is drawn. *Per Walsh J.* in *Mongra* v *Debi Ram*, 35 Ind. Cas. 328.

Of any person out of the reach of, or not subject to, etc This clause ... who is out of ... secondary ... ing notice ... *Wiseman*, ... L J P. & M 109.

According to English law the mere fact of the non-amenability of the possessor to legal ... process cannot ... possible forms of ... by a Court before excusing for non production If the precise whereabouts of the document is unknown, search may be made; if the possessor be ascertained, he may be requested to appear with the document, or he may be requested to deliver the document for the use at the trial, or his deposition may be taken with a copy furnished by him annexed to it No one or more of these efforts ... to make any such ... In the first group, ... a nature depending more or less on the circumstances of the case *Boyle* v *Wiseman*, 10 Exch. 647, *Ward* v *Murray*, 1905, Times, Mar 5, cited Phip p 548 In the second

v *Gan Kim* 9 C 939 So also secondary evidence of a document can be admitted without notice to the adverse party, when the person in possession of the document is out of the reach of or not subject to the process of the Court *Haranand* v *Ramgopal*, 27 C 639 (P C)=27 I A. 1=4 C W N 429 Section 86, of the Evidence Act, lays down that if a copy of a foreign judicial record ... presume it to be genuine ... other proof, for under ... may be given of public ... person is out of reach

5. of, or not subject to the process of the Court. *Haranand* v. *Ram Gopal*, 2 Bom L R 562 A notarial copy of a foreign will is admissible on proof by experts that the original is not allowed to be removed, and that the local Courts regard such copies as equivalent to originals *Phip Ev 7th Ed* 527; *Re Von Lienad*, (1896) P 148; *Re Lemme*, (1892) P 89, *Enohin* v *Wylie* 10 H L C 1, but see *Re Brown*, 80 L T. 360, *Permanent Trustee* v *Fels*, (1918) A C 879

As regards the meaning of the expression of "any person not subject to the process of the Court" there is some conflict of opinion According to *Mr. Stokes* these words are intended to inclu
bound to produce the document on accou
produce it. *Stokes Anglo Indian Code*, V
C & P 737, *Morston* v *Dawney*, 1 H & 31
this clause includes that rule of English
s subject is thus briefly
"Secondary evidence is
a stranger to the proceed-
here lawfully refuses to
im either in his own right
or as agent acting on the
of the party who seeks
attendance in Court of the
of *subpoena duces tecum*,
and should lawfully refu
admissible *Doe* v *Clifford*, 2 C & K 448, *Dwyer* v *Collins* (1852) 7 Ex 632. If on the other hand he attends, but without the document, and a *subpoena duces tecum* has not been served on him or not been duly served, this is a fatal objection to the admission of secondary evidence as the party has not done all that lay in his power to procure the production of the original (*Hibberd* v *Knight* 2 Ex 11) If the person so refusing is merely agent for another by whos
principal does so
the Court upon a

the reach of, or not subject to, the process of the Court" So it cannot be said that this clause includes the English rule just mentioned

209; *Huntingdon* v. *Mildman*, Cro Jack 217; *Wigmore* § 1211 So "where a person is an utter stranger to a deed, there in pleading he is not compelled to shew it" *Buller Nisi Prius*, 252 So if the person possessing the document is by reason of privilege not compellable to produce, there is the same reason for admitting other evidence of its contents as if its production were physically impossible, because the party who stands in need of the evidence which that document affords is not to suffer from its absence at the trial *Per Pollock C B* in *Sayer* v *Glossop*, 2 Exch. 409, 410. Mere disobedience to a notice to produce

S.

what is called a *subpoena duces tecum* i e, a summons to attend the trial as a witness and bring the documents with him (Vide Order 16, rule 1 of Act V of 1908 = s 159 of the Old Code) The person on whom such a *subpoena duces*

tion, penalty, or forfeiture (*Vide* s 130 *infra*) So a party will not be required to produce the muniments of title to his estates (*Taylor* § *158, 1164, section 130 infra*), nor will his solicitor, to whose care they have been entrusted (*Hibberd* v *Knight*, 2 Exch 11; *Doe de Gilbert* v *Ross*, 7 M & W. 102; *Volant* v *Soyer*, 13 C B 231); and in either case independent secondary evidence of their contents may be given *Per Hill J* in *R* v *Leatham*, 3 E & E 658, 668; *Best Ev* § 216 So it is "a well established rule of law" that the productions of a privileged document is excused *Per Hill J* in *R* v *Leatham* 3 E & E 658, 668. The principal may of course waive his privilege (*Merle* v *More*, Ry & M 390),

is apprehended that no secondary evidence is admissible under the Indian Evidence Act, if the party in possession of the document withholds it under §§ 130 and 131 of the Act

regards this clause *Mr.* words 'of any person they stand, there is no of the document, as an hardly believe that this is what was intended I think it probable that the word 'not' has been here omitted by mistake, and that the case intended to be dealt with here is the

911 "We are not entitled" said *Lord Loreburn* "to read words into an Act

65. Under rules of strict interpretation it appears that this clause intends to make a departure from the English rule, which does not allow secondary evidence of any document improperly withheld It may be that the party calling for the document which has been improperly withheld, has its remedy against the party so withholding the document in separate suit for damage or he may be punished for contempt of Court but such remedy may give very inadequate relief where the party withholding is a pauper and the loss to be suffered for the non production of the document is considerable Moreover that will give rise to multiplicity of suits It is also not desirable to deprive a party to produce secondary evidence of a document, simply because a third person refuses to produce the original of the document wilfully or perhaps fraudulently There may be in addition the dan
the party withholding such do
some legal right to the doc

according to *Prof Wigmore*, the rules of law laid down by *Alderson B.* in *Jesus College* v. *Gibbs*, 1 Y & C 145 156, where he said "You could not have proved it by secondary evidence unless the document had been in the possession of a party not bound to produce it (The third person refuses) it is true, at his

to cover a contigency for which no provison has been made in the Act itself.

Wher
have been
secondary
203, *Lord* ...
a false copy" But the giving
inst the contemplated danger. The
the opponent does not produce the
Hall, 14 East. 274, 276, *Le Blanc J*
on previous notice to be
given . that he may not be taken
Dudley 62, 64 "The answer to this is, fi
to guard against surprising his opponent by warning

secondly, that if here the purpose were, to give the opponent time to discover evidence impeaching or confirming the document, the notice should allow time for such an investigation, yet the law is clear that only time enough to produce the document need be allowed; and thirdly, that if, in fact he is not surprised, it is in law still no excuse for not giving notice.' *Wigmore* § 1202 'The true reason is" says *Prof. Wigmore* "that which is naturally deducible from the proponent's situation He is required to produce the document if he can; he says that he will not bring S.

with the request If we translate ly appreciate the significance of the future production by the opponent; and this notice of demand is necessary, in *Baron Parke's* words, (in *Dwyer* v *Collins*, 7 Exch 639) 'merely to exclude the argument that the party has not

shown that by giving notice to that adversary to produce it, he has used every exertion in his power that the best evidence might be given" So where a document of title which is in possession of a party is not produced by him after notice to produce the same, the party giving notice is entitled to give secondary evidence of the document under s 65(b) and section 66 proviso 2 *Narsidas* v *Ravi Sankar*, A I R 1931 Bom 33; see also *Abdul* v *Kishan*, 11 Lah L J 401, *Makhan Lal* v *Gavinda*, 13 R D 718; *Subrayulu* v. *Vengama*, A. I. R 1930 Mad 742=123 Ind Cas 197; *Wigmore* § 1202, see also *Maungsan*

to ere be 90.

ought to be, denies that he has it, secondary evidence is admissible *Teju Mal* v *Zulphakar Sha*, 49 P R 1882 The word "produce' only means "procure the production or give it in evidence" *Gaya Prosad* v *Jaswant*, 1930 A L J. 1003=125 Ind Cas 460=A I R 1930 All. 550

CLAUSE B

Written admission as to the contents of an original document Section 22 lays down that oral admissions as to the contents of a document are not

proof of a document even though the original is in existence, and might be but is not produced *Cun Ev* 221 The result seems to be this —The written admission may always be proved The oral admission can only be proved in

65. condition mentioned in cl (b) of section 65, be admitted. *Safar Ali* v *Mohesh*, 23 C L J 122=34 Ind Cas 956 In a suit for redemption of mortgage, the mortgage deed was not produced Secondary evidence consisted of a document addressed to the mortgagors by the alleged agent of the mortgagee, which

proved to liability ortgagee, rting to be his It was It was produced for mortgaged deed under

s 65(*b*), secondly, to save limitation under section 19 of the *Limitation Act* *Held* that the document was no secondary evidence of the existence of the mortgage as it did not fall within the category of writings described in clause (*b*) of section 65 of the Evidence Act *Gajraj* v *Babar Ali*, 20 Ind Cas 62 This clause has no application where the original document is inadmissible for not being registered or properly stamped. *Duethi* v. *Krishnaswami*, 6 M 117; *Sambayya* v *Gangayya*, 3 M 308, *Damodar* v *Atmaram Babaji*, 12 B 443 (446) Where the reocord of the statement of the accused is not admissible, secondary evidence thereof could not be given *Queen Empress* v *Viram*, 9 M 224 In rejecting such evidence, *Parker J* at p 240 observed: "Reference is made by the Sessions Judge to s 65 of the Evidence Act, the words appearing in cl (*b*) in that section being quoted; but for the reasons above stated, I am of opinion that it was n[illegible] writing—if the affixing [illegible] be held to constitute a [illegible] contents of the previous statements"

CLAUSE (C).

[illegible] lost or destroyed. The loss or destruction of [illegible], opens the door for the admission of secondary [illegible]ley's Ev 274 This rule is a very old one. In 1611, in *Dr Leyfild's Case*, 10 Co Rep 92 (a)=Wig. Cas 235 in admitting secondary evidence in such contingency, the Court observed: "yet in great and notorious extremities, as by casualty to fire, that all his evidences were burnt in his house, there, if that should appear to the Judges, they may, in favour of him who has so great a loss by fire, suffer him upon the general issue to prove the deed in evidence to the jury by witnesses, that affliction be not [illegible] "The extreme whenever equally y slowly. where

Anon, Jenkins J In th[illegible] charters have been los[illegible]

2 Keble 546; *Underhill* [illegible] 8; *Robinson* v *Davis*, 1 [illegible] v *Mellmish*, Ambl 24 [illegible] *Villers*, 2 Atk 71, *Lord* [illegible] foreseen or [illegible] Now the [illegible] unavail- [illegible] evidence is [illegible] destroyed

Wuzeer Ali v *Kali Coomar*, 11 W R 228; *Rajendra* v. *Behari*, A. I. R. 1932 Pat 157; *Abheraj* v. *Gaya*, 8 O. W N 1228 But secondary evidence is admissible where the Court is satisfied that the original is lost or destroyed *Hurrish* v *Prosunna*, 22 W R 303, *Syed* v. *Nuseebun* 10 W. R 24, *Lukhimoni* v. *Koruna*, 3 C L R 509; *Khetter Chunder* v *Khetter Paul*, 5 C 886=6 C L R 199; *Jaffree Khanum* v *Imdad*, 2 N W. P 314; *Woomesh Chunder* v *Sama Sundari*, 7 C. 98=8 C. L. R. 189; *Syed Abbas* v *Yadeem*, 3 M I. A 156;

Amerunnisa v. *Afadoonnisa*, 15 B L R
A. 87; *Sheo Sarun* v *Goolbance* W R

Al
Ra C J 160
(1(v *Kishori*
La Hay 581;
Sugden v. *Lord St Leonards*, 1 P D 154; *Ranee* v *Hardyal*, W R (1864) 301;
Ranjit v. *Chunilal*, 1 N. W P 178; *Bishambhar* v *Emperor*, 90 Ind Cas 706=
2 O 3; *Marakarulli* v *Veranlutti*, 16
M 67 Cas 660; *Gopi* v *Mahanandi*,
12 M 24 L W 227=97 Ind Cas
785=A I R. 1926 Mad 1001; *Tulsi Ram* v *Ram Saran*, 23 A L J 109=
l known and that fact may be recognised
telegrams are destroyed after three months
secondary evidence is admissible *Bishambhar Nath* v *Emperor*, 2 O W. N 760=90 Ind. Cas 706 If it is found that a document has been lost evidence may be given and whether proof is sufficient in a case is a question of fact *Bibi Sugra* v *Angad Gir*, L R 4 A 201. But a mere assertion an explanation that a document is lost without any cient ground for admitting secondary 3 A 539 Where the explanation for the is lost, the regular course is to prove the loss before tendering secondary evidence *Surat Singh* v *Ram*, 59 Ind Cas 461 In ordinary cases if the witness in whose custody a deed was, should depose to its loss, unless there is some motive suggested for his being untruthful, best evidence should be accepted as sufficient to let in secondary evidence of the deed *Chitsham* v *Jamna* 24 O C 272=48 I A 365 P C of such s 1006 insist- power- *Dayal*, Ind Cas 399 But the question whether or not sufficient proof of search for, or loss of, an original document, to lay a ground for admission of secondary evidence has been given, is, a point proper to be decided by the Judge of first instance and is treated as depending very much on his discretion and his conclusion should not be overruled, except in a clear case of miscarriage *Ma Paik* f filed a suit on have been lost and was not lost but suppressed as there was an payment of

A L J 265=18 Ind Cas 878

word "destruc- " merely that it the two come moment that the destruction becomes questionable at all (i e when not proved by eye witnesses of burning or tearing, the inquiry is raised whether the search for it has been

5. sufficient; and, in the next place, the proof of a loss usually carries the implication that the thing not found has ceased to exist, and thus assimilates the case to one of destruction Thus the great question to which so many Judges have devoted so much pains—the establishment of a test for the sufficiency of proof of loss—includes practically not only the cases, of loss in the narrower

useless paper, ...

and important document which the party might have an interest in keeping, and for the non-production of which no satisfactory reason is assigned . . . where the loss or destruction of the paper may almost be presumed very slight evidence of its loss or destruction is sufficient" *Per Abott C J* in *Brewster* v *Sewell*, 3 B

... this,

never likely to be required for any purpose whatever In the former case ... reasonable to exact proof of a very careful search, whereas in the latter very slight evidence tending to show loss or destruction will suffice. *Will Ev 2nd Ed* p 208 What is proper search or enquiry must depend on the particular

surrounding circumstances of the particular matter before the Court ... jury A paper of *considerable importance*, which is not likely to be permitted to perish may call for a much more minute and accurate search than that which may be considered as waste paper, which no body would likely take care of . . What inquiry will do? I think, in cases of this sort [there the loss was of a ... after

its ...

no ...

the ...

where it ought to be found" *Per Poll*...

W 319 329 In the same case *Alderson*

has been a loss, and whether there has

much on the nature of the instrument searched for . If we were speaking of envelope, in which a letter has been received, and a person said, 'I have searched for it and ... So

with res...

party wh...

to be ...

it has been take...

If he had said, ...

ought to go to ...

away A

would be satisf...

itself; and the

contents of this

document by ...

the original *R* v *Morton*, 4 M & S 48, *Gully* v *Exeter*, 4 Bing ..., *R* v ... C B N S. 747, 750, *R* v ...

... W 269; *R* v *Gordon*, 25

... ully as to exclude every ... The question is

hypo...

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suggests and which were ...

st. 278; *R.* v *East Fairley,*
392—1896) Vol II, 347. If
circumstances tending to
... the most rigid enquiry should be made into the reasons for its non production *Johnson* v *Arnume, supra.* It follows, properly, that the determination of the sufficiency of the search and in general of the proof of the fact of
Court's discretion *Wigmore* § 1191
evidence of the search of the originals,
are admitted Whether or not sufficient proof of search for or loss of, an original document, to lay a ground for the admission of secondary evidence, has been given, is a point proper to be decided by the Judge of the first instance, and is treated as depending very much on his discretion His conclusions should not be overruled except in a clear case of miscarriage *Haripria Debi* v. *Rukmini Debi,* 19 C 438=19 I A 79 P C, *Choitram* v *Khem Chand,* A I R 1929 Sind 7 In *R* v *Kenilworth,* 7 Q B 642, 649, *Denman L C J* said "I think that we collect from *R* v *Morton,* the only rule, namely, that no general rule exists The question in every case is, whether there has been evidence enough to satisfy the Court before which the trial is had, that to use the words of *Bayley J* in *R* v *Dento,* 'a *'bonafide''* and diligent seach was made for the instrument where it was likely to be found' But this is a question much fitter for the Court which tries than for us They have to determine whether evidence is satisfactory, whether the search has been made *bona fide'* where there has been due diligence, and so on It is mere waste of time on our part to listen to special pleading on the subject" *Wigmore* § 1194, *Ma Nyein* v. *Mayin,* U B R (897

proof was given of search, cannot be received as secondary evidence *Meer Usudoollah* v *Beeby Imaman,* 5 W R P C 26=10 M I A 19, see also *Roopmanjooree* v *Ramlal,* 1 W R 144; *Pandu* v *Bapudas,* A. I R 1929 Nag 288

Non production for any other reason The question whether the non-production is due to any other sufficient reason not arisin from his own default or neglect is one of fact and depends mainly on the discretion of the Court, *Gaya Pros d* v *Jasuant,* 125 Ind Cas 460=A I R 1930 All 550 The certified copy of a document which is already filed in another Court and cannot be produced without unnecessarily delaying the trial of the suit is admissible under s 65(c) *Jobeda* v *Monabali,* 130 Ind Cas 865=A. I R 1930 Cal 479

CLAUSE (D)

When the c

6 M & W 68
also be proved
be produced in Court *Taylor* § 438, see also *R* v *Forsey* 6 C & P 81 *Cobden* v *Bolton,* 2 Camp 108, *Doe* v *C*
8 C & P 728, *Bruce* v *Nicolopolo* 1

bringing a notice into Court."
A remarkable illustration of this rule was furnished in the case of a man, who
wall of the Liverpool goal, on mere
Lord Abinger in *Martimer* v *M callan,*
must show that the writing cannot
oduced in Court. *Jones* v *Tarleton,*
9 M & W. 675=11 L J, Ex 267. Evidence has been admitted of the inscription

65. on a wall or a tomb stone giving the date of death *Smith* v *Patterson*, 95 Mo 525=8 S W 567; *Bruce* v. *Nicolpolo, supra*, *R* v *O'connell*, 5 St. Tr N S 244. If there ar
stone itself may have to be produced
; *Davidson*, 13 Q B. D 265
There is a
that the Court may readily assume that they cannot be produced in Court, and as to which secondary evidence may be allowed, such as inscriptions and addresses on travelling trunks If the producti
s found is indispensable, it would
sign were painted on a house, it w
have to be produced, nor can it be for wagons, boxes, tombstone, and the like, on which one's name may be written *Kansas etc Rail* v *Miller*, 2 Colo 440, *Burrell* v *North*, 2 Car & K 679 While Courts, in the administration of the law of evidence, should be careful not to open the door to falsehoods, they should be equally careful not to shut out truth They should not encumber the law with rules which will involve labour and expense to the parties, and delay the progress
without giving any additional safe guard
ited States, 3 Wall. (U S), 114; *Burr*
on a coffin plate, the coffin plate should be produced as it is removeable *R* v *Fine Wills Cir. Ev 5th Am* Ed 212
says *Mr. Taylor* "and the
it its removal, secondary
that case, as in the case of mural inscriptions, it is not in the power of the party to produce the original" *Alton* v, *Farnual*, 1 C M & R 227, 291, 292; *Boyle* v *Wiseman*, 10 Ex R. 647' *Taylor* § 438 *Mr Whitley Stokes* thinks that such a case is not provided for, unless perhaps by the latter part of clause (c) But it can hardly be said that the original cannot be produced in reasonable time when it cannot be produced at all It seems that the case would fall under paragraph (iii) of clause (a), in as much as it is in the power and possession of a person who is out of the reach and not subject to the process of the Court. *Woodroffe Ev 8th Ed.* p 519 Secondary evidence, of the abstract which by section 32 of the Factory and Workshop Act, 1901 (*Edw 7 C 22*) must be affixed in the factory, can be given as the original cannot be removed. *Owner* v *Beehive Spinning Co Ltd*, (1914) 1 K B 105=83 L J K B 282, *Mortimer* v *M'Callan*, 6 M & W 58. Under this clause any kind of secondary evidence is admissible

CLAUSE (E)

When the
ble
record under sec
this clause In
a Lal, 14 C 491 This excep-
Mark Ev 57 In *Hannel* v.
"The admission of copies

practice and besides the documents might be wanted at different places at the

you cannot remove the document in which the writing is made, you are entitled to the next best evidence" *Per Abinger L C. B* in *Mortimer* v *M'Callan*, 6 M. & W 58, 59, *Wigmore* § 1218.

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iginal
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rtified
ow v.
Proce-

(c) In the matter of Adya, 11 Ind Cas 261.

An entry in a public document such as a settlement record can be proved only by the original
A I R 1923 Lah 150
tenant

chmi Das,
evidence
Radha Nath v Empe L J 659.
It is doubtful whether rom some record in the Revenue Court is admissible in evidence Bhaquati v Marjad, A I R 1931 Oudh 136=129 Ind Cas 331=7 O W N 1079.

CLAUSE (F).

ndary evidence of the contents a document of which a certified er law in force in British India given in evidence in the first instance without having been introduced by any other evidence Harish v Prosunno, 22 W of which a certified copy in British India to be giver Cas 50
Hazari Lal v Cas 752
Section 57 of the under that section shall be admissible for the purpose of proving the contents of the originals, but that clause was not intended to override the provisions of the Evidence

admissible in evidence Sansa Rao v Ghasi, 13 C P L R 94 The issue of a certified copy of income-tax returns to a person not entitled to inspect is forbidden by s 54 of

the deposit thereof
ys Act, (VII of 1882)

65. This clause only allows certified copies as secondary evidence But when the original is lost or destroyed any secondary evidence is admissible *Kunnath* v *Vayoth*, 6 M 80, *In re Ava and the Brenhuldu*, 5 C 588, *Chandresuar* v *Bisheswar* A I R 1927 P 61=101 Ind Cas 289=5 P 777, *Hiranand* v *Ram Gopal* L R 27 I A 1=27 C 639 P C ; *Ananda* v. *Secretary of State*, 43 C 973=20 C W. N. 573 Other secondary evidence is also admissible where the document satisfies the condition of the next clause *Ram Sundar* v *Chandresuar*, 34 C 293.

CLAUSE (G).

When the original consists of numerous documents This provision is for the saving of public time If the point to be ascertained were, for instance, the balance in a long series of accounts in a merchant's books evidently great inconvenience would arise, and much public time will be wasted, if a witness were

and to make his examination *Beding*, 3 Camp 310 He is sworn, and then to give the *l Phil Ev* 433 *Taylor* § 462,

where the books and documents are multifarious and voluminous and of a character to render it difficult for the jury to comprehend material facts without the aid of such statements . . In a trial embracing so many details and occupying so great a length of time as the case at bar, during which a great mass of

. t was the only mode of attaining the jury" *Wigmore* § 1230 The is principle is that by which the state of pecuniary accounts or other business transaction is allowed to be shown by a witness's schedule or summary, *Meyer* v *Sefton*, 2 Stark, 274, 276; *Gardner*

rshaw, 1 De G & Sim 260, of copyright, the material presented in such a way as to be conveniently compared *Lewis* v *Fullerton*, 2 Beav 6, 8; *Mawman* v *Tegg*, 2 Russ 385, 398, *Wigmore* § 1230 A witness may speak as to the insolvency of a party at a particular time from an inspection of his books *Meyer* v. *Sefton*, 2 Stark 274 This exception however, will not enable a witness to state the general contents of a number of letters received by him from one of the parties in the cause, object of the examination be they produced on his mind between the writer and a th *Taylor* § 462 'So a witness' the parties, though he may not allowed to speak to the general *Lord Kenyon* in *Roberts* v Courts" says *Prof Wigmore* 'require, as a condition, that the mass thus summarily testified to, shall, if the occasion seems to require it, be placed at hand in Court, or at least be made accessible to the opposing party, in order that the correctness of the evidence may be tested by inspection if desired, or § 1230,

any person who has examined them, and who is skilled in the examination of such documents In *Ram Sundar* v *Chandreshuar Prosad*, 11 C W N 501=34 C 293, the Court observed "This objection is founded on the fact who had examined

embodied the results of their examination of the records and registers. The objection made by the learned Counsel for the Appellant is that the Collectorate
, under the provi-
e documents are
But the learned Judge has found as a matter of fact that those documents could not be conveniently

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Evidence Act, then the only secondary evidence which could be admitted was the certified copies of the documents in question We do not agree with the
We think the
mitted and for
not because the
documents were
use the fact that

documents That being so,
general result of the documen
skilled in the examination of those documents and the general result was given by the Record keeper and the clerks who gave evidence before the learned Judge" Abstract of mutation records is admissible under the section *Sher Mohammed* v
78 Ind Cas 451 Evidence may be
when they consist of numerous
Kanungoes entertained to assist the
ue Records, yet it is an abuse of
their functions to require them to give oral evidence of the contents of a document such as record of a *Muafi* enquiry which ought to be examined in original by the Court itself *Gilani* v *Mussamat Hussan*, 2 Lah L J 714

Rules as to notice to produce.

66 Secondary evidence of the contents of the documents referred to in section 65, clause (*a*), shall not be given unless the party proposing to give *such secondary evidence has previously given* to the party in whose possession or power the document is *[or to his attorney or pleader,] such notice to produce it as is prescribed by law; and if no notice is prescribed by law, then such notice as the Court considers reasonable under the circumstances of the case.

Provided that such notice shall not be required in order to render secondary evidence admissible in any of the following cases, or in any other case in which the Court thinks fit to dispense with it —

(1) when the document to be proved is itself a notice;

(2) when, from the nature of the case, the adverse party must know that he will be required to produce it;

*These words in section 66 were inserted by the Indian Evidence Act Amendment Act (18 of 1872) s 6

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(3) when it appears or is proved that the adverse party has obtained possession of the original by fraud or force;

(4) when the adverse party or his agent has the original in Court;

(5) when the adverse party or his agent has admitted the loss of the document;

(6) when the person in possession of the document is out of reach of, or not subject to, the process of the Court.

Princi [illegible] quired if
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the party [illegible] because
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notice to the party in possession [illegible]
in [illegible] *Per Peter J* in *Aoot* [illegible]
9 [illegible] f notice is satisfied, no notice is
necessary [illegible]

[illegible] embodies the law of notice, which
[illegible] can be received under section 65,
[illegible] section 34 of Act II of 1855 which
[illegible] section 65 (*a*), namely, that where
the document was out of the reach of the process of the Court. Taking this section with clause (*a*) of section 65, notice must be given where the document is in (*a*) the possession or (*b*) the power of the person against whom it is sought
[illegible] e possession of a person legally bound to
[illegible] y where a person is out of the jurisdiction of,
[illegible] The cases arising

order, cases in which the rule of notice is [illegible]
rule is satisfied, cases in which, by exception, [illegible]
§ 1202 Where it is in the hands of the a [illegible]
order to lay the foundation for secondary evidence is reasonable [illegible]
to produce it *Bradford's Case*, Case 24 in Clayton's Rep = Thayer Cas Ev. p 780 In *Salern* v *Melmish* Ambler 247, *Lord Hardwick* in allowing proof
by a copy said: "There [illegible] parol may
be given of the contents o[illegible]
deed is in the hands of [illegible]
and does not ... The rul[illegible]
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proved is itself a notice to quit, [illegible]
(2) where from the nature of the action the defendant has notice that the p[illegible] intends to charge him with possession of the instrument, as for example, in trover of a bill of exchange *Jolley* v *Taylor*, 1 Camp. 143; *Scott* v. *Jones*,

! T . . .. . : . P. 113 (3) Where the adverse party S.
. . . audulently, as where, after service
. . . . had received paper from the witness
in fraud of the *subpoena*. *Leeds* v. *Cook*, 4 Esp 256, *Neally* v *Greenough*, 25 N. H 325. (4) Proof that the adverse party or his attorney, has the instrument in Court, renders notice to produce it unnecessary. *Dwyer* v *Collins*, 7 Exch. 639 (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original In such a case the party will be admitted to give secondary evidence of its contents (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service *Greenl Ev* § 563(e) The above rules are applicable both in civil and criminal cases It will comparatively seldom happen that documents are required to be produced at a criminal trial, and
. . . 1 *Nort Ev* 251 Where
. a letter, which was neither

613 Each partner should be served with the notice contemplated by s 66 of the Evidence Act to produce such accounts and papers as may be in his custody If he omits to produce the books and the books that are proved to be at the time in his custody or under his control the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied. *Pulin Behary*
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dispensing with the notice can operate to make it admissible *Prafulla* v. *Emperor*, A I R 1930 Cal 209 = 50 C. L J 598

Secondary evidence of the Contents 'Secondary evidence of the contents" means apparently "not of the existence or condition of the documents" *Whitley Stokes*, Vol II p 893

Party—Meaning of The word 'party' means not only adversary in the cause, but also a stranger 'legally bound to produce' the document *Whitley Stokes*, Vol II p 893

Such notice to produce as is prescribed by Law According to English practice an adversay in the cause is given a notice to produce the document in question . . .
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C & P 394 But
Alfalo v *Fourdrinier*, M & M 334, *Byrne* v *Harvey*, 2 Mo & Rob 89 But as to the time and place of the service no precise rule can be laid down, except that it must be such

party desiring to use it, until he has by *subpoena duces tecum* resorted to the

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hold that in an action of trover for bonds or notes no notice to produce the instr

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instrument These principles apply directly in this case. The form of the

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(N. Y.) 293; see

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of papers, (*Jolley* v *Taylor* 1 Camp. 143); in an action to recover the amount of

a forged bank note which has been returned to the defendant. (*Luckett* v *Clark*,

D 446) In an action in contract it is held that the pleadings imply notice to the orders and letters constituting the contract. *Zipp* v. *Colchester*, 12 S D 211 (*Am*). So the rule is the same where the writing is a proper matter of defence and the adverse party must understand that it will come in question (*Kelnor* v *S* . . . written contract in possession . . . *Dana* v *Conat*, 30 V. . . . forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true. It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect. Notice in fact is notice in form; notice in law is notice in effect, and either is sufficient," *Per Baldwin J* in *U S* v *Doebler*, 1 Bold W 519, 524 (*Am*). It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle *Wigmore* § *1205* *R.* v. *Haworth*, 4 C & P 254, 256 But in an action for arson with intent to defraud the insurer, notice to produce the policy was required. *R.* v. *Kitson*, 6 Cox Cr. 159, see also *R* v *Elworthy* 10 Cox Cr. 579 (582). If the maker of a note or cheque or the acceptor . . . an action, deny by his

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4 Taunt. 865; *Bucher* v. *Jarrat*, 3 B & P. 143. (3) Where the adverse party has obtained possession of the document fraudulently, as where, after service of a *subpoena duces tecum*, the adverse party had received paper from the witness in fraud of the *subpoena*. *Leeds* v *Cook*, 4 Esp 256; *Neally* v *Greenough*, 25 N. H 325 (4) Proof that the adverse party or his attorney, has the instrument in Court, renders notice to produce it unnecessary. *Dwyer* v *Collins*, 7 Exch. 639 (5) Similarly no notice is necessary where the adverse party or his agent admits the loss of the original. In such a case the party will be admitted to give secondary evidence of its contents (6) Similarly if the writing is in the control of a third person without the jurisdiction of the Court, no resort to legal force is of service *Greenl Ev* § 563(e) The above rules are applicable both in civil and criminal cases It will comparatively seldom happen that documents are required to be produced at a criminal trial, and notice will consequently have but seldom to be ...

section 65 of the Evidence
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649 Each partner should be served with the notice contemplated by s 66 of the Evider ... papers as may be in his custody ... books that are proved to be at the ... the presumption recognized in illustration (8) to s 114 of the Evidence Act may be applied *Pulin Bihary* v *Mohendra*, 34 C L J 405 Before secondary evidence of any document can be given, a notice to ... v *Ma Shwe*, 2 Rang 397= ... of a letter neither called ... hough no objection may be taken to the giving of that evidence, and no subsequent dispensing with the notice can operate to make it admissible *Prafulla* v. *Emperor*, A I R 1930 Cal 209=50 C. L J 598

Secondary evidence of the Contents 'Secondary evidence of the contents" means apparently "not of the existence or condition of the documents' *Whitley Stokes* Vol II p 893

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56. power of the law to obtain it; so that the mere fact of the third person's possession, or of notice to him, or

... In India the procedure for ... riminal Procedure Codes (*Vide Civil Pro Code*, Order XI rules, 15, 16, 17, 18 and Order XVI, rules, 5, 6, 7, 8, 9, 10, 18, *Criminal Procedure Code*, ss 94 to 98, 485) In the original side of the High Court where the English practice is followed, a *subpoena duces tecum* ... *offe Ev 8th Ed* 523 ... ll be served as the Court

"It may be defficult to lay down any general rule as to what the notice ...

... be dangerous to do so since if any material errors were to creep into the partı- ...

Lawrence v *Clark*, 14 M & W. 250 Notice to produce 'all letters written to and received by the plaintiff between the years 1837 and 1841, both inclusive, by and from the defendants, or either of them, or any person on their behalf; and also all b ... (*Morris* v. ... defendant, ... & Rob 33); and also "all accounts relating to the matters in question in this cause" (*Rogers* v *Constance*, 2 M & Rob 179) have been held sufficient notice to ... 679 ... *Bes*. ... ent ... *sup* ... thi ... bo ... at ... of ... wh ... *An* ...

Where a ... him instead of on the woman herself would constitute notice as is required by this section *Durgawati* v *Jagannath*, A. I. R. 1929 All 680

... the jury ... *Doe d Badges* v ... declines to use the ... will not make them ... 10), though it is other- ... ig them *Wilson* v ... 5 Notice to produce ... ine a witness as to their contents. *Graham* v. *Dyster*, 2 Stark 23. If a party refuses he cannot

o contradict the secondary proof (*Doe d.* S. 135) or to show that there are attesting ...*ckson* v *Allen*, 3 Stark 71; *Edmonds* v. *Challias*, 7 C B 413); or to refresh the memory of a witness (*Fill* v *Ainsworth*, Bristol, 1817); or it seems, for any purpose (*Collins* v *Gaibon*, 2 F. & F. 47. *Doe* v. *Hodgson*, 12 A & E 135) He is in effect bound by any legal and satisfactory evidence produced on the other side. *Shookram* v. *Ramlal*, 9 W. R. 248; *Nort Ev* 252

... roved is itself a notice. ... a copy The reason ... *Slaymaker*, 14 S & R Pa 153, 156 (*Am*) "Every written ...

... ing" *Wigmore* § 1206, see also *Phillipson* v *Chase*, 2 Camp 111 But this consideration can well be made in tl... the notice to produce In England, ...

... quit *Ibid* There also this exception ... in regard to notices to produce, for the ...

... aracter of ... because it ... re of the ... document ... 54; *Taylor* ... red for a ... ature of a ... to be a mere notice". *Grove* v *Ware*, 2 Stark 174 A notice of a bill's dishonour was held to be a notice *Ackland* v *Pearce*, 2 Camp 599 But in case of a ... ice was re- ... & R 261, ... See also ... iso notice ... America ... produce), most Courts from time to time recognize that the case of a notice—notice to quit, notice of dishonour, notice of suit, and the like—is to be governed merely by the general principle namely, where the pleadings by implication give notice to produce the notice, no express notice to produce it is necessary; but otherwise it is required *Wigmore* § 1209

Proviso—para (2)— ... required to produce it ... the form of the pleadings, ... the possession of an in... produce need be served upon him *Calling* v *Freueek*, 6 B & C 398, 399 "Where the nature of the action gives the defendant notice that the plaintiff means to charge him with the possession of such an instrument, there can be no necessity for giving him any other notice' *Per Le Blance J* in *How* v *Hall*, 14 East, 274, 277 This principle is accepted in a variety of cases *Wigmore* § 1205 It naturally suggests itself that there are cases in which formal notice to produce would be idle, as in the case of an action for wrongful detention of a document belonging to the plaintiff, although, strictly speaking, such an action would be for the material on which the written character appeared, and it is ... account that the general

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(*Kelnor* v *Savage*, 20 Me 199), or the action is brought on a written contract in possession of the defendant which is fully described in the complaint *Dana* v *Conat*, 30 Vt 246; *Burr Jones* § 223 'If the note, he is charged with forging, passing, or delivery is of the same kind with the others which he has disposed of or retained in his possession, he had notice in effect that if practicable to procure it, evidence will be given of their counterfeit character and of having passed them as true It is notice in law, by which a party is as much bound both in civil and in criminal cases as by notice in effect Notice in fact is notice in form, notice in law is notice in effect, and either is sufficient," *Per Baldwin J* in *U S* v *Doebler*, 1 Bold W 519, 524 (*Am*) It seems settled therefore, that on a charge of larceny or of forgery no express notice is necessary; and the principle would also extend to other charges; but the nature of the charge will determine the application of the principle *Wigmore* § *1205 R* v *Haworthy*, 4 C & P 254, 256 But in an action for arson with intent to defraud the

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Maung Po v *Ma Shwe*, 84 Ind Cas 373 = A. I. R. 1925 Rang. 7; *Mi Le* v *Ma Shwe* U B R. 1907. 4th Qr Ev 13, but see *Dinonath* v *Rama Rai*, 6 P. 102 = 97 Ind Cas 318 = 1926 P. 512 In another case it is held that in a suit for redemption when the mortgagee is in possession of the mortgage deed, and fails

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to produce it, oral evidence is admissible under s 65 (a) read with proviso (2) to section 66 of the Evidence Act *Mi Amin* v. *Mi Gauk*, 9 Bur L T. 52=31 Ind. Cas. 892; see also *Bahadur Singh* v. *Mahadeo Singh*, 36 Ind. Cas 696; *Sahai* v. *Sheo*, A. W N. 1888, 117, *Dwarka* v. *Ramanand*, 11 A 592=51 Ind. Cas 275=17 A. L J. 711.

No notice to defendants to produce the original was necessary to render secondary evidence admissible, where the defendants, from the nature of the

be required to produce the original *Syed*

0 It is doubtful if a *pro forma* defendant

in the decision of the case is not an adverse paty within the meaning of proviso (2) *Durgabati* v *Jagannath*, A. I R 1929 All 680.

ined fraudulent possession of a document in his third person (who thus t from the requirement

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amounts to a refusal.

Thus in *odium spoliatoris*, a notice need not be given to the adverse party to produce a paper, of which he has fraudulently or forcibly obtained possession,

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A defendant

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did not contain the whole of the letter as written, and that something material had been cut off from the top It was not necessary for the plaintiff to give notice to produce the other letters *Robinson* v *Cutter*, 163 Mass 377, *Burr Jones* § 223.

Proviso,—para (4)—When the adverse party has the original in Court A

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1 C M & R 38, *Cook* v

Patridge, ibid)

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Taylor § 456 In *Dwyer* v *Collins*, 7 Ex Ch

indorsee against the acceptor of a bill of

pleaded, *inter alia*, that the bill was given

before the *Lord Ch. of Ba.* the defendant proceeded to prove his plea, and

Lord Chief Baron, after consulting the Judges ruled

66 In that case *Lord Chief Baron Parke* said "The next question is whether, the bill being admitted to be in Court, parol evidence was admissible on its non-production, or whether a previous notice to produce was necessary On principle the answer must depend on the reason why notice *to produce is required* If it be to give his *opponent* notice that such a document will be used by a party to the cause, so that he may be enabled to prepare evidence to explain or confirm it, then no doubt a notice at the trial though the document ... is too late

... he must do before he can be permitted to make use of secondary evidence ... the demand for the production ... the true reason, the measure of time necessary to procure the ... time necessary to procure evidence to explain or support it,—a very complicated one, depending on the nature of the plaintiff's case and the document itself and its bearing on the cause, and in practice such matters have never been inquired into but only the time with reference to the custody of the document and the residence and convenience of the party to whom notice has been given and the like We think the plaintiff's alleged *principle* is not the true one on which notice to produce is required but that *it is merely* to give a sufficient opportunity to the opposite party *to produce it* and thereby secure if he pleases the best evidence of its *contents*, and a request to produce immediately is quite sufficient for that *purpose*, if it be in the Court It would be some scandal to the administration of the law if the plaintiff's objection had prevailed" *Wigmore Cas Ev* 227

Proviso para (5)—When the adverse party or his pleader has admitted loss of the document The rule requiring notice to the opponent proceeds on the assumption that the opponent has possession of the document the object being to show a demand and refusal to produce So the requirement of notice does ... on the theory that the ... for the document as ... notice is unnecessary it follows that where the document is admitted by the opponent to have been destroyed or lost, or even out of his possession, no notice is necessary for it is no longer a case of opponent's possession, but of loss *Wigmore* § 1203 In such a case the notice could be nugatory *R* v *Haworth*, 4 C & P 254 *Foster* v *Pointer*, 9 C & P 718, *How* v *Hall* 14 East 276, *Doe* v *Spitty*, 3 B & Ad 182, *Taylor* § 455. A party however cannot under this exception call ... tion of a document that has been traced into the ...

Where by the proponent's ev... hands—as by the presumptio... receipt of it, then even takin...

... tice, while if we take the opponent's ... has in truth received the document, his denial is express refusal to produce, which equally puts the plaintiff in the position of being equally unable to obtain the document so that notice is unnecessary *Wigmore* § 1203

Proviso, para (6)—When the person in possession of the document *is out* of the reach of, or not subject to the process of the Court Section 65 lays down that secondary evidence may be given of the existence, *condition or* contents of a document, when the original is shown or appears to be *in the* possession or power of any person who is out of the reach of, or not *subject to*, the process of the Court, and when after the notice mentioned in section 66, such person does not produce it "There is therefore a clear legislative *enactment* that notice or a reasonable notice, must be given, but that is qualified by s. 66, clause (6) which dispenses with notice *Mr Jackson* argues that there *must*

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him at the last moment at the hearing of the suit, would have been nugatory. *Mellus* v *Vicar Apostolic*, 2 M 295 In *Haranand* v *Ram Gopal*, 27 C 639 (648)=3 C W N. 129, *Lord Hobhouse* said 'His proof of the *Sikhun* records

ions 65 and 66 of the Evidence Act secondary

c documents, which they are under section 74,

, when the person in possession of the document is out of the reach of or not subject to the process of the Court, which is the case here" See also *Harnund* v *Ram Gopal*, 2 Bom L R 562

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348=A I R 1926 Pat 512=6 Pat 542
letters were in the possession of parties inte
claim, but the plaintiff did not take steps
Held that there being no question of the genuineness of the document these steps should have been waived by the Court and the document admitted in evidence under s 66 of the Evidence Act *Habiram* v *Hemnath*, 19 C. W. N 1068

67. If a document is alleged to be signed or to have been written wholly or in part by any person, the signature or the handwriting of so much of the document as is alleged to be in that person's handwriting must be proved to be in his handwriting

Proof of signature and handwriting of person alleged to have signed or written document produced

Principle The introduction in evidence of a writing is not accomplished when the document is produced in Court There is still a preliminary matter to be attended to before the writing can be received This is the authentication of the writing or the proof of its genuineness *Mckelvey's Ev* §§ 277 279 Most documents bear a signature, or otherwise purport on their face to be of a certain

and must be supplied by evidence But a document purports in itself to indicate its authorship, and the perception that this element is nevertheless missing, and must still be supplied, is likely not to occur There is a natural tendency to forget it Thus it has constantly to be emphasised by the judicial requirement of evidence to that effect Thus it is that in the tradition of the common law a wise emphasis has been placed upon the necessity of supplying the logical element of authenticity for writings. The general principle has been enforced that a writing purporting to be of a certain authorship cannot go to the jury as possibly genuine, merely on the strength of this purport; there must be some evidence of the genuineness or execution of it. *Wigmore* § 2130, *Horne Tooke's Trial*, 25 How St. Tr 78, *Pfeal* v *Vanbatenburg*, 2 Camp 439 'In the ordinary affairs of men, it is very often assumed, without proof, that he whose name has been affixed to a written instrument placed it there himself. But

7. when signing becomes a matter of legal controversy, it must be established by proof" *Per Bronson C. J* in *Willson* v *Betes*, 4 Den 201; 213.

General Principle of Authentication The foundation on which rests the necessity of authentication is not any artificial principle of evidence, but an inherent logical necessity Thus if as a part of some facts asserted, *Doe's* letter is offered, what is involved in the assumption of the offer is (a) a letter written (b) by *Doe*; thus a letter alone, without the fact that it is *Doe's*, is not receivable, simply because it is not the thing offered By one of the many rules of Evidence, *Doe's* letter may be admi
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the importance of proving it, exists wherever any personal connection with a corporeal object is assumed in the offer The necessity of authentication, therefore applies equally well to chattels—to a knife, a horse, a coat, etc, whenever it is asserted to be connected with a person This process of authenticating chattels is ordinarily referred to as identifying them, but the two ideas are distinct, and different principles of evidence are applied *Identification* presupposes that two objects, apparently different, have been referred to and the issue is whether they are in fact one and identical, not separate objects

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yet the document may have been placed there by a falsifier (2) a postal stamp or post mark or other mark indicating that an official has acted upon the document at some time and place, but this mark may have been *falsely* used.

(3) Sundry marks indicating action by some one subsequent to the original marking e g burnt edges, indicating an attempt to destroy by fire (b) External evidence will include (1) all subsequent separate conduct by the alleged maker, indicating a consciousness of its genuineness or the reverse, (2) All subsequent separate conduct by third persons having a similar import—*Wigmore* § 2131, *Wigmore's Principles of Judicial Proof* § 52

Scope of the section of a document, there is what it purports to be ? I point is dealt with in s Evidence Act govern ca e v *Gudarkoen* 82 Ind Cas 306 The nature of the evidence will depend to a large extent on the nature of the document If it is a mere memorandum such as the entry in a diary mentioned in s 32 (b) it must be proved that the diary was really that of the person whose statements it is said to contain If it is a letter it must be shown who wrote it, or at any rate who signed it for a signature to a document turns the whole document into a statement by the person who

who executed it *Mark Ev* necessary under this section This section does not require to be produced Nor does the Act require the writer of a document to be examined as a witness *Abdool Ali* v *Abdoor Rahman* 21 W R 429 The proof of hand writing and signature under this section must be by any of the recognised modes of proof and amongst others by statements admissible under s 32 of the Evidence Act *Abdulla* v *Gunnibai*, 11 B 690 The execution of a document cannot be deemed proved as it is required by the Evidence Act merely because it is proved in the sense of the definition of ' proved That definition of the word proved must be read along with s 67 of the Act until it is proved that the signature purporting to be that of the executant is in the hand writing of the executant the Court cannot proceed to consider whether the execution is proved In other words section 67 makes proof of execution of a document something more difficult than proof of matter other than the execution of a document *Salaik* v *Mt Tamiz Bano* 107 Ind Cas 564=A I R 1928 A 303 But it was never intended by s 67 of the Evidence Act that direct evidence of hand writing was always necessary but that section merely stated with reference to needs what was the universal rule in all cases th new rule either to or felt the fact of execution of the document was properly proved *Karali* v *The East Indian Railway* 48 C L J 32=111 Ind Cas 492=A I R 1928 Cal 498, *Barindra* v *E*, 14 C W N 1209 1210

and of proof is required for it must nevertheless be shown signature denoting execution who professed to execute it A Court is not bound to treat the registration endorsement as conclusive proof of the fact of execution If there are suspicious circumstances attending the execution of the document such endorsement cannot be resorted to for the purpose of holding that the execution has been proved *Jogannath* v *Dharaji* 5 O L J 191=46 Ind Cas 279 Under this section a document can be proved by any is 390 Where a register d in order to prove that eting of the association and it must be proved by oral testimony that the register was in fact a register of attendance kept for the on a iture

said ' There is no evidence as to who wrote down the names which appear on the page in question It is suggested that the names or signatures were written

67. out by the persons themselves under the date which appears at the heading of the paper But no witness has been produced to identify these signatures The learned Sessions Judge has considered that the mere fact that a person's name appears on such a document is proof that he signed it It is obvious that when this register was produced it was necessary to show by oral testimony that it was

urpose of recording the names of
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satisfaction of the Judge to be genuine As no witness was called to testify to this document in any way whatsoever, it is obvious that these essential requirements were not attempted to be fulfilled The document accordingly is not admissible in evidence in the absence of oral proof of its nature and authorship and even if it were admitted it does not prove the presence of the petitioners at

of the identity of their signatures A
nce if the writer of the certificate is not
witness *Peter* v *Mahomed* 22 Ind Cas

654 The ordinary method of proving handwritings are (1) by calling as a witness a person who wrote the document or saw it written or who is qualified to express an opinion as to the handwriting by virtue of section 47 of the Evidence Act, (2) by a comparison of the handwriting as provided in section 73 of the Evidence Act, and (3) by admission of the person against whom the document is tendered A document does not prove itself nor is an unproved signature proof of its having been written by the person whose signature it purports to bear *Per Mookerjee J* in *Sarojini* v *Hari Das* 26 C W N 113 at p 119, see also *Gunga Pershad* v *Inderjit* 23 W R 390 P C To prove the execution of a bill of sale executed in their favour by the plaintiff's father the defendant called a *Kazi* who deposed that the vendor came before him accompanied by

was then registered
On special appeal
was sufficient direct
ary under section 67
a v *Manak Chand*

27 Ind Cas 866, *Lahini* v *Bala*, 77 Ind Cas 798 = 18 N L R 85

ost universal Some-
and sometimes both
erally makes a mark

and some other person writes his name *Mark Ev p 60* All that is required is that the signature must be by a person who is conscious of his act a mere mechanical movement of the hand is not sufficient *Kalee Tara* v *Nobi...* 21 W R C R ... *...nkins* v *Gainsford* 3 Sw & Tr 93 ... ention of executing a document. *Re* ... e or initial may be considered as ... *In bonis Redding* 2 Roberts 339, ... 58 Ind Cas 134 = 7 O L J 406, ... 930 M 770 A mark is a mere symbo... who notices it often

ratmoni 2 C W N 642 = 25 C
use of pen and ink is not neces-
Tr 93. In that case *Sir Cresswell*
pen or some other instrument
rson make a difference that a

fac simile of the whole name was impressed on the Will instead of a mere mark or cross The mark made by the instrument or stamp was intended to stand for and represent the signature of the testator In the case where it was held that sealing was not signing, the seals were affixed by way of a signature, So execution of a document can be made by affixing a mark on it. *Taylor* v *Dening* 3 Nev & P 228, *Baker* v *Denning*, 8 Ad & Ell 24, *Donelly* v *Broughton*,

(1891) A C 435 Where the alleged executant of a deed (who was a marksman) denied execution and all the attesting witnesses are dead or for some other reason not available, proof of the handwriting of the attesting witness and of his identity is sufficient proof of execution This is founded on the rule that on proof of his handwriting every thing must be presumed to have been rightly done, and a fraud must not be imputed without some evidence on that behalf *Ponnu Swami Kalyansundara* A I R, 1930 Mad 770=125 Ind Cas 231

kn(
froı
que
wel
had been furnished But as there can seldom be a sole person knowing the
the case)
multiple
knowing
the same facts are often persons hostilely interested who thus have a motive for fabrication ; and if it were once laid down as a general rule of law, that the contents of a letter might be taken as evidencing its authenticity, too many would be found to take fraudulent advantage of this rule Accordingly, it seems generally conceded that the mere contents of a written communication, purporting to be a particular person's are of themselves not sufficient evidence of genuineness Only in special circumstances, where the contents reveal a knowledge or other trait particularly referable to a single person, could the contents alone suffice II

s of a particular
, (a) an illiterate's
tter *Ibid.*

Illiterate s letter , typewriting It ought to be conceded that where there is no direct testimony to the act of execution or sending by an illiterate, the evidence to be drawn from the contents should in some situations, be allowed to suffice to go to the jury The case of an amanuensis using a type writing machine presents a similar impossibility, whenever the signature (as sometimes happens) is also type written or stamped and it would seem that a similar necessity justifies a resort to evidence from contents If there were a serious possibility of abuse this step would not be advisable But in fact there is also a danger of abuse in the opposite direction for the difficulty of authenticating such a document is sometimes taken advantage of by those who wish to be able to disavow their authorship To day however in view of the scientific development of the study of documents by microscopy and other arts the authorship of type written documents can often be traced with certainty to the specific machine used , so that this mode of authentication does not then in principle differ from that of using the handwriting *Wigmore* § 2149

Printed matter—news paper Vide notes under s 81 *infra*

Proof of execution of document required by law to be attested

68 If a document is required by law to be attested, it shall not be used as evidence until one attesting witness at least has been called for the purpose of proving its execution, if there be an attesting witness alive, and subject to the process of the Court and capable of giving evidence.

"Provided that it shall not be necessary to call an attesting witness in proof of the execution of any document, not being a will, which has been registered in accordance with, the provisions of the

68. Indian Registration Act, 1908, unless its execution by the person by whom it purports to have been executed is specifically denied'*

The general notion of
be called before another
of that particular witness
to obtain knowledge of the matter more accurately than any other person His opportunities of knowledge, it must be supposed, have been not only better than those of others, but so much better that it would be a palpable risk of injustice to proceed in the trial without endeavouring to obtain him Moreover, such a rule should be applied only where the class of witnesses thus preferred can be designated wit'
call him mus

in quest on, he
the one thing
can contribute
by the law by
the partisan interests of either side may fail to furnish *Wigmore* § 1286.

History of the rule "As regards the requirement' says *Professor James Bradley Thayer* that the proof of the execution of an attested document must be by the witnesses if they can be had, this, also, has a clear and very old origin Such persons belonged to that very ancient class of transaction or business witnesses, running far back into the old Germanic law who were once the only sort of witnesses that could be compelled to come before Court Their allowing themselves to be called in and set down as attesting witnesses was understood
Proof by witnesses
ly to know the fact
ght be, he could not,
ss, unless he had
It was a part of
witnesses formally
allowed their names to be written into deeds in large numbers When jury trial, or rather proof by jury, as it originally was, came in, the old proof by witnesses was joined with it, when the execution of the deed was denied, and the same process that summoned the twelve, summoned also these witnesses The phrase of the precept to the sheriff was *summone duodecim* (etc, etc,) *cum aliis* The presence of these witnesses was at first as necessary as that of the jury Great delays and embarrassments attended such a requirement where the number of witnesses m
Accordingly
necessary,
After anotl
longer a nec
century, in 1562 63, process against all kinds
them to come in, not with the jury or as

),

witnesses could not in one way or the ot
to come in As regards ordinary witnesses to the jury, compulsory process seems not hav ... Since 1318, the
attendance of
not be got,
long period
whether a de
denied it Ha

*This pro
(XXXI of 192

S

any that can be stated in a Court of Justice" Thayer Prel Tr Ev pp. 502, 503

Reason and Policy of the old Rule Strictly speaking there is no sufficient
Lord Ellenborough (in R v
and ratiocinative system of
1700 S So on this point
the great Judges Not being
able to make a departure from long tradition, insufficient and inconsistent reasons for enforcing the rule have been laid down in support of it The rule is thus stated by *Lord Ellenborough L C J in R v Harringworth*, 4 M & S. 350 "In as much as they are plighted witnesses the knowledge they have upon the subject is essential, and if it can be procured must be forthcoming" See also *Barnes* v *Trompowsky*, 7 T R 265 In *Geropulo* v *Wheler* 10 C B
because 'he is the witness agreed
v *Garth*, 8 Exch 803 *Pollock C B*
to prove the execution of a deed
for this reason, that by an *imperative rule of law* the parties are supposed to have agreed *inter se* that the deed shall not be given in evidence without his
s execution' Relying
(of the rule) is not (as is
evidence, but that he
o speak to the circum-
ed for the purpose of
dispensing with proof at the trial, but cannot be broken" But the difficulty about this reason is that no such agreemer
attestation is required by law Moreover
not apply between others than the par
fact Further more this assumes that the opponent charged as obligor or maker is a party to the document—*which, if the execution is denied is an* assumption of the very point in issue *Wigmore* § 1288, *Transworth v Briggs*, 6 N H 561, 565 *contra Chamberlayne's Ev* § 487 Some of the Judges assigned the reason
attesting witness as
Porlan, 4 Esp 241,
principle that there
of what took place
reason is reiterated by *Le Blance J* in *Call* v *Dunning* 4 East 54 where he said 'A fact may be known to the
ledge or recollection of the obligor, and
knowledge of the subscribing witness rel
Ashurst J in *Abbot* v *Plumbe* 1 Doug
are numerous First it is inconsistent with the rule itself, for the rule applies even where fraud duress and time are not in issue, and even where the maker *himself* is competent as a witness Again, the attestor is *in practice not usually* a person who knows anything about the circumstances preceding the document's execution, or knows more than any other person who by being present could be a qualified witness Finally if the witness does possess special knowledge about some affirmative issue, the opponent is the proper person *to call the witness, if he desires him* So this rule has *no justification in its* original broad form *Wigmore* § 1288 'Has the rule, then no justification in policy? It certainly has none in its original broad form But in most jurisdictions it has by statute been limited to documents required by law to be attested, and in this shape it seems to be entirely justifiable In the first place the attestation *is in such cases required by law as a special precaution against forgery*, thus the attestation itself must in any case be proved as an element in the validity of the document, and there seems to be no special hardship in obtaining the

86. witness rather than in obtaining evidence of his signature In the next place such documents are, in mo t jurisdictions, wills of deceased persons and deeds of illiterate persons, for such documents the maker himself being either deceased or not acquainted with writings, the attestor's testimony is almost inevitably the most desirable and most trustworthy source of information as to the fact of execution, more over it is in such cases that the defences of fraud and undue influence are most likely to be made and here also the attestator s testimony is likely to be of use and ought to be obtained if possible" *Wigmore* § 1288

Reason of the departure from the old rule and principle underlying the section ' We do not purpose to meddl
execution required either by the Legislature,
we think it deserving of serious considerat
execution of written documents may not in ot

, witness
the deed
was executed But it is notorious that in practice the attesting witness in the majority of instances knows nothing of the transaction, the instrument having been prepared a clerk a servant, or a neighbour is called in to attest it A deed to which as parol testimony is not admitted to contradict or vary the terms of
a
at
th
of the document is not the real matter in dispute and where there are no concomitant circumstances to be inquired into is often attended with difficulty and expense and sometimes leads to the defeat of justice Cases have occurred where, in tracing a title, numerous witnesses from distant parts have been rendered necessary to prove the formal execution of deeds though their execution
was not really in dis
by a single witness,
which it was thou
party alleging title
the adversary's cas
it was not supposed

the party
signature

received, and the party requiring it
of the document is not really in
to be limited to any particular witness to prove the execution When
genuineness is in dispute, the party producing it will be sure to call the attesting witness as the absence of the latter would throw the greatest discredit on the instrument We therefore recommend that except in cases where the evidence of attestation is requisite to the validity of the instrument an attesting witness need not be called *Common Law Procedure Commission, Second Report* (1853) p 23, *Wigmore Cas Ev* p 246

Attestation of documents—calling of witnesses No document can be used
held by

when the genuineness of the document has to be proved *Marlby Ev* 61
sections have no direct bearing on the question as to whether the attestation was according to law *Balkrishna* v *Narain Sha* 13 N L R 21 Section 72 lays down that an attested document not required by law to be attested may be proved as if it was unattested Section 68 is applicable to cases where a document is required by law to be attested *Kunwar* v *Ghugi* 108 Ind Cas 57 To prove wills required by law to be attested an attesting witness and subject
attesting witness alive,
of giving evidence. *Tulsi Singh* v
Judai, 82 Ind Cas 306 Where all
is sufficient to prove the hand writ
by other evidence (*Ibid* s 69)

But execution of a document will be sufficiently proved when it is admitted by the party himself who has executed the document (*Vide* s 70) So also where document is thirty years old, the Court may in its discretion presume the genuineness and due execution as well as attestation of the document (*Vide* s 90). The Court shall presume also that every document called for and not

does not recollect it, its execution may be proved by other evidence *Vide* s

Scope of section 68 The object of placing more than one attestation upon document whether at any party's voluntary instance or by requirement of law, ordinarily not to demand the combined testimony of all at the trial, but merely provide by way of caution a number of witnesses, so that the contingencies death, removal of residence and the like, may be guarded against, and one witness at least may be available But a main object in Statutes requiring execution with is a secondary Tindal C J said look primarily ty of the testator t three witnesses should be in the nature of guards or securities, to protect him in the execution of his Will against force or fraud or undue influence The proof of the Will by the three witnesses supposing it should afterwards come in contest only is an incidental and secondary benefit, derived from the mode of attestation It is well settled that in an action at law it is sufficient to call only one of the subscribing witnesses if he can speak to the observance of all that is required by the statute" *Doe* v *Leves* 7 C & P 574 In *Bullen* v *Michel*, 4 Dow 297, 331, *Lord Eldon* said "They usually call one witness leaving it to the other side, if they think proper, to call the other witnesses" According to English

Wigmore § 1304, see also *Ogle* v *Cook* 1 Ves Sr 177 *Grayson* v *Atkinson*, 2 Ves Sr 454 460, *Binfield* v *Lambert* 1 Dick 337, *Bird* v *Butler*, 1 Dick 337; *Powel* v *Cleaver*, 2 Bro C C 449 501, *Fitzherbest* v *Fitzherbest*, 4 Br C C 231 *Carrington* v *Payne* 5 Ves Jr 404, 411 *Bootle* v *Blundell* 19 Ves Jr 494, *Winchelsea* v *Wanchope* 2 Russ 441, *Tatham* v *Wright*, 2 Russ & Myl 1 8, 16 According to section 68 of the Evidence Act, to prove the execution of a document required by law to witnesses must be called to prove

in the Punjab which requires *bahi* entry to be attested at all *Kanwar Ram* v *Ghugi* 108 Ind Cas 57 = A I R 1928 Lah 148 A mortgage deed signed by the marksman was attested by three witnesses In a suit on mortgage its execution was not specifically denied but the plaintiff sought to prove the same Two of the attesting witnesses having been dead the third was called, but he deposed that he attested the deed in the absence of the executant It appeared however that the Sub Regi also spoken *Held* that unl the execution of the mortgage was not specifically denied *Yakub Khan* v *Guljar Khan*, 52 B. 219 = 30 Bom L R 565 = 111 Ind Cas. 257 = A I R 1928

68. Bom 267 An account book is not a document which is required by law to be attested and this section has no application to a case in which such account book is produced in evidence *Emperor* v *Narboda Prosad* A I R 1930 All 38 There is no law which requires the attestation of a sale deed so far as the Punjab is concerned This section has therefore no application to sale deed in that province *Maharaja of Faridcot* v *Anath Ram*, A I R 1929 Lah 1 One of the three attesting witnesses being alive the plaintiff called one witness and when he resiled the plaintiff proceeded to prove the document by other evidence *Held* there was a full compliance with the provisions of s 68 and 71 *Hinson Ali* v *Gurudas Kapali*, A I R 1927 Cal 188=33 C W N 248=49 C J 16 Where no attempt is made to prove a mortgage deed either by calling in an attesting witness or even by putting any question to the scribe of the deed who was examined as a witness regarding the attesting witnesses or attestation the document cannot be used as evidence *Jiwan* v *Dilip Singh* A I R 1929 All 389=27 A L J 588 The amendment by Act 31 of 1926, is a provision relating to procedural law and not a substantive law and therefore must be taken to be retrospective in operation *Thayammal* v *Muthu Kumar Swami* A I R 1929 Mad 81 Where the executant of a mortgage deed, the writer of the deed and the attesting witnesses have all died, having regard to the new definition of attesting in s 3 T P Act, and to the varied mode of proving registered document as amended by s 68 Evidence Act it is sufficient to satisfy the Court that the execution which was not specifically denied was so probable that a prudent man ought under the circumstances of the case to act upon the supposition that it was so executed *Parun* [illegible]
To satisfy the requirement of this secti[illegible]
put his mark in the mortgage deed [illegible]
12 A L J 1114 Sections 68 to 71 of [illegible]
in which the fact of execution may [illegible]
and have no direct bearing on the question as to whether the attestation was according to law The sections proceed on the assumption that the attesting witnesses referred to are attesting witnesses within the meaning of the law requiring the document to be attested If the fact that there are any valid attesting witnesses is denied, it has to be proved like any other disputed fact If the execution is admitted no other proof of mere execution is required, and if the document on its face purports to have been attested by the required number of attesting witnesses and if it is not denied that [illegible]
the question of valid attestation does not [illegible]
arises, then the maxim *omnia praesumen*[illegible]
however it is denied that the attestation [illegible]
relying on the deed as an attested deed must [illegible]
is not admitted Even if due attestation is not denied, but evidence on the subject is given the Court cannot ignore the evidence There can be no due attestation without execution, an [illegible] or disproved
the fact of execution is of no [illegible] the deed as a
mortgage deed is concerned" L [illegible] R 21 By
the terms of this section when [illegible], a document
cannot be used as evidence at all as a document either requiring attestation or in fact attested, but this does not prevent it from being used in evidence as something else or for any other purpose Section 68 is subject to the limitation viz, that if the documents were tendered in some other proceeding for the purpose of proving the handwriting of the scribe, it could not be objected to upon the ground that no attesting witness being called to prove it it could not be used in evidence at all *Moti Chand* v [illegible]
121=44 Ind Cas 306 The law as [illegible]
imperative and does not on the face of it [illegible]
cases provided in ss 69 70 and 71 of the Evidence Act [illegible] *Other Chandra Paul* 35 C L J 443=27 C W N 134=68 Ind Cas 86 Other evidence under s 71 cannot be admitted where the provisions of s 61 have not been complied with *Banwari* v *Gopinath*, A I R 1931 All 411, *Pedu* v *Venkata*, A I R 1932 Mad 148=34 L W 663 Where a mortgagor admits having signed the mortgage sought to be enforced but couples it with a denial of the presence of the attestors at the time of signing the mortgage the mortgagee must prove the execution of the mortgage by calling at least one attesting witness to prove the attestation *Arjun Chandra* v *Kailash Chandra*, 36 C L J

373=27 C. W. N. 263=70 Ind Cas 352 Where there is no proof of execution of a Will the identification of the handwriting of the attestors does not prove execution by the testator. *Mian Chand* v *Mt Jiwani* A I R 1923 Lah 171 The direction in section 68 of the Evidence Act is mandatory and there is no distinction drawn by the section between documents which are the basis of a suit and those whose production is required for a collateral purpose so far as their admissibility is in question. *Tirath Ram* v *Mathal* 70 Ind Cas 725=10 O L J 525=A I R 1924 Oudh 525 Section 68 of the Act applies both to primary and secondary evidence *Sheikh Kamiullah* v *Gulia* L R 5 A 696=A. I. R. 1925 All 96 The provisions of s 68 are mandatory and it is not controlled by s 90 The mere fact that the only surviving attesting witness is considered hostile by the party does not relieve him from the duty of examining him as a witness, nor is it enough that summonses and warrants had been issued, upon the witness and the witness had failed to appear but the processes of the Court such as are mentioned in Order XVI rule, 10, Civil Procedure Code have all got to be exhausted *Gobinda Chandra Pal* v. *Pulin Behari*, 31 C. W. N. 215=98 Ind Cas 147=A I R. 1927 Cal 102 In a mortgage suit the plaintiff may, to rebut the evidence of the only attesting witness who gives evidence, call the writer to prove that the document was executed by the mortgagor and attested by two attesting witnesses It is not ne ... ull also be an attesting witness ... L. R. 1125 This section ... he legality or validity of the ... if there has bee no proper ... v *Lakshmi*, A I R. 1930 All ... ere the executant of a document ... l having put his mark to it, and all the attesting witnesses are either dead, or have turned hostile or are not available, there is no rule of law which prevents a Court from holding the execution proved when the signature of the attesting witnesses are proved to its satisfaction having regard to the circumstances of the case. *Ponnu Sami* v. *Kalyansundara*, A. I. R. 1930 Mad 770

... no definition of the word 'attes ... here was also no definition of the te ... as been newly added to the Transfer of Property Act by Act XXVII of 1926 That definition has been taken verbatim from section 63 of the Indian Succession Act (XXXIX of 192 ... an instrument, means and must be deemed ... two or more witnesses each of whom has ... his mark to the instrument, or has seen some ... in the presence, and by the direction of the ex ...

... same time, and no particular form ... 3 of the T. P. Act, *Abinash* v *Dasarath* ... 14 Jur 919=2 Rob Ecc Rep 315, *Dr* ... persons shall be present and see what passes, and shall when required, bear witness to the facts." So "attest" means merely to act as a witnesses, which might be done without subscription *Rickets* v *Loplus*, 4 Y & C 919; *Freshfield* v *Reed*, 9 M & W. 404, *Burdett* v *Spilsbury*, 10 Cl & F 340; *Hudson* v *Parker*, 1, Rob 14, *Ford* v *Kettele*, L R 9 B D 139 But upon the construction of the Act it is clear that no attestation will satisfy the requirements, except throught the outward mark of subscription *Per Sir C Cresswell* in *Charlton* v *Hindmarsh*, 28 L J P. 132 "To attest is to bear witness to a fact Take an example, a notary public attests a protest, he ... nts in that protest, but to the fact of the ... I conceive, the witness in a Will bears ... equires attesting witnesses to attest, namely ... acknowledged in their presence" *Hudson* v. ... v *Phillips*, *Lord Campbell Chief Justice*. ... the word "attested" that the wi

S. 68. be present as witnesses and see it signed by the testator. And the principle was given effect to in the *House of Lords* in *Burdett* v *Spilsbury*, 10 Cl & F 340. There the *Lord* ... se words "The party who sees the ... subscribes as a witness he is an ... mortgage deeds by two witnesses required by section 59 of the Transfer of Property Act is attestation of the actual fact of the execution *Shamu Patter* v. *Abdul Kadir*, 16 C.W.N. 1009 P C The witnesses must see and be conscious of the act done and be able to prove it by their own evidence, they must be both mentally and bodily present, for if not, they migl... mind. *Per Dr Lushington* in *Hudson* v ... (1864) 3 S & J. 578, *Sir Gorell Barn*...

In my view, at the end of the transaction

W. 404; see also *Sharp* v ... 44=10 Bom. L R 943; *Da*... 256; *Sashibhusan* v *Chana*... 364 (P. C) Again in the ca... *Phillips*, 4 E & B 450=24 ... ment was not merely to sub... execution, but included al... some disinterested person capable of giving evidence as to what took place These cases contemplate as a requisite of a good attestation that the document must have been executed in the presence of an attesting witness, who subscribed his name to the instrument in token of this circumstance *Sarungigar Begam* v. *Borada Kant*, 37 C 526=11 C L J 563=14 C W. N 791; see also *Ganga Parshad* v. *Ishri Pershad*, 45 C 748=27 C L J 548, *Deonarain* v. *Kakur*, 24 A 319 (F. B), *Prankrishna* v *Jadunath*, 2 C W. N 603, *Girindra* v. *Bejoy*, 26 C 246=3 C W N 81; *Dinomoyee* v *Banbehary*, 7 C. W N. 160, *Sashibhusan* v *Chandra Peshkar*, 4 C L J 41=33 C 861

tion, ... defeat... case o...

...soning appears to be based on good sense, ... of justice, equity and good conscience, according to which the Indian Courts are bound to decide *Per Mookerjee J* in *Surungigur Begum* v *Baroda Kant Mitter*, 11 C. L. J. 563 (572)=37 C 526=14 C. W. N. 974.

S.

Presence, meaning of—Signature of a Purdanashin lady—how to be attested. *Sweet* in his Law D
presence of B, and B
witnessed A's executio
Dictionary defines attes
a written instrument, to
also *Bury* v. *Hulse*, (1
instrument be deemed to have been executed in the presence of a witness. It may be generally stated as the result of the decisions, that presence involves two ideas, namely, mental cognition of the act, and physical contiguity; in other words, the person in whose presence the act is done must be able mentally to know what is being done and what is done in the presence of a person, must take place in phys
inflexible rule as to
trated by a referei
to what extent judic
subject, *Casson* v. *Dade*, 1 Bro C C 99, it was held that when the testatrix sat in her carriage, opposite to the window of the attorney's office, in which the Will was attested, the

the room the two witnesses who attested the codicil, the curtains at the foot of the bed were however drawn

Sir Herbert Jen
hold, if necessary
have attested in
that the testator,
The principle deducible from these c
according to the custom of the country,
before male witnesses a document w
sively proved to have been executed b
be deemed to have been attested by
purdah, and who before attestation, satisfied themselves that there was no fraud, and that the document had been actually executed by the lady screened off from their gaze *Sarrurtyigur Begum* v *Baroda Kant*, 37 C 526=11 C L J. 563 This view has also been adopted by *Brett J* in the case of *Harmongal* v *Ganour Singh*, 13 C W. N 40 and by *Stephen and Chatterjee JJ* in *Isri Prosad* v. *Gunga Prosad*, 14 C. W N 165 A mortgage deed was taken for execution behind the *purdah* to a *purdanashin* lady Her son came from behind the *purda* and said that it had been signed by her The witnesses thereupon affixed their signatures to the document, though none of them saw her sign it *Held* that there was no valid execution of the document as it was not attested as required by section 59 of the Transfer of Property Act *Rai Ganga Pershad* v *Ishri Pershad*, 22 C W N. 697=48 C 718=31 M L J 547 P C; see also *Hira Bibi* v *Ram Hari*, 5 Pat 58 (P C)=89 Ind Cas 659=A I R 1925 P C

417=45 Ind Cas 691, *Padarnath* v C W N
991 P C=37 A 471; *Rai Radh* It is
not necessary that the attesting witne lady
sign the document. *Kasidanbi* v. *Ga*

Requisites of valid attestation The object of attestation is that some person should verify that the deed was signed voluntarily. *Sarrurtyigur* v. *Baroda Kant*, 37 C 526=11 C. L J. 563=14 C W. N. 974. The attesting

68. witnesses must subscribe with the intention, that the subscription made should be a complete attestation of the Will, and evidence is admissible to show whether such was the intention or not *In bonis Wilson*, 1 P. & D. 269, *In bonis Sharman*, 1 P & D 661, *Griffiths* v *Griffiths*, 2 P & D 300, *In bonis Murphy*, I R 8 Eq 300; *Robert* v *Phillips*, 4 E & B 450, *In the goods of Streatley* (1891) P 172 The witnes ... as an execution of the document ... nature is to be attested, by which ... Rob 712; *Ewon* v *Franklin*, D ... , *Phiffs* v *Hale*, 3 P & D 166; *In bonis Dilles*, 3 P & D 164, *Leonard*, v *Leonard*, (1902) P 243 Where a witness, put in his signature without any intention of attesting, it is not a valid attestation *In bonis Smith*, 15 P D 2, *In bonis Murphy*, I R 8 Eq 300, *In bonis Sharman*, 1 P & D 661 The attesting ...

Pearson ...
that the ...
of the ...
Dunn, 1 ...
in any ...
witnesse ...
Hanman ...
(1843) 1 Rob 757, *Roberts* v *Phillips*, 4 El & Bl 450, *Savitri* v *F A Savi* 19
C ...
P ...
mu ...
R ...
6 (...
11 C L R 359 Generally, any competent witness may attest; thus marksmen, (*Re-Enyon*, 3 P & D 92) and infants if of years of discretion, may be attesting witnesses *Phip Ev 7th Ed* 501 A party to a deed or his agent cannot attest it *Seal* v. *Calridge*, 7 Q B D 516, *Peace* v *Brookes*, (1895) 2 Q B 415

Attest ...
his signatu ...
v. *Krishna*, ...
Ind Cas ...
145; *Dhari* ...
Ayyasaime ...
Abinash v *I* ...
attesting witness must be shown or presumed *Badri* v *Abdul* 35 A 254,

... r purpose and in whatever manner, is as a ... C W

41 M 535, *Dinomoyee* v *Bonbehary*, ...
48 C 61. Where the name of the ... under a separate heading styled "scribe" apart from the signature of the ... Will that the only other person who signed as ... signature of the scribe was not, as ... as attestation *Abinash* v *Dasa* ... v *Ajodhya* 20 C W N 699=34 ...

... *mdas* v *Ramoomal*, A I R 1927 Sind ... 853=A. I R 1925 Oudh. 734 A ... behalf of the mortgagor cannot be a competent attesting ... 23 C W N 200=40 Ind. Cas 720; *Paban* ...
Sristidhar v *Ra* ...
case, the scribe of ...
name at the end o ...
Held, that such ...

S.

the meaning of this section *Bakhtar v. Isachand*, 5 N. L. R. 3=1 Ind Cas. 173; but see *Ram Sahu v. Gauri Shankar*, 59 Ind Cas. 153 Where a person who has signed a deed as a scribe subseq . . . . . . witness the onus of proving this assertion . . . . *v Lalhu*, 4 Pat. L. J 511=53 Ind Cas 73 . . . in any case a scribe wherever he wrote . . . the document as an attesting witness unless he actually . . . so in the document

B 405=22 Bom L. R. 1:6=55 Ind Cas. 610 A scribe who executes a document for and on behalf of the executant is not a person who sees what passes" or "sees it executed" when he himself does the very thing to which he subsequently signing as a witness he professes to bear witness *Sristidhar v Rakshakay*, 63 Ind Cas 507

Attestation by a Sub Registrar The registration of his Will by a testator and his signature to a certificate of admission of execution, testified by the signature of the Sub Registrar, and of a witness is a sufficient attestation to satisfy the requirements of section 63 of the Succession Act. *Amarendra v Kashi*, . . . admits his . . ., before him . . . names on the Will as witnesses to the admission of the testator, such attestation is sufficient to satisfy the requirements of s 63 of the Succession Act *Nitya v Nagendra*, 11 C 429; *Sarada v Triguna*, 1 Pat. 300, *Rajendra v Menoka*, 1 Pat L R 267; *Horrosundari v Chandar*, 6 C 17=6 C L R 303; *In re Roymonee*, 1 C. 150, *Horendra v Chandra*, 16 C 19, *Mohammad v Ali Haidar* 12 O L J 1= A I R . . . *Syed v Taiyaba*, 1 O L J 591=26 Ind Cas. . . . =23 Bom L R 309 But a Sub Registrar . . . ent was admitted cannot be taken to be a good . . . proof that he affixed his seal or signature in the presence of the executant *Abinash v Dasarath*, 32 C W N 1228, but see *Radha v Nripendra*, 17 C L J 118

Personal acknowledgment "What is the plain meaning" asked *Dr Lushington* in *Hudson v Parker*, (1844) 1 Rob 11 at p 25 "of acknowledging

. . . of *Blake v. Blake*, (1882) 7 P & D 102 at p 107 *Jessel M R* observed "What is in law a sufficient acknowledgment under the statute? What I take to be the law is cor . . . p 113) in the fo . . . the witnesses . . . testator should . . .

68. them to sign their names, that amounts to an acknowledgment of his signature, if the Court is satisfied that the signature of the testator was on the Will at the time' In *Blake* v *Blake*, (1882) 7 P. & D 110 *Jessel M R* considered the cases of *Gwillim* v *Gwillim*, and *Beckett* v *Howe*, and observed 'I cannot find one word in the judgment of *Gwillim* v *Gwillim*, to show that *Sir C Cresswell* was of opinion that if the witnesses were saying he had signed would be suffici out the interpretation put upon it by new doctrine laid down in that c *Parker, supra* The existence of any such doctrine rests entirely upon the state-

ords to that effect, this is my signature *Daintreege* v *Fasalo*, (1888) 13 P. D 102 at p 103, *Cotton L J* took a similar view Similarly in *Ilott* v *Genge* (1842) 3 Curt 160 at p 172 *Sir H J Fust* said: "The production of a will by the testator, it having his name upon it, and a request to witnesses to attest it would be a sufficient acknowledgment" In *In the Goods of Thompso* is produc have an the pape of his signature by the testator". See also *Balmukund* v *Bhagwandas*, 15 Bom L. R 209=19 Ind Cas 401; *Manickbai* v *Hormusji*, 1 B 457; *Hurro Sundari* v. *Chunder Kant*, 6 C 17, *Nitya Gopal* v *Nagendra Nath*, 11 C 49, *Amarendra* v *Kashi Nath*, 27 C 169 Attestation in the presence of a testator on acknowledgment of signature or exec *Chand* v. *Mohanandi*, 6 C L J 453, *Sobiiri* v *Savi*, 19 C W N 1297=29 In has been added by the Transfer of Pro Since the passing of that Act attestation a personal ackowle passing of that Act, before the attesting sufficient, *Vide Sha* P C, *Saheda* v *Raja* (P. C)=A. I R 1 263, *Ranu* v *Laxmanrao*, 33 B 44,

Act, the law was the same the acknowledgment of the donor Such attestation was held to be not valid attestation *Vide Amarappa* v. *Raghava*, 44 B 231; *Saheda* v *Rajah Ram*, 11 A L. J. 757=21 Ind. Cas 83, *In re Veluvapalatti Peda*, 9 M L T 57=8 Ind Cas 887; *Baijnath* v *Biraja*, 2 Pat. 52(61). These rulings are also no longer good law.

been duly accounted for. *Swamidin Singh* v. *Kaniz Fatima*, 11 Ind. Cas Where only one attestor proved a mortgage bond attested by more than two witnesses and when its due execution was not denied, *held* that having regard

to s. 68, the document may be taken as properly proved. *Nand Kishore* v. *Karte Lam*, 29 C 355=6 C. W. N 395 It is not correct to apply an Act which was passed subsequent to the trial of a case to the procedure in the case Proviso to s. 68 of the Evidence Act was held inapplicable to a case disposed of before it took effect. *Lanucara* v. *Gopi*, 131 Ind. Cas 557=1931 A. L. J 312=A I R 1931 All 411 A mortgage bond purported to be executed by three persons who were all dead at the time of the suit. The signature of each of them was represented by an irregular scribble such as might be made by an illiterate person, and against each of these marks there was a statement that it was the mark of one of the executants, the name being given in each case. These statements were proved to have been written by a deceased professional bond-writer who wrote the whole document in the ordinary course of his business The two attesting witnesses also were dead and the signature of each of them was satisfactorily proved to be in his handwriting *Held* that there was sufficient proof of the execution of the bond, and that the statement in writing of the deceased bond-writer was relevant under s. 32 (2) of the Evidence Act *Hira* v. *Manakchand*, 11 N. L. R. 9=27 Ind Cas 866 Where the only living witness of a document was illiterate and on being examined denied its execution *Held*, that the document could be proved by other evidence *Badri Proshad* v *Gandhar*, 26 S.

So long as there

ocument which is

ll one such witness

has been called The fact that, when called, he will prove hostile, does not excuse the plaintiff of his duty *Tulsi Singh* v *Gopal Singh*, 1 Pat. L J 369 Sections 68 and 69 read together were intended to lay down how a document

it was not the intention of the legislature that an attesting witness or some other witness should have to prove further that the document was in fact signed by the mortgagor in the

Munna Lal, 11 A L J

15 A L J 164=39

ignatures of

, and that of

ption of its

gh v *Hukam Singh*, 15 A L J 167=39 A 112=38 Ind Cas 651 It is not necessary that two attesting witnesses should be called when two are alive nor that even assuming that one only need be called, he should at least be made to prove

Venkata v

Mere proof

f a document

ment is one

that the document was executed in the presence of two attesting witnesses *Perumal Chattar* v. *Raghava Charriar*, 11 L W. 563. Where evidence of the

execution of a deed is available which, if tendered would satisfy the requirements of s 68 of the Evidence Act, the Court is justified in refusing to draw the presumption under s 90 of that Act nor can such presumption be invoked in favour of the deed nor would such presumption be justified in favour of the authority of a person to sign for an illiterate executant *Raghubar* v *Sanual* 8 O L J 23=61 Ind Cas 125 Where the only living attesting witness to a mortgage deed who had to be and was called by the mortgagee to depose to execution and attes ... the mortgage, was got at by the ... ied the clear evidence he gave in ... as attestation *Held* that the sworn evidence given by the witness in examination in chief can be acted upon by the Court *Thannem* v *Bommadevara,* 11 L W. 344=(1911) M W N 747

The death of attesting witnes ... legal evidence not by hearsay ... found must be proved to the satisf ... diligent and honest search A ... it can be compelled to attend the Court to give his evidence *Asoomeah* v *S R. Chetti,* 13 Bur L T 114=61 Ind Cas 637

To prove a deed of gift the production of a witness who identified the donor and also the attesting witnesses when the deed was being registered and who was known personally to the Sub Registrar together with an *entry in* favour of the donee in the village records in succession to the donor, is sufficient ... *Partab Bahadur* v *Ramdas,* 60 Ind ...

... ment

it is open to the parties to ... as a matter of fact see the ... v *Mon Mohini,* 67 Ind Cas 87 Th ... satisfies the requirement of section 68 ...

... other is, it cannot be inferred *that the* back the other and that there his evidence ... *chminarayan* v *Moulavi Zahirul,* A I R ...

... f of execution of the document ... =101 Ind Cas 277=*A I R.* 1927 ... a mixed question of law and fact cannot be raised for the first time in second appeal *Erulandi Thevan* v *Subramania Iyer,* 97 Ind Cas 611=1926 M W. N 559 Evidence of attestors to mortgage deed is, indispensable unless it is impossible to produce them *Karimulla* v. *Gudar Koeri,* A I R 1925 All 56.

Required by law to be attested The term "required by law to be attested" means required by law of the country where the property *is situate* *Elizabeth May Toomey* v *Bhupendra Nath Bose,* 7 Pat. 520=111 Ind Cas 57=A I R 1928 Pat. 304 In that case *Dawson Miller C J* said. "*It* was next contended that the indenture of 20th June 1926 was not properly *proved* as neither of the attesting witnesses to ... had been called, nor ...

... attestation ... in this country. ... ignature of ... his signature required ... ited the document in ... Whatever conflicting ... apply to contracts in relation to law where the *lex loci contractus* and the *lex loci rei sitae* or, as *Professor Dicey* calls it, *lex sitas* differ it seems to be generally agreed by *Story, Dicey Westlake* and other text-writers that in so far as the formalities of aliena tion or conveyances are concerned the law applicable is that of the country where

the land is situated, (see, Dicey, Conflict of laws, Ch. 21 and Appendix Note 17). S
The case of ...

... to govern. Thus as to conveyances or Wills of land the local nature of the thing requires them to be carried into execution according to the law here." So also in Imlahdsha v. Varhil, 5 B & C 451, Abbott C J said: "The rule as to the law of the domicile has never been ... ity that the law of England, ... law of a foreign country." The ... their respects to foreign law, ... oreign country. In Waterhouse ... "When the law of a foreign ... the property of a debtor situate ...

... required to be attested, and s. 68 does not therefore apply. Sanatan v. Dina Nath, 26 C 222 = 3 C. W. N. 228.

An unattested ... as containing a personal covenant to ... ludes it. Madras Deposit and Benefit Co ... it is impossible to view the question of the execution with reference to the covenant to pay as severable from the execution of the document in so far as it creates a security. Virappa v. Channa Muthu, 2 M. L. T. 175 = 17 M. L. J. 213 = 30 M. 251; but see Venkata v. Venkata, 54 M. 163 = A. I. R. 1931 Mad 140 = 60 M. L. J. 56.

In order to prove a sale deed, it is not necessary, under this section to examine a marginal ... by law to be attested ... is not a document ... application to a case in which such account book is produced in evidence. Emperor v. Narbada, 51 A. 861 = 121 Ind Cas. 819 = A. I. R. 1930 All. 38.

This section only applies to cases where a document is required to be attested in the manner provided by law and it can not be admitted in evidence unless one of the attesting witnesses is examined. Mathura Prosad v. Chhedi Lal, 13 A. L. J. 553 = 29 Ind Cas. 363.

The provision of this section does not apply to the Will of a Mahomedan, and so an admission by the defendant, in a suit by the testator, was held to be relevant in a later suit to prove the Will. Najban Bibi v. Saiyad Raja, 4 O. C. 468.

Waiver of objection. Where no objection was taken to the admissibility of a mortgage deed in the Court of first instance on the ground that the deed ... at least, as ... considered ... Kaliathira, 13 M. L. J. 143.

Effect of document not properly attested. A document which is inopera- ... not being properly attested can not take ... endra ... Kali ... or of ... 164 (P. B.) = 11 A. L. J. 141 = 18 Ind ... L. J. 133 = 36 Ind Cas. 903; Prannath ... undra, 44 C. 388 (P. C.); Official Receiver ... hemchand v. Malloo, 10 N. L. R. 81; ... 18 S. L. R. 282. Narayan v. Lakshmandas, ...

... only one witness is ... amount contained ... Pulaka Veetil v. Thiruthapalli, 32 M. 410 (F. B.) (Madras Deposit and Benefit Co. v. Oonamalai, 18 M. 29, overruled); Sada Kavur v. Tadepally, 30 M. 284; Ram Narain v. ..

8. ; *Sonatun* v. *Dinonath*, 26 C. 222; *Dhand* v *afaladdi* v. *Mohar*, 26 C. 78; *Dullim* v. *Behari*, *M.*, 43 M. L J. 475; *Mathura* v *Cheddi*, 13 A. *eir* v. *Clara Ruxton*, 4 C. L. J 510; *Quah Chang*

Transfer of property Amendment Act (XXVII of 1926) whether retrospective The Transfer of Property (Amendment) Act (XXVII of 1926) was

and *Roy JJ*, held, (i) that in view of the definition of the word "attested" in

adequate, but it was held by a Full Bench in the Allahabad High Court in *Ganja Nandan Kaluar* v. *Hanuman Das*, A. I R. 1927 All 1 = 49 A. 25 (F. B) ct and this was followed by a *Sajer Paramanick*, A. I. R 1927 ie Bombay High Court in *Matilal* ot decided on the ground that Act decision in that case, made the

alone, there would have been no doubt whatever on the question That amendment was, however, inserted in this Act in the middle of a large number of amendments relating to the military and air force and s 4 of that Act was enacted at the same time which prescribes as follows.—

"This Act shall ... nce of ... lready ... thereof, ... from any debt, penalty, obligation, liability, claim or demand or any indemnity already granted, or the proof of any past act or thing."

... retrospective the legislature determined that that should not affect the validity, invalidity, effect or consequences of anything already done or suffered, or any proceeding in respect thereof It would therefore ...

Act and under which portions of over 100 Acts are repealed, and amongst these are ss 3 and 4 of Act 10 of 1927 By repealing s 4 of Act 10 of 1927 that Act would have its retrospective effect restored, but in Act 12 of 1927, the saving clause contained in Act 10 of 1927 is repeated almost verbatim . This saving clause, therefore, enacts that the repeal of ss. 3 and 4 of Act 10 of 1927, which would have made that Act retrospective, is not to have that effect, for Act 12 of 1927 cannot res... therefore, of this legislation ... of 'attested' is not to have retr... rights or any act done in the ... not valid when executed for want of proper attestation the subsequent legislation will not make it valid' But the view expressed by their Lordships in this case ... ion in a subsequent Full ... A I R 1929 Mad 1=55 ... ed to the Full Bench for decision was —

"Whether Acts 27 of 1926, 10 of 1927 and 12 of 1927 are retrospective in their nature so as to apply to documents executed on a date prior to their coming into force?"

Coutts-Trotter C J on behalf of the Full Bench answered the question as follows The Acts are retrospective We should have thought that Acts 27 of 1926 and 10 of 1927 showed a clear intention that they were to be regarded ... of 1927 preclude further discussion" ... 772=109 Ind Cas 469=A I R 1928 ... v *Swami*, 30 L W 677=A I R 1929 Mad 881=57 M L J 588, *Dargawati* v *Jagannath*, 27 A L J 1391=118 Ind Cas 662=A I R 1929 A 680

Proviso So far as any rule of pleading requires that the execution of a document named in the declaration must be expressly traversed, the failure to plead in denial must, under such a rule, be equivalent to a confession of the allegation of execution in the declaration, and thus the execution is not an issue on the trial, and the present rule does not apply *Wigmore* § 1295, Vide also order VIII, r 5, C P Code The words, "specifically denied" mean specifically denied by the party against whom it is sought to be used In *Cook* v *Transuell*, 8 Taunt, 450, *Gibbs C J* said "In cases where '*non est* ...

part of the deed, he must do it by the attesting witness in the common way" See also *Gillett* v *Abbott*, 7 A. & E 783 Proper reading of the proviso to s. 68

69. is that if
required
deed the
document
the deed
an attesting witness *Radha* v *Deoki*, A I R 1932 All 320=1932 A L J 207; but see *Ramdayal* v *Sulab*, 14 R D 494 If the validity of a mortgage be specifically denied, in the sense that the document did not effect a mortgage in law, then it must be proved by the mortgagee that the mortgage deed was attested at least by two witnesses. *Lachman* v *Surendra*, A I R 1932 All. 527 (F B)=1932 A L J 653

Proof where no attesting witness found

69. If no such attesting witness can be found, or if the document purports to have been executed in the United Kingdom, it must be proved that the attestation of one attesting witness at least is in his handwriting and that the signature of the person executing the document is in the handwriting of that person.

Principl … attestation of an attesting or … when the attestor is unavailable … tion; and according to the orthodox form of preferred witness rule, the attestation must even be used in preference to other testimony" *Wigmore* § 1505 The reason is that the attestation is in effect the extra-judicial statement of the attestor to the fact of due execution, admitted under the hearsay exception and being admissible so far as concerns the H

instrument relative to its
have subscribed his name in
attestation comes in by w
Lossee v *Lossee*, 2 Hill 609
as a written declaration of
event of his death, or absence, yields a reluctant credit by way of necessary substitute for his oath *Mr. Hill's Note on the case*; *Wigmore* § 1505 So this extra judicial statement, expressed or implied, is always, when the attestor is unavailable, admissible by exception to the Hearsay rule The question there is, not merely whether it is admissible, but whether it is preferred to any other … attestor is personally … that extent disposed … could now be made … Is it, then further, a part of the rule of preference that, before thus going to other testimony, the attestor'
singular na
signature
over testimony on the stand under cross-examination is an extraordinary measure, assuming for such a statement a value not at all to be attributed ordinarily to such statements. Nevertheless, such a preference unquestionably existed as a part of orthodox common law rule in England *Wigmore* § 1320 But this section requires that the signature of the maker also, as well as that of the attestor must be proved. This contention means in effect that another witness to the maker's signature must be called, for (as has just been noted) the attestation is the attestor's testimony to the fact of execution, *i e* the placing of the signature by the purporting maker. If, then, it is necessary to call a second witness to the maker's signature, this must be on the supposition that the testimony of the attestation, taken alone, does not go far enough in its implied or expressed statements This is indeed the ground upon which in part the above contention has been rested. It argues first, that the attestation,

while asserting execution by a person of a certain name, does not sufficiently identify that person with the party in the case. It argues further more, from the point of view of policy, that a person might be bribed to make a false
... feasible
... attestor's
... M 520
..., that that proof
... the defendant
with the note ... what is the effect which, with the greatest degree of latitude
can ...
whic ...
dete ...
utm ...
A B ...
step further and show that the defendant is A B of C in the county of York, or in some manner establish that he is the person by whom the note appears to be executed Now what does the subscribing witness in this particular case attest? Why, that this instrument was duly executed by a person of the name of *Francis Musgrove* There may be many persons of that name and if you do not show
... trument, you
... ve It is not
... e instrument
executed .. why? Because it is an essential part of the issue, which you are bound to prove, that the instrument was executed by the defendant in the suit It seems to me, therefore on principle, that you must give some evidence of the identity of the defendant with the party who has signed the instrument." *Wigmore* § 1513 But "wher
handwriting In this case one
is beyond the reach of the proce
which could be obtained was

... on-residents,
... lm)] and in
... instrument

Burr Jones § 529

Attestor's Hearsay Statement—How admissible Upon the general prin-
... statement cannot be used
... ng testimony in person.

he did not see executed by the
to trustworthiness seem to be four (1) The occasion is a formal one, and the statement requires a writing; and there is commonly a radical disinclination to take part in a false transaction of such a sort (2) The concoction of a false document will either fix an innocent party with a false obligation or will divert legitimate heirs of their rights, and there is a natural repugnance to giving assistance in such a wrong (3) The making of a false attestation, whether or not it is in criminal law a forgery or a perjury, is popularly supposed to be such, and the attestor would probably be at least an accomplice in a forgery, so that substantive sanction deterring from a crime would probably operate to prevent a false attestation (4) The attestor knows that he is liable at any time to be called upon in Court to substantiate his attestation, and not only in his falsity likely there to be exposed by the opponent's witnesses, but he will there be obliged either to commit perjury by swearing to the fact of execution or to ... of recanting and confessing his falseness, ... of circumstances which easily accounted for ... to the Hearsay rule. *Wigmore* § 1508.

Scope of the section By the strict rule of the common law the primary or best evidence to prove the execution of a deed or other writing required by law to be attested is generally the testimony of subscribing witnesses, if available

or if not, then proof of his handwri the rule under discussion was declared by ormal and universal as that can be stated *gworth*, 4 Maule & S 325) yet it has several qualifications and exceptions The rule does not apply if the subscribing witness is dead (*Adam* v *Kerr*, 1 Bos & P 360), or can not be found (*Falmouth* v *Roberts* 9 M & W. 467 = 11 L J Ex. 160, *Parker* v *Hoskins*, 2 Taunt 223; *Birt* v *Walker*, 4 Barn & Ald 697), or is without the jurisdiction of the Court (*Prince* v *Blackburn*, 2 East, 250; *Glubb* v *Edward*,

... in secondary evidence, it is equally well settled that where a ... produced at a tri

dead or cannot b
of being produce
writing; and tha
of the instrumen

it must be proved that "no such attesting witness can be found" In other words, before a party can rely u
exhaust all process of the Court
16, rule 10, C P. C for the arre
property. *Shahzadi Begam* v
Cas 756 = A I R 1928 Pat 356
(who was a marks-man) denie
dead or for some other reason no. ... where
attesting wi
one attesting
dispute as
charge the
A. I. R 1
writing of o
A mor
execution.
he denies execution, ...
has been admitted before the Registrar, the Court of fact can consider it *Lalurai* v. *Kamalja*, 1924 Nag 367. Sections 68 and 69 of the Evidence Act read together were intended to lay down how a document which was required by law to be attested, if the provisions of the sections ... iment, in the absence of evidence to ... not the intention of the legislature that an
should have to prove further that th
mortgagor in the presence of at least
Munna Lal, 14 A. L. J. 1041 = 39 ...
comes to a finding as to a document having been legally proved within the meaning of this section, it cannot be legally interfered with by the appellate Court, specially when no objection was taken to the admissibility of the document at the time of the hearing *Monch Konda* v. *Alcha Allalasuram*, 32

witness is S
Chiranji
... ference to proving the attestation of at least one attesting witness when all the attesting witnesses are dead, are sufficiently complied with by proof of the handwriting of the scribe and by the fact that some of the attesting witnesses signed by the pen of the scribe *Krishna Jiu* v *Bishnath*, 34 A 615 = 10 A L J 217 All

as the document had been admitted by one of the executants in certain other document tendered in evidence and proved *Held*, that the evidence adduced did not comply with the requirements of s 69 of the Evidence Act and the document could not be taken to have been proved *Gobardhan* v *Hari Lal*, 11 A L J. 379 = 19 Ind Cas. 121 = .. A 561 In England, it is recognized that there is a distinction between proof of the handwriting of a person and presumptive and other evidence that a document had been executed The Indian Law does not appear to allow a party to rely on presumptive or other evidence

the attesting witnesses had been duly accounted for *Suamudin* v *Kaniz*, 11 Ind Cas 225, see also *Namperumal* v *Kaphara*, 14 L W 563 This section no doubt requires proof that the signature of the executant is in his handwriting, but this fact may be proved indirectly by a contemporaneous admission of execution made by an executant or by other relevant facts, such as his subsequent conduct, just as well as by the evidence of a witness who directly swears to his signature Such an admission recorded by the Sub-Registrar in his registration endorsement can be accepted in evidence as proof of execution *Ajudhia* v *Jagannath*, 20 O C 18 = 38 Ind Cas 605 In the expression "it must be proved that the attestation of one attesting witness at least is in his handwriting" "handwriting" could probably be held to include, in the case of marksman, his mark *Whitley Stokes*, Vol II p 894, see also *Pran Krishna* v *Jadunath*, 2 C W N 603

absence of the witness beyond the jurisdiction of the Court (*Mills* v *Twist*, 8 Johns (N. Y) 121], or his absence in a distant part of the country, are not sufficient *Mclord* v *Johnson*, 4 Bibb (Ky) 531 The absence of the witness is sufficiently accounted for if, after diligent enquiry, he cannot be found *Clark* v *Sanderson*, 3 Binn, Pa (192); *Cunliffe* v *Sefton*, 2 East, 182, *Crosby* v *Percy*, 1 Taunt 364, *Dudley* v *Summer*, 5 Mass 438, *Morgan* v *Morgan*, 9 Bing 359, *Evans* v *Curtis*, 2 Car & P 296, *Bright* v *Doe*, A & E 22; *Whitelock* v *Musgrove*, 1 C & M 511 What is due diligence must, of course, depend somewhat upon the circumstances of each case The proof should show satisfactorily that a reasonable, honest and diligent inquiry has been made After such proof is given, the decision of the question depends to a considerable extent upon the so
Burton 11 Johns (N Y) 64 Such
Twist, 3 J
witness, if
Jackson v
treated as p
What is sufficient proof of the search for an absent witness, in order to admit secondary evidence of the signature, depends somewhat upon circumstances. Where the witness has a fixed residence within the country the rule should be more strict than where the defendant had no fixed residence, was a labouring
ment.
to use
vs that
282
party,

0. or that suc , the rule will not be enforce es § 529; see al o *Thannesa* attesting witness must be pı d Cas. 637.

Witness' name unknown, through loss or Illegibility of Document. "It is clear that where the very name of the attestor cannot be ascertained, the attestor is unavailable for the purpose of furnishing his testimony. This situation occurs where the document is lost; here the proponet is exempt from producing the attestor [*Keeling* v *Ball*, Peake Add Cas 88; *Re Phibbs* (1917) p 93)]; unless of course the name has otherwise before trial become known to the proponent, for in that case his t the document before him, might document did or did not once exist

exists" *Wigmore* § 1314 The known but the person cannot *Giles*, 1 E & B 642.

Causes of unavaility—Illness—Failure of Memory etc When the attester is at the time of trial so ill or so infirm from age that it is impractic able, without ttendance in Court, his production Taunt. 16, *contra Harrison* v *Bh* far as it involves a mental disability organic in its nature, and analogous to insanity, should

tion purely as to the identity *Wigmore* § § 1315, 1316.

If the attestor admissible The interest. *Su re* has since become because it speaks as

70. The admission of a party to an attested document of its execution by himself shall be sufficient proof of its execution as against him, though it be a document required by law to be attested.

Admission of execution by party to attested document

Principle For the purposes of proof, a judicial admission of the opponent —i e an express agreement for the purposes of the trial—has the same effect as a

name. *Wigmore* § 1290

Scope of the relate to admissio p 891. The term party in the course by the a lmission o *Budha* v. *Sewan*,

evidently distinguished from the execution by witnesses, which is known as "attestation." *Jhama* v *Dechu*, 2 N. L. R 10 (16) "Section 70 of the Indian Evidence Act lays down that the admission of a party to an attested document of its *execution* by *himself* shall be sufficient proof of its execution as against
Now the question
s as to what is meant
on' there means the
assent to the contents
no this, there he admits
can be taken to mean
of assent by him, but
ent have been complied
arty admits execution
be taken to admit that
59 of the Transfer of Property
Bom L 1290 = 17 B 137 = 76 Ind,
7 C W N 263 So *section 70*
of the Evi
attestation
Transfer o:
endra v *Nitai*, 7 C W N.
Satishchandra Mitra v
Woodroffe J said "That
struct on that even when
of execution or signing
his be the meaning of that

ad to the
so indica-
law to be
441 = 44
Ind Cas 984, *Pabau Khan* v *Badal*, mat
Nanhi, 64 Ind Cas 11 = 19 A L J 855 ath,
3 Pat 317 = 74 Ind Cas 100 = 1923 P , 38
C L J 114 = 74 Ind Cas 178, *Aung Kin* v *Ma Aung*, 1 Rang 557, *Nageswar* v *Bachu*, 4 Pat L J 511 = 53 Ind Cas 79; *Priyanath* v *Bissessuar*, 1 C. W N ccxxii, *Dhanua Lal* v *Shambu*, 47 Ind Cas 9 But in a recent case the Judicial Committee of the Privy Council has held that this section
J *Hira Bibi* v *Ram Hari*, 30 C W
A L J 815 = 52 I A 362 = 2 O W
1144 = 42 C L J 148 = 98 Ind Cas
R 1925 P C 203 This section applies
Ma Po Gin v *Ma Hin Din* 5 Rang
v *Diva*,
an not
, 45 C
unless
Arjun
Chandra v *Kailash Chandra*, 36 C L J 373 The admission by a mortgagor of the execution of a mortgage deed before the Court does away with the necessity of proving its execution but not with the necessity of such attestation as is required by law *Pandurang* v *Balaji*, 14 C P L R 42 Under this section,
ufficient proof as against the
proposition that the document

4 Pat L J 511, *Nibaran* v *Ram Chandra*, 22 C W N 445 = 44 Ind Cas 984
document cannot be
nt of its execution
178 = 38 C. L J 114,

There was a clear *admission of execution in the written statement* The attesting witness called stated that the executant did not sign the deed in his presence *Held* that the document must be taken to have been proved. *Ramlal* v. *Mussi, Septi*, 94 Ind Cas 558 = A I R 1926 Pat. 295

Admission when to be made The term "admission" in this section relates only to the admission of a party in the course of a trial of a suit *Abdul Karim* v *Salimon*, 27 C 190 Such admission can be made by a party in his pleadings or in his examination *Rajmangal* v *Mathura*, 30 Ind Cas 576 = 38 A 1 = 13 A L J. 881; *Musst Sarja* v *Murlidhar*, 13 N L R 197; *Budha* v *Saruan*, 7 N

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pending before a Court of Justice, cannot be supported on principle or authority If authority were needed to refute such a proposition, I think authority may and can be found in the decision of their Lordships of the Privy Council in *Kunwar* C 241, in *Hampleton* v *Wallis*, *Gobordhan Das* v *Harilal*, 19 Ind my opinion an admission under hough it be an admission not made before a Court of Justice, but

1924 Rang 139 But in a later Patna case it has been held that this section relates to the admission of the party in the course of the proceedings in which the document is produced made either in the proceedings or in the evidence. *Banuari Prosad* v *Bigni Kuar*, 8 Pat L T 7 = 101 Ind Cas. 277 = A I R 1927 Pat 131; see also *Deorao* v. *Dhandirao*, 109 Ind Cas. 576 = A I R 1928 Nag 244; *Harilal* v. *Thakur Bag*, 19 O C 23 = 34 Ind Cas. 281 An admission can be made in a written statement *Ram Lal* v *Septi*, 91 Ind Cas 558 = A I R 1926 Pat 295 = 1926 P H C C 117, *Ayerati* v *Esmail* A I R 1929 Cal 449 = 49 C L J 347 But an adm... of execution of a document before a Sub Registrar does not amount ... which is the admiss on referred to in section ... *ihibkhan*, 93 Ind Cas 660 = 18 S L R 282 = ... *nuan*, 7 N L R 85.

... betan

the document need not in any manner evidence its execution. Since the p... tion of the attesting witness is required solely for the purpose of evidencing ... *Goodson*,

Wigmore § 1294

Execution not disputable—Because of opponent's claim under the same instrument Where the opponent's claim as expressly set forth in the pleadings ... very

attitude, he must relinquish the latter one; so long as the document ...

for his purposes, it is also (so far as he is concerned) genuine for the proponent's purposes. The execution thus not being disputable, the rule requiring the attesting witness to prove it does not apply *Wigmore* § 1297

Proof when attesting witness denies the execution

71. If the attesting witness denies or does not recollect the execution of the document, its execution may be proved by other evidence.

Principle The notion of the rule of Preference for the attesting witness is that of the general desirability, in furtherance of truth, of obtaining his knowledge on the subject What may be the tenor of witness's testimony, remains

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evidence the execution, the present rule says nothing about the consequences—whatever any other rule may say The present rule's force is absolutely spent when witness is produced for examination So the attestor's positive denial of the facts of execution, contradicting the statements implied or expressed in his attestation leave the proponent still free to prove by other testimony, if he can, the facts of due execution, a permission demanded not only by principle but also by policy in as much as the proponent might otherwise be defeated of his rights by a corrupt attestor *Wigmore* § 1302

Scope of the section The party seeking to prove an instrument may examine his witness as to the acts of execution performed, the date, the place,

15 Pick Mass 534 If a party, who calls a witness to prove a particular fact, be disappointed in the result of the testimony, it is competent for him to prove the fact by other testimony 3 *Stark Ev* 1692 If the subscribing witness fails to establish

attestation,

of law, not

testimony

534 In other words, the execution of the instrument, even though it be a Will may be established by competent evidence against the positive testimony of the subscribing witnesses *Matter of Gottrel*, 95 N Y 329 The party who would establish a deed must lay his ground work by the production of the subscribing witnesses if th hey fail to establish the execution of it, positive rule of the law, is not to be c be permitted to establish

attestation or not *Nort Ev* 254 When in a mortgage suit is was found that one of the attestors was dead and the other either denied or did not recollect the execution of the document, the execution of the same can be proved by other evidence *Lakshman* v *Gokhul*, 1 Pat 54=(1922) Pat 415=70 Ind Cas 298 A statement of the attesting witnesses to a mortgage deed that they signed the blank paper and not the completed deed is sufficient to attract the operation of this section and entitles the mortgagee to prove execution by evidence other than that of the attesting witnesses *Dinabandhu* v *Sanatan*, 48 Ind Cas 624 "If one of two or more attesting witnesses being called, denies or does not recollect the execution of the document it is not very clear whether other evidence can be given to prove it, if there be another attesting witness alive, subject to the process of the Court and capable of giving evidence,

71. who is not produced" *Field Ev 7th Ed* 227. It is not intended by enacting this section to depart from the rule of English law that the evidence of the other witnesses should not be introduced unless the absence of the other attesting witness is satisfactorily explained in the case where one of the two attesting witnesses has been called and has denied execution. *Ayenanti* v *Mahammad*, 49 C L J 347 = A I R 1929 Cal 44. So other evidence under s. 71 cannot be admitted where provision of s 68 have not been complied with. *Banwari* v *Gopi*, A I R 1931 All 411 = 1931 A L J 312.

given false testimony ... ill which was attested by four witnesses, two of whom had died and the other two deposed practically in favour of the objector, *Mookerjee* v. *Breachcraft JJ* observed. "This however, does not compel the Court to pronounce against the Will It was ruled ... in the case of *Nubo Kishore Dass* v *Joy Doorga Dassee*, 22 W R 189, that the mere fact that attesting witnesses to a Will have repudiated their signatures, does not invalidate the Will, if it can be proved by evidence of a reliable

consideration the circumstances of the case and judge from them collectively whether the requirements of the statute were complied with; in other words the Court may, ...
of the case ...
evidence is o...
Court and ...
the Will ...
also *Re Sweet*, (1891) P 400; *Re Owens*, 29 L R Ir 451 So the ...
of a document is not necessarily at the ...
v. *Anjumanunnissa*, 48 Ind Cas 53 ...
19 Ves. Jr 494, 507, *Lord Eldon* said

namely, that the party did not execute it." *Per Lord Kenyon, C J* in *Ley* v *Ballard*, 3 Esp 173 note "The attesting witness's testimony is not indeed conclusive for the party may go on to prove him untrustworthy and may call other witnesses to prove th...
v *Harringworth*, 4 M. & ...
Glascock, Skinn 413; *Austin* ...
N P 264, *Richie* v *Oatfield*, ...
v. *Bradbury*, Buller N P 26...
hands, it was objected he ...
if you call one w...
he prove against yo...
him to call other ...
Wigmore § 1302.
absence of recolle...
evidence *Sheik K*...
Balram v *Kamal*...
347 = A I R 1929 Cal. 141. See also *Coles* v *Coles*, L. R. 1 P. 70; *Bowman* v

S.

v. *Hodgson*, L. R. 1 P. 362; *Dayman* v. *Dayman*, 71 L. T. 699, *Pilkington* v. *Gray*, [1899] A. C. 401; *Goodison* v. *Goodison* (1913) 1 Ir R 219 Where the attestor denies attestation and the other attestors are dead, what is required under s. 71 is only pro ... he presence of attesting witnesses. *Lalla* ... *cari* v. *Sankar Dayal*, 74 Ind. Cas. 969 ... positive and there is nothing to throw d... ected. *Wyatt* v. *Berry*, (1893) P. 5; Phip. Ev. 502. Where the only living attesting witness of a document was illiterate and on being examined denied execution. *Held*, that the document could be proved by other evidence *Babu Prashad* v. *Gambhir*, 29 Ind. Cas. 500 A ... at the time of its ... *Gouri Shankar*, 39 I ... witness is considered hostile by the party taking his stand on the document, does not relieve him from the duty of examining him as a witness *Golanda* v *Pulin* 31 C. W. N 215 · *Tula Singh* v *Gopal Singh*, 1 P L J 369 If he denies the execution, other oral evidence is admissible to prove execution *Basdeo* v. *Rasthbehari*, 104 Ind Cas 344; *Lakshman* v *Gokul*, 1 Pat 151; *Sashi Mukhi* v. *Monmohi* ... n v *Krishna Ji*, 29 Bom. L R. 1425 = 105 ... er is not bound to call a hostile attesting witness ... *Belbin* v *Skeats*, 1 S & T 148; Phip Ev. 502.

...

obviously cannot excuse, for it cannot be ascertained except after production to testify.—When it appears after such production, other principles come into play, (a) the witness may adopt his attesting signature as record of past recollection, and upon the faith of it verify the facts of execution as thus known to him ... be otherwise ... of execution; ... ay be proved by other qualified persons *Wigmore* § 1315 The first question is, may not the attestor, though not actually recollecting the circumstances, adopt his ... e his testimony on the faith ... had he not witnessed the ... Recollection *Vide* s 159 ...

circumstances of the execution ... prove the facts of execution by other witnesses Because "it could never have ... xecuted, when- ... attending the ... ill, not because ... e requisites of the law, but because they would most likely prove or disprove them, and

...

since th... they ar... are circ... ation al... *praesumuntur rite esse acta*. ...

71. *Lindley L*
sion, in a sh
of acting on
reasonably be
when the e consistent with that intention
effect in a p all due formalities
can only b maxim is not wanted
where such such observance is
disproved. The maxim only comes into operation there is no proof one way or the other, but where it is more probable that what was intended to be done was done as it ought to have been done to render it valid, rather than that it was done in some other manner which would defeat the intention proved to exist, and would render what is proved to have been done of no effect" See also *Cooper* v *Beckett*, 3 Curt 648=4 Moo P C 419, *Wright* v *Sanderson*, (1884) 9 P & D 149, *Lloyd* v *Roberts* (1858) 12 Moo P C 158 The presumption app more or less force according to the circumstances of each case
Vennicoi (1890) 15 P. & D
170 (184
probate
and if
the Will has been duly executed, probate
Hemangini, 4 C W N 204, *Anna Cholam* v *Ramasuamy*, 30 M L
(P C)=20 *Blake* v *Blake* (1882) 7 P & D 102
Hotker L J Will has
been in doubt
sign, the fact
the Court to come to the conclusion that they
Blake v *Knight*, 3 Curt 547, *In re*
the recollection
Woolmer v.
Daly, 2 Lah 773 The same other documents
required by law to be attested One of the attesting witnesses A to a mortgage bond deposed that he was present, saw the execution and became an attesting witness, the other witness B stated that at the request of the mortgagor, he became an attesting witness but had no recollection of any other circumstances in connection the execution of the document On the same day, when
the documen identified, the executant
who, in his Held
that the infer
laid down in
38 C L J 1
principle applicable to cases of this character
Jogendra Nath v *Nitai Charan*, 7 C W N 384, by the *Allahabad*
in *Ram* v *Munnalal* 39 A 109, *Uttam Singh* v *Hukum Singh* 39 A. 162.
and by the Madras High Court in
it might
of the

upon the face of the
signature of the testator at the foot, as also the subscription
It was ruled by *Dr Lushington*, that, in the absence or death of witness
prima facie the presumption is that the testator signed in the joint presence
of the two persons and they This principle was
applied by the Allahabad Hig where
reference was made to *Wright*
followed, as based on sound
mentioned before. Reference may
in *Blake* v *Blake*, 7 P. D. 102; *Harris*
v. *Peverett*, (1962) P 205. No doubt
(1915) 1 P 211, the que
stances, and cases are con
inference by reason of
were not in contemplation of

Proof of document not required by law to be attested.

72. An attested document not required by law to be attested may be proved as if it was unattested.

Principle and Scope This section embodies section 37 of Act II of 1855. For a long time it was held that when a document was attested, one at least of the attesting witnesses must be produced *Doe* v *Durnford*, 2 M & S 62. In *Wardell* v *Fermour*, 2 Camp 282, 284, *Lord Ellenborough* said that "it did not depend on the nature of the deed to be proved, it must depend upon the possibility of procuring the attendance of the attesting witness, not upon the testimony he is likely to give" See also *Hughes* v *Dixon*, 2 Stark 180; *Streeter* v. *Barlett*, 5 C B 562 But as this worked great hardships to suitors the Common Law Procedure Act 1854 (17 & 18 Vict C 125, s 26) and the Indian Evidence Act of 1855, introduced the present reform this practice *Nort. Ev.* 255 Those Acts restricted the rule to documents required by law to be attested. *Re Rice*, L R 32 Ch D 35. In England the Common Law Procedure Act, has been replaced by Stat 28 & 29 Vict C, Ss 1, 7 So now in England, an attested document, to the validity of which attestation is not by law necessary may be proved by admission or otherwise as if there were no attesting witnesses. This rule is applicable also to Ireland *R* v *Mallon*, 12 Ir C L R 55 This

Identity of Party and document. In order to prove a document the identity of the writer or marksman with the defendant or other person alleged to have signed the document, may have to be given *Phip Ev 7th Ed* 504 In *Newson* v *Luster* 13 Ill 175, *Trumbell J* said "I have no hesitation in holding that proof of the handwriting of the grantor to a deed furnishes altogether more satisfactory evidence of its execution than would proof of the handwriting of the subscribing witness" The identity of the party may be proved by showing that he had spoken of the … & P 613) or by proof of similar … n, especially if the name be unc… B 861, *Simpson* v *Dismore*, 9 M & W 47); *Phip Ev 7th Ed* p 504 The identity of the document, whether attested or not, may also have to be shown, *e g.*, when the defendant, pursuant to notice, produced a document which the plaintiff denied to be the contract in question, parol evidence was received to determine the point *Fraude* v *Hobbs*, 1 F & F. 612; *Phip Ed 7th Ev* 504

Comparison of signature, writing or seal with others admitted or proved

73. In order to ascertain whether a signature, writing or seal is that of the person by whom it purports to have been written or made, any signature, writing or seal admitted or proved to the satisfaction of the Court to have been written or made by that person, may be compared with the one which is to be proved, although that signature, writing or seal has not been produced or proved for any other purpose.

The Court may direct any person present in Court to write any words or figures for the purpose of enabling the Court to compare the words or figures so written with any words or figures alleged to have been written by such person.

*[This section applies also, with any necessary modifications, to finger impression.]

* *This paragraph was added to s. 73 by the Indian Evidence Act, 1899* (5 of 1899).

73 Principle In proving a document o . evidence offer themselves, first testimony b or some circumstance of the kind of hand second mode there is a ... based on comparison, ...

tribunal directly ...
Wigmore § 1996 ...
to afford a fairly trustworthy inference, must of course be genuine, and they ... also be numerous and representative enough to serve as an adequate basis for inference to the general style *Ibid*

Scope of the Section By section 45, handwriting and signature of a person can be proved by an expert Section 47 admits the opinion of any person, acqu ... is supposed to be writt ...
In addition ...
under ss 45 and 47, ...
with an undisputed one ...
in dispute it to be co ... by the party to be genuine ... comparison is the more satisfactory. If it be proved genuine to the satisfaction of the Judge, with whom the ... *Ridgway*, 1 F & F. 270), the compa ... Times 223) A party may und ... purpose of comparison (*Doe* v *Wil* ... be less satisfactory, as a person ... writing with the very view of defeating a comparison. *Cobell* v. *Kilminster*, ... could only be made between the disputed ... the cause But the present ...

Nort Ev. ...
doubted in ...
have decl ...
admission ...
comparison with the ...
standard must be proved ...
"The difference between letters which have been received in correspondence ... a witness's hand" it was argued in *Mudd* v *Suckermore*, 2 P & D ... a witness

in a condition cal
selected or even
Best Ev § 238
in *Mud1 v Suckermore*, (1836) 2 P D O 20, the inconvenience of collateral issues already exists where a witness speaks to the genuineness of handwriting from an impression derived from a letter he has received The correctness of this knowledge depends on the genuineness of that letter, and even where he says he saw the party write, his knowledge depends on the issue whether or not he did see the party write As to the second objection *Mr Best* says "It is not always easy to obtain fair specimens, and should such be produced, it would be competent to the opposite party to encounter them with true one" *Best on Ev* § 238. Concerning the third objection, *Mr Best* says "It does not seem satisfactory logic to protect a jury which can read from availing themselves of that means for the investigation of truth because other juries might, from want of education, be disqualified from so doing; if some men are blind, that is no reason why all others should have their eyes put out." *Best on Ev* § 238 This last argument against jurors loses all its force in India in as much as no civil cases are tried here by jurors and a few important criminal cases only are tried with the help of
are literate
by compa-
by juxtaposi-
mind of the
witness on the other, it has been pointed out in the latter case the characteristics of the standard are indistinct, shadowy and uncertain, while in the former they appear in

paper in
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held that
cause) "has been that the standard writing must be one used in and connected with the case But how can this be held necessary when we look at the object of the standard It is of no consequence what the writing you compare is; all you want is a genuine handwriting, and it is as respects the nature of the evidence not material what instrument it is, nor whether the paper be blank in all except the signature, nor whether the writing be connected with the case or not."

In England the controversy was set at rest by the enactment of Stat 17 & 18
which allow comparison of hands
y laws as well as under this
ear, first, that any writings, the
not of the jury, but of the

4 F. & F 490),
Muk, 4 C & P
any one, the J
Fussell, 3 F & F
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3. them, the jury may compare them as well as any body else and any two people may think differently" *Per Yates J.* in *Bgookbond* v *Woodley*, Peake N.P 21 Note Similarly in *Doe* v. *Suckermore*, 5 A & E 749, *Denman L C J* said "If the proved document and the controverted are both in Court, and the witnesses speak to their resemblance or difference from immediate observation, they seem to perform a task for the jury which every one of them, even though illiterate, might well perform for himself" So it is clear that on principle, comparison by a lay witness should not be allowed, even in the presence of the tribunal. But this rule does not apply in the case of an expert witness, because "he does what possibly the jury may be incompetent to do" *Ibid*; *Wigmore* § 1997 The question of comparison of signature is distinct from question of admissibility *Khyiruddin* v *Emperor*, 53 C 372=92 Ind. Cas 442=27 Cr. L J 266=A I R 1926 Cal 139 The word "purports" in this section does not limit the scope of the section to such documents only as are signed or contain some intrinsic statements of the identity
by a party to be in the handwriting of
proof be campared with other writing
satisfaction of the Court to have been made or written by that person *Veera Raghava* v. *Souri Aiyanger*, 35 M L J 608=41 Ind. Cas 688=24 M L. T 477. In delivering the judgment in the case the Court observed "This case turns
solely on the r
Evidence Act.
Kumar v *Empe*
Batchelor JJ i
are inclined to
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ascribed by the prosecution to a particular
person, then the
regard to the adn
disputed writing,
have been written or made by the accused *Emperor* v. *Ganpat Balkrishna*, 14 Bom L R 310=15 Ind Cas 649=13 Cr. L J 505 But in *Barindra Kumar* v *Emperor*, 37 C 467=14 C W N. 1114 at p 1138, *Jenkins C J.* said "In applying the provisions of section 73 of the Evidence Act it is important not to lose sight of its exact terms It does not sanction
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times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as

might be derived from the arguments of counsel and the evidence of experts. **S.**
In *Sreemutty Phoolee Bibee* v. *Gobind Chunder Roy*, 22 W. R. 272, it was said by the Court that 'a comparison of signature is a mode of ascertaining the truth which ought to be used with very great care and caution.' In this case no expert has been called to assist the Court, and not because no expert was available; there is, it is well known a Government expert as to handwriting and certain of the documents in this case bear a stamp which shows that they have been submitted to him. It is true that the opinions of experts on handwriting meet with their full share of disparagement at times, but at any rate there is this use in their employment that the appearances on which they rely are disclosed, and can thus be supported or criticised, whereas an opinion formed

[illegible] And [illegible] distin- [illegible] C. 516, [illegible] See also [illegible] 30 Nag. [illegible] is one [illegible] o other [illegible] inot be [illegible] proof alone. [illegible] nd Cas 741;

[illegible] ne purpose of comparison of handwriting under this section it is his duty, under section 298 of the Criminal Procedure Code to find whether these documents are admitted or proved The record of the case should contain a note of such finding. *Queen-Empress* v. *Tulsaji*, Rat. Un Cr C 491; *Queen Empress* v *Lalsing*, Rat. Un Cr C 152. But in a trial by jury, where the Judge allowed certain documents to go upon the record, which were not proved under the requirements of s 73 of the Evidence Act, for the purpose of comparison with the disputed handwriting, *held* that there was no such irregularity of procedure as to warrant an interference in revision Whether the documents were proved or not, it was for the jury to decide *Queen-Empres*

[illegible] 98. The Court has [illegible] genuine signature to come to a conclusion *Gondu* v *Tulsiram*, A I R 1930 Nag 27.

English law and origin of the ru [illegible] except when the witness wrote the [illegible] its nature comparison;—it being the [illegible] comparing the writing in question [illegible] some previous knowledg (*Doe* v *Sukermore*, 5 A & E 731, *per Patteson J*), the law until the year 1854, did not allow the witness, or even the jury except under *certain special circumstances*, actually to compare two writings with each other, in order to ascertain whether both were written by the same person *Taylor* [illegible] ule excluding proof of the hand-writing by [illegible] The first was the case of a document [illegible] tent for the Court and jury to compare the [illegible] in the case for other purposes, and which were admitted or proved to be in the handwriting of the supposed writer *Best. Ev* § 239, *Griffith* v. *Williams*, 1 C & J 47; *Doe d Perry* v *Newton*, 5 A & E 514. The case of *Perry* v *Newton, supra*, decided by the Court of King's Bench in 1836, is always cited as the leading case to support this exception, although the exception did not arise in the case at all On the trial of an

[illegible]

jury, that they might compare them with the signature in the will. The letters were not in evidence for any other purpose. The Judge *refused to allow them* to be put in, and on appeal the full Court sustained the ruling. *Lord Denman*

3. C. J. said: "This is a point on which we ought not to raise any doubt... The comparison is unavoidable. There being two documents in the cause, one of which is known to be in the handwriting of a party, the other alleged, but denied to be so, no human power can prevent the jury from comparing them with a view to the question of genuineness; and therefore it is best for the

persons acquainted with the handwriting of the supposed writer, either by having seen him write or by having held correspondence with him, the law, acting on the *maxim lex non cogit impossibilia*, allows other ancient documents, which are proved to have been treated and regularly preserved as authentic, to be compared with the disputed one" *Best on Ev.* § 240; *Roe* v. *Rawlings*, 7 East. 282 (n); *Doe* v *Tarer*, R & M. 141; *Doe* v. *Davies*, 10 Q. B. 314; *Moorewood* v. *Wood*, 14 East. 327; *Barr.* v. *Harpar*, 1 Holt 420; *Brune* v. *Rawlings*, 7 East. 282; *Crawford and Lindsay Peerages*, 2 H. L. C 557; *Solita* v. *Yarrow*, M & R. 133, *Bromage* v *Rice*, 7 C & P. 548. With these exceptions comparison was not allowed in England. *Macpherson* v. *Thoytes*, Peake N. P. 29; *Brookford* v. *Woodby*, 9 Peak. N P 30; *Garrels* v. *Allexander*, 4 Esp. 29; *Brookford* v. *Woodley*, 9 Peak N P. 30, *Gancols* v. *Abuandro*, 1 Esp. 37. In *Engleton* v. *Kingston*, 8 ... I never heard of evidence in ... those who had never seen ... equently received

of the jury to prove comparison of metropolis the jury are composed ... conclusions from such evidence. For my part, I have always been inclined to admit it, and shall do so in this case." See also *Rivett* v. *Braham*, 4 Term. R. 497, *King* v *Cator*, 4 Esp 117

The subject at last came before the Court of King's Bench in the well known case of *Mudd* v. *Suckermore*, 5 Ad. & E. 703 In that case the Court ... dmissibility ... years after ... dissenting ... "Compari- ... ion of the ... s; and such ... submitted

... whose handw- ... calling on ... reception of ... ch compari-

sons were not allowed in India *Annagurubili* v. *Kristnasuami*, 1 M. H. S. C. R. 457.

In 1865, Stat. 28 & 29 Vict. C. 18, was passed, section 8 of which runs as follows : "comparison of a disputed writing with any writing proved to the satisfaction of the Judge to be genuine, shall be permitted to be made by witnesses ; and such writings, and the evidence of witnesses respecting the same may be submitted to the Court and jury as evidence of genuineness, or otherwise, of the writing in dispute" Section 1 of the same Act provides that the above enactment, in common with certain other clauses relating to evidence,—shall apply to all Courts of Judicature, as well criminal as all others, and to all persons having, by law or by consent of parties, authority to hear, receive, and examine evidence, whether in England or in Ireland" *Taylor* § 1869 The Indian Evidence Act found place on the Statute Book in 1872.

Comparison of writing etc, meaning of All evidence of handwriting, except where t
comparison of h
ness entertains,
mind, derived from some previous knowledge of the hand *Woodward J* in *Travis* v *Brown* 43 Pa St 12 (Am) But this is not what is properly known as comparison of handwriting "By comparison is meant," says *Starkie* "a comparison by the juxtaposition of two writings, in order by such comparison, to ascertain whether both were written by the same person" *Stark Ev Part IV p 654* "Comparison of handwriting is where other witnesses prove a paper to

mind, as an external visible and tangible object is distinct from a mental impression or memory. It is the distinction between what is objective and what is subjective *Woodward J* in *Travis* v *Brown*, 43 Pa St 12

The genuineness of the standard Wherever proof of handwriting by
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In a
oversy

record, is presumed to be genuine, and may be used as a standard without further proof *Saute* v *Dawson*, 2 Mart 202 (Am) "When the identity of anything is fully and certainly established, you may compare other things with it which are doubtful, to ascertain whether they belong to the same class or not, but when both are doubtful and uncertain, comparison is not only useless as to any certain result, but clearly dangerous, and more likely to bewilder than to instruct the jury." *Per Coulter J* in *Depue* v *Place*, 7 Pa St. 428 (Am) A document to be admissible against an accused person should be proved to be a document

3. in the handwriting of an accused person by comparison with an admitted or proved specimen of his handwriting, in the light of the testimony of expert witness *Pulinbehari* v *King Emperor*, 16 C. W. N 1105=16 Ind Cas. 257, *Queen-Empress* v. *Tulsaje*, Rat. Un Cr. C. 491.

...tographic copies of ... admitted signature ... 94 C A. Such copies are secondary evidence *Ibid* But it is held in *Massachusetts* that magnified photographic copies of the signature in dispute and of admitted genuine signatures of the same person are admissible in evidence when accompanied by competent preliminary proof that the copies are accurate in all respects except as ... are capable" said *Merrick J.* "of affording some ...

glass ... mark ... not ... tion ... admi ... prop ... accuracy of the copies produced by the art of the photographer, we are unable to perceive any valid objection to the use of such proposed representations of original and genuine signatures as evidence competent to be considered and weighed by a jury" *Marcy* v *Barney*, 16 Gray, 160 Letter press copies might under some circumstances be useful as well as the originals, or in default of them *Wigmore* § 2019.

... Any person whose handwriting is in ..., may be required by the Judge to write in ... may be compared with the document in question *Doed Devine* v *Wilson*, 10 Moo P C 50?, 503; *Cobbett* v. *Kilminster*, 4 F. & F. 490; *Taylor* § 1871 To prove the handwriting of a person in a particular document a party may ask the Court to have the handwriting of that person to be taken in Court for the purpose of comparison The result of the ... of an issue arising in the case and is quite ... of the question of admissibility or otherwise of ... hin the province of the jury and not of the Judge *Khyiruddin* v *Emperor*, 42 C L J 504

...

J. 79; *Basqit* v *Emperor*, 6 P 304=104 Ind. Cas 626, *Emperor* v. ... 46 M. 715=69 Ind Cas 374.

Comparison of handwriting—Value of A comparison of handwriting is at all times as a mode of proof hazardous and inconclusive, and especially when it is made by one not conversant with the subject and without such guidance as might be derived from the arguments of counsel and the evidence of experts. *Sarajini* v. *Hari Das*, 26 C W. N 75, *Balakram* v *Md Said*, 77 Ind Cas. 872. In *Phoode Bibee* v. *Gobind Chunder Roy*, 22 W. R 272, it was said by the Court ... the truth which ought ... *peror*, 76 Ind. Cas. 4-5, ... comparison of writings has consequently been deemed a mode of ascertaining truth which ought to be

used with very great caution (*Nalin Krishna* v *Rasik Lal*, 10 C 1047 (1051), and S.
2) = 16 W. R. P C 16), specially
comparison. *R* v. *Silverlock*,
516; *Doe* v *Suckermore*, 5 A &
4 M I A 67 = 7 B L R 216 =
1 = 20 I A 95; *Ambika Charan*
Galstun v *Sonatun*, 78 Ind.
R 520, *Abdulla* v *Ganni*, 11 B
... *man* v *Gurish*, 9 W. R 150.
dissimilarity of signatures, a
particular signature is not
the signature, yet resemblance
... genuine *Sarojini* v *Hari*
Das, 26 C W. N 113 = 34 C L J 373, *Balaku* v *Parmesuar*, 64 Ind Cas.
, there is room for suspicion that
re.
, tu-
ally written in the ... The
character of a person's signature is generally of uniform appearance, and the
... person is thus
signature of a
person is such a
facsimile that one is a perfect match to the other in every respect There
is generally diversity in the marks of the pen, the size of the letter, the level of
the signature and space it occupies, that stands as a guard over the genuine
signature and ... *Sarojini* v *Hari Das*,
supra, see al ... ut as was observed by
Coleridge J in ... test of genuineness
ought to be ... some other specimen
or specimens but to the general character of the writing which is impressed on
...
or position, as for instance the writer sitting up or reclining or the paper being
placed upon a harder or softer substance, or on a place more or less inclined—
nay, the material as pen, ink etc, being different at different times are amply
sufficient to account for the letters being made variously at the different
times by the same individual Independently, however, of anything of this
sort few individuals, it is apprehended, write so uniformly that dissimilar
formations of particular letters are grounds for concluding them not to have
been made by the same person" *Galstaun* v *Sonatun*, 78 Ind Cas 668 = A I.
R 1925 Cal 485

PUBLIC DOCUMENTS.

Public documents.

74. The following documents are public documents.—

(1) documents forming the acts or records of the acts—

(i) of the sovereign authority,

(ii) of official bodies and tribunals, and

(iii) of public officers, legislative, judicial and executive, whether of British India, or of any other part of Her Majesty's dominions, or of a foreign country,

(2) public records kept in British India of private documents.

74. Scope of the section This is important because certain m documents as distinguished from It is not always easy to deter private document In *Sturla* v *Freccia*, 5 App Cas. 623, the question arose as regards the meaning of the word 'public documents". In delivering the

in the c 12 Cl & F 641. Now m which it goes is, that it should o by a public officer I do n f meaning of the whole world. I think an entry in books of a manor is public in the sense that it concerns all the people interested in the manor. And an entry probably in a corporate book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer I understand a public document there to mean a document that is made for the purpose of the public making use of it, and being able to refer to it It is meant to be where there is a judicial or quasi-judicial case with the Bishop acting under the be said to be quasi judicial He is but I think the very object of it m purpose of being kept public, so th acce term and the pape Mun Royal proclamations, and all other acts of State *Powell Ev* 248 In this connection it should be borne in mind that the term 'public' as applied to documents is used in English l the statements contained in as a form of testimony, eithe persons, of the facts stated therein mean that the document is one of those, originals of which are kept in some

strangers must be a register abduction document persons of Evidence only in the second sense All descriptions of public documents have characteristic, that they are kept in some special custody and provable by means of a copy without production of the original *Wills Ev. 2nd Ed* 407 A public document is one prepared by a public servant in the discharge of his public official duty. The mere fact that it is kept in a office does not lead to the inference that it is a public document *Madhab Din* v. *Karar Singh*, 107 Ind.

Cas 618 = A. I. R. 1928 Lah. 640; see also 105 Ind. Cas. 353 = A. I. R. 1928 Nag. 93. Where a letter received from the Comptroller of the Military Accounts in reply to the warrant of attachment acknowledging the same was relied on to prove knowledge of the judgment-debtor as regards the existence of the decree, held, that the letter was a public document under s 71 of the Evidence Act and that the same, did not require proof. *Sheikh Elu* v. *Hira Lal*, A I. R. 1928 Oudh. 488. If the law requires that ... Revenue record, such pedigree in the Revenu ... A. I. R. 1928 Lah. 211 = 103 Ind. Cas. 182. Da ... 98 Ind. Cas. 471 = A. I. R. 1927 All 52. C ... Deputy Collector under s. 40, Bengal Tenancy ... 1926 Pat. 436 = 95 Ind. Cas 966. Registers ... Act, ... gisters ... 5 Ind. Cas. 955; 69 Ind. Cas. ... and death nor porcha slips ... 22 C. W. N. 822; 17 Ind. Cas 82.

Acts or Records of the Acts In ...

... any other officer furnishes for the information of the Public Prosecutor? It is true that the police officer acts in performance of a statutory duty, but section 74 makes no distinction between such acts and other official acts" When a Civil Surgeon reports to a Magistrate as to the age of a person he is merely giving his expert ... ct in official capacity for the use ... onsequently such a document ... *Saadat Ali* ... 1 Luck 733 = 108 In ... mentioned ... in th ... om acts of ... prep ... es not make a distinction betw ... *aiya* v. *Government* ... L J ... of Posts and Telegraphs notified that stamps ... be issued to Post Offices for sale to the public was not an 'act' or 'record of act' of a public officer ... the meaning of this section *Velayudam* v *Emperor*, 1929 M. W. N. ... Ind. Cas 509 = 30 Cr L. J. 483.

Statutes and state papers. Statements and recitals of public nature contained in public statutes; Royal proclamations [*R.* v. *Sutton*, ...

74.

Radcliffe v. *Union Ins. Co*, 7 Jones. 38; *Talbot* v. *Seeman*, 1 Cranch. 1, 37, 38); or Parliamentary Journals as to all matters properly before either house are public documents. *Phip. Ev. 7th Ed. 324.*

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. and written statement
certified copy of the
ocument whereas the

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nature, that they can be proved by copies to the same extent as records, and are subject generally to the same rule of evidence Indeed, henceforth, for the sake of convenience, the general term "re
all the documents just mentioned
record of another Court may be pr
Chief Baron Gilbert: "Records,
justice, to which every man has a c
transferred from place to place t

or accounted for like any other document *Bayley* v. *Wylie*, 6 Esp. 85.
although in strictness
of records for all Courts
orary removal was by

S.

Case, 5 C
proceedin
Writs of
be proved by actual production, though after their return, they become matters of record, and are consequently provable by copies B N P. 234 With respect to writs of summons under the Rules of the Supreme Court, they may
copies by the
be lost, by
se documents
they relate.
R. v. Scott, L. R 2 Q. B. 415=45 L J. M C. 259. The pleadings in an action

forth; and so much so that a party cannot be admitted to plead that the things
record, as long
solute verity."
by a decision,
m v. Gooroo,

the identity of the person who gave the deposition. Brajaballav v. Akhoy, 30 C W N 254=93 Ind Cas 15 Proceedings of a Court of Justice may be

I R. 1931 All. 487=A.

S. 75 76.

Private documents.

75. All other documents are private.

Private documents ... classed as *Public* i e ... *Private* i e as to their u... document *Phip Ev* ... ments are private docun... contract, memorandum, l... of the private document ... must be produced ... *Jones* § 201. An abstract statement prepared by a patwari even though bas... on papers in his possession and filed in a suit is only a private documen... *Sheo Das* v *Sheo Dayal*, A I R 1930 All 712 = 128 Ind Cas 770

Certified copies of public documents

76. Every public officer having the custody of a publi[c] document, which any person has a right t[o] inspect, shall give that person on demand [a] copy of it on payment of the legal fees therefor, together with [a] certificate written at the foot of such copy that it is a true copy o[f] such document or part thereof, as the case may be, and such certificates shall be dated and subscribed by such officer with his name and his official title, and shall be sealed, whenever such officer is authorized by law to make use of a seal, and such copies so certified shall be called certified copies.

Explanation. Any officer who, by the ordinary course of official duty, is authorised to deliver such copies, shall be deemed to have the custody of such documents within the meaning of this section.

... document ... has a right ... There is no ... in British ... ular cases. *Field Ev 7th Ed* 232. In England, the right to inspect public documents varies ... inspect many ... is section saves ... refuse to show ... 257, *Taylor* ... clude all such ... on the ground of state policy ... Bom L R 236 ... of the judgmen... the document" ... looked from ou... a judgment in a criminal case *Ladli* v *Emperor*, A I R 1931 All ... A L J. 405 As ... right to inspect and take copies, vide the ... the *Criminal* Procedure Code (Act ... *of 1908*), the Administrator Genera... Act (VII of 1913), the Oudh Land Revenue Act (XVII of 1867), etc

It might have been supposed that, for the lawful custodian of documents in official custody, an authority could be im... of his office, to furnish copies that should be ... must be the lawful custodian of the particu... of course exist at the time of certifying ... whose office had expired ... no properly certif... authority test ... ; this custody, however enaul...

him to speak, not merely to the correctness of the copy, but also to the existence and genuineness of the original. The great obstacle, to the use of a register as evidence of a record of private deed, was the registrar's inability to speak to the genuineness of the deed, and special means to qualify him in this respect had to be provided. This obstacle does not exist for an official record, for it is originally prepared and thereafter preserved in the office, and although it may S.

of Bengal is a public document, within the meaning of s 74 of the Indian Evidence Act. Any person is entitled to inspect the same and to obtain certified copies thereof under this section, interest for the protection of Bostab, 8 C. W N. 125 = 31 C R. 38 Ch. D 92; *Rex* v allows certified copies to a p *mar* v *Fazal*, 84 Ind Cas 487; see also *Bank of Bombay* v

inspect public documents is, however, assumed, in s 76 of the Evidence Act It may be inferred that the Legislature intended to recognize the right generally for all persons, who can show that they have an interest for the protection of which it is

Lah 605.

77 Such certified copies may be produced in proof of the contents of the public documents or parts of the public documents of which they purport to be copies

Proof of documents by production of certified copies

ace een as for others to use the would be a constant additional wear and tear upon the document *Wigmore* § 1215 The usual mode of proving the record of another Court is by production of a certified copy But the copy is not produced in such cases because it is better evidence than the original, it is received only on the ground of convenience, as a substitute for the original record The reception of a copy avoids the inconvenience of removing the original record from place to place *Bullow* v *Thomas*, 19 Gratt 14, 18 For reasons similar to those applicable to judicial records, documents belonging to any public office need not be proved, but may be otherwise proved Their removal for production in evidence would delay, and hinder the official use of the files, would make it impossible for other persons to consult

7 the absent documents, would subject them to risk of loss, and would injure them by constant wear and tear. *Wigmore* § 1218; *Per Lord Mansfield* in *Jones* v *Randall*, Cowp 17; *Per Lord Ellenborough* in *Hennel* v *Lyon* 1 B & Ald 182 184, *Per Lord Abinger* in *Mortimer* v *M'callan*, 6 M & W 58, 69; *Per Pollock C B* in *Doe* v *Roberts*, 13 M & W. 523, 530 Now a paper offered as a copy but not supported by any person's testimony in Court is a hearsay—i.e., extra-judicial statement—obnoxious to the *Hears y* [illegible] be called to the stand to verify the paper [illegible] A paper offered anonymously as a copy, or offe [illegible] to verify it, is inadmissible But there are exceptions to the Hearsay rule under which copies made by specific classes of persons may be admitted Under the exception for official statements, copies made by officers lawfully authorized to give copies—i e, examplified, certified, attested, or office copies are receivable *Wigmore* § 1281 The reason for the exception is thus stated by *Buller J* " Here a difference is to be taken between [illegible] person trusted for that purpose, for there that [illegible] copy given out by an officer of the Court w [illegible] which is not evidence without proving it actually ex [illegible] difference [illegible] any purpose, the law must [illegible] *Trial at Nisi Prius by Buller* [illegible] stark 8; *Appleton* v *Braybr* [illegible] his custody of the original; [illegible] ly to the correctness of the [illegible] genuineness of the original *Wigmore* § [illegible] to the Hearsay rule the principle of [illegible] isfied The *Necessity* principle is satisfied by the fact that the certifier cannot be called to testify to the genuineness of the copy without great inconvenience and loss to public departments.

Scope of the section " In this section the term used is 'may' This, then, is one and usually the most convenient, mode of proof of public documents The [illegible] f proof If then [illegible] shou [illegible] in e [illegible] orig [illegible]

Pea [illegible]

[illegible] does make copies admissi [illegible] *Faxel*, 84 Ind Cas 487=2 [illegible]

rate It contains particulars of the area and of the land in respect of which the rate is due It is a public document within s 74 of the Evidence Act The *porchas* distributed to the cultivators are also public documents If produced in original the *jamabandis* do not require to be further proved The contents of the *jamabandi* could also be proved by the production of certified copies furnished as provided by ss 76 and 77 of the Evidence Act *Umrao Singh* v *Ram Singh*, L R 3 A 356 (Rev)-1 U P L R (B R) 26, see also *Ramlal* v, *Ghasiram*, 71 Ind Cas 825

Proof of other official documents

78 The following public documents may be proved as follows —

(1) Acts, orders or notifications of the Executive Government of British India in any of its departments, or of any Local Government or any department of any Local Government,—

by the records of the departments, certified by the heads of those departments respectively,

or by any document purporting to be printed by order of any such Government

(2) The proceedings of the Legislatures,—

by the journals of those bodies respectively, or by published Acts or abstracts, or by copies purporting to be printed by order of Government

(3) Proclamations, orders or regulations issued by Her Majesty or by the Privy Council, or by any department of Her Majesty's Government,—

by copies or extracts contained in the London Gazette, or purporting to be printed by the Queen's Printer

(4) The Acts of the Executive or the proceedings of the Legislature of a foreign country,—

by journals published by their authority, or commonly received in that country as such, or by a copy certified under the seal of the country or sovereign, or by a recognition thereof in some public Act of the Governor-General of India Council

(5) The proceedings of a municipal body in British India —

by a copy of such proceedings certified by the legal keeper thereof, or by a printed book purporting to be published by the authority of such body

(6) Public documents of any other class in a foreign country,—

by the original, or by a copy certified by the legal keeper thereof, with a certificate under the seal of a notary public, or of a British Consul or diplomatic agent, that the copy is duly certified by the officer having the legal custody of the original, and upon proof of the character of the document according to the law of the foreign country

78. 1 Official Printed copies. There is no reason why an officer may not be authorised to give printed copies as well as written copies, nor has there been . . . can not be said of an office. An ... le; but the official printer's authority though a general one, is express rather than implied. The objections that have been made in connection with the use of printed copies have chiefly had their source, not so much in a doubt of any of those principles, as in the difficulty o ... be an official one. ... printed copies of ... reason for their correctness is thus stated by *Tilgham C. J.* in *Biddis* v. *Jones*, 6 Binn. 326: "Confidential persons have been selected to compare the copies with the original rolls and superintend the printing." The most frequent application of the principle, however is, to the evidencing of the statute law domestic and foreign. Upon the theory of Judicial Notice, no evidence of domestic law need be offered.

P. L R. 1909.

Clause (1) ... because "such th ... act of Parliament

... far, then, as the proceedings of the Legislature are relevant to be proved, the journal is admissible. If the proceeding, for example, consists in the receipt or acceptance of a report or a petition, the st ... port or petition may be inadmissible; but the fact of its ... may be relevant, and therefore may be evide ... 1662. Under this clause, the text of an ... be taken to be the authorized text of the Act ... Cas. 316; *Subramania* v. *Shanmugam*, A. I ... *Bhagat* v. *Rupkishore*, 77 Ind. Cas 409. As regards the value of *Hansad* report, *Vide The Englishman* v *Lajpat Rai*, 37 C. 760 = 14 C. W. N. 713.

... authoritative mea... ... the same case *Buller J.* added: "The gazette, which is published by roy... authority is admissible to prove any thing done by his Majesty in his character of King or which has passed through His Majesty's hands." In the same case also *Lord Kenyon L. C. J.* observed: "That the gazette is evidence of many

acts of State is
of subjects . . .
acts of state, a
admitted that the
Cockburn, 5 Esp 234; *Vanoneson* v. *Dorwick*, 2 Camp. 41; *R.* v. *Gardner*, 2 Camp. 513; *Att. Gen* v. *Thealstone*, 8 *Price* 92; *Bradley* v. *Arthur*, 4 B. & C. 301.

Clause (4) Depositions in a foreign Court are public documents *Hara-nand* v. *Ramgopal*, 4 C. W. N. 429=27 C. 639 P. C.; see also *In re Rudolph Stalman*, 15 C. W. N. 1053.

Na . . . Cas. 643.

Clause (6).
such as was in
ment, is no suffi
existence of an
purports to testify. Such evidence can be manufactured without any great difficulty and the Courts must be on their guard against its acceptance unless under proper tests
(1897—1901) Vol
the Native State o
Shamsher v. *Moh*
this clause are ver
is the Political Agent of the Government of India. [illegible] *Krishnabai*, 28 Bom. L R. 1225=50 B. 716=A. I. R. 1927 Bom. 11.

PRESUMPTIONS AS TO DOCUMENTS.

Presumption as to genuineness of certified copies.

79. The Court shall presume every document purporting to be a certificate, certified copy or other document, which is by law declared to be admissible as evidence of any particular fact and which purports to be duly certified by any officer in British India or by any officer in any Native State in alliance with her Majesty, who is duly authorized thereto by the Governor General in Council, to be genuine:

Provided that such document is substantially in the form and purports to be executed in the manner directed by law in that behalf.

The Court shall also presume that any officer by whom any such document purports to be signed or certified, held, when he signed it, the official character which he claims in such paper.

Presumptions as to documents. Section 79 to 90 deal with certain presumptions as to documents All these presumptions are based on the ancient and well known maxim *omnia praesumuntur rite esse acta.* (All acts are presumed to have been done rightly and regularly). *Co. Litt. 6b*: 332. The rule is applicable to public and official acts as well as to ancient deeds and private

9. acts Where the acts are of an official nature or require the concurrence of official persons, a presumption arises in favour of their execution. In these cases the ordinary rule is *omnia præsumuntur rite et solemniter esse acta donec probetur in contrarium* (Co Litt 232· *Van Omeron* v. *Dowick*, 2 Camp 44; *Doe* v *Evans* 1 Cr. & M 46)—everything is presumed to be rightly and duly performed until the contrary is shown. *Per Story J. in Bank of United States* v *Dandridge*, 12 Wheaton (U. S) R 69, 70; *Davies* v. *Pratt*, 17 C B 183; *Broom's Legal Maxim* 723 Upon the same principle proceeds the rule that deeds, wills and other attested documents which are more than thirty years old, and are produced from the proper custody, prove themselves and the testimony of the subscribing witnesses may be dispensed with, although of course it is of the Broom's But in whereas In the whichever Cun, 290= 6 Bom L R 750, *Raghunath* v *Hol Lal* 1 A L J 121 (123) The presumption mentioned in this clause is rebuttal, a *presumptio juris et de jure* (974)=3 Cr L J 32 The word " construed in more rigorous of th *Muhammad* 110 P L R 1902; *Ramien* v *Verappa*, 11 M L T 69 there is no a fact," a presumption is option left to the Court, given to disprove it, and t evidence if he can Sections 79 to 90 contain the principal presump regards documents Of course certain presumptions as regards documents may also be raised under section 114 [*Vide* s, 114 (ills i)]

to do it *Harri* presumption that his duty *Per* *Coleridge J* in *R.* *ton* v *Roberts*, does not arise official acts and latter deals with former, taking t the acts until the to office may be has acted in an official capacity *Berryman* v *Wise*, 4 T R, 366; *R* v *Gordon*, 1 Leach 515, *R* v *Verelst*, 3 Camp 432, *Marshall* v *Lamb*, 5 Q. B 115, *Plumer* v *Briscoe* 11 Q B 46

suspected that some one personated G, and that his signature is forged ... send to Chambers for the original examination, otherwise the copy so attested

and delivered, must be received and relied on" The same rule is applicable to certificates and other documents as well Certificates and other documents

signature and the seal (where a
Field Ev 7th Ed 141 So if a duly
of a lease in official custody, had
have been necessary of the signatures or handwriting of those Commissioners
i officers signing it, such a
wing an official act done by
produced from proper custody

having been made competent eviden
necessarily dispensed with, such
to a copy Com v Richardson, 142
raising this presumption is that suc

ed by law in that behalf The
to prove the certificate of registra
ed under this section *Muhammad*
v *Sohara* 71 Ind Cas 805 But this presumption does not arise where sanction under s 196 Cr Pro Code is signed by the Deputy Secretary instead of by the Chief Secretary as required by that section *Md Oxullah* v *Beni*, 36 C L J 180=26 C W N 878=56 C 135 It is doubtful whether this section is applicable to copies given before the passing of the Indian Evidence Act *Julir Ali* v *Rajchunder*, 10 C L R 469 (476)

who

s rate and I cannot say
ce acting
drawn?
ryman v
f all peace officers justices
that they acted in these
characters without producing their appointments Similarly in *Mc Gohey* v *Alston* 2 M & W 206 *Baron Parke* said The rule is that all public officers

en of most
accompani

been made by the proper officer

80. Whenever any document is produced before any Court, purporting to be a record or memorandum of the evidence, or of any part of the evidence, given by a witness in a judicial proceeding or before any officer authorized by law to take

Presumption as to documents produced as records of evidence

80. such evidence or to be a statement or confession by any prisoner or accused person, taken in accordance with law, and purporting to be signed by any Judge or Magistrate, or by any such officer as aforesaid, the Court shall presume—

that the document is genuine; that any statements as to the circumstances under which it was taken, purporting to be made by the person signing it, are true, and that such evidence, statement or confession was duly taken.

es sanction to the maxim *omnia præ-*

regular. *Lawson Pre. Ev.* Rule 10. is a degree presump- .. *Ev* 261.

Scope of the section. The statement as to which this section says that certain presumpti accordance with tl kind of evidence. case of certain operate to render

omits to claim so, does not arise copy should als in a specified proceeding.

106=33 C. W. N. 1131=119 Ind. Cas. 193=A. I. R. 1929 Cal. 617 (F. B.)

deposition preclude the presumption that the copy is a true copy. *Soraoju v. Mata Din*, 7 O. L. J. 542=60 Ind. Cas. 437.

of recording depositions P. Code and in criminal of Order 18, runs as evidence of each witness the Court, by or in the endence of the Judge, ut in that of a narrative, e of the Judge to the same, and shall sign it" down in a language different from that in which it is given, and the witness does not understand

S.

the language in which it is taken down, the evidence as taken down in writing shall be interpreted to him in the language in which it is given." As regards the effect of non compliance of the formalities laid down in these two sections,

5 C 825=

tes to the

the point

were not

But it is

is not read

over to the witness in the presence of the Judge Upon that it is argued that the deposition is not legally a deposition at all and the Judge was wrong in allowing

the cases

Emperor,

interpreted

he conten-

tion advanced, unless the rule laid

for instance, *Empress* v *Jogendra Nath* 42 C 240=18 C W N 1242 Speaking for myself, however, with great respect I am not sure that I clearly understand the principle of those decisions Under section 80 of the Indian Evidence

malities for these two rules renders the deposition inadmissible in evidence against the deponent on his subsequent trial for perjury Section 91 of the Evidence Act excludes the oral evidence of its contents *Emperor* v *Nawab Ali*, 51 C 236=25 Cr L J 1027=81 Ind Cas 803=A I R 1924 Cal 705, See

32, *Mohendro* v.

461=50 Ind.

31, *Kamatchi* v.

ess understands

ce is a sufficient

ad over by the

or 23 C W. N

he appears by

his section is to

give the witness an opportunity of correcting his statement *Ramdhani* v

R 393

Amrita

v *Sama*

C W N.

L J 811;

3=27 Cr.

Rahaman,

ence Act

ce should

of them

being that the Magistrate shall sign it only after it has been read over to th

0. witness in the presence of the accu[illegible] and the accused may have an op[illegible] *Emperor*, 12 Bur L. T 167=1[illegible] 506; see also *Ngai Sam* v *K. E*, U[illegible] the Criminal Pro Code does no[illegible] shall be taken and attested by the Magistrate in the presence of the accused What it provides is that the deposition, if so taken and attested, may be put in evidence in the Sessions trial Therefore, that the deposition was taken and

[illegible]

Lah 632=125 Ind Cas 892=31 P L R 472=A. I. R 1930 Lah 714

Confession of accused taken in accordance with law A confession by an accused recorded by a Magistrate is admissible under this section, even though the Magistrate who recorded it, ultimately came to the conclusion that he had no jurisdiction to try the case *Emperor* v *Banko Behary*, 10 C P L R Cr 16 If, when a document is tendered in evidence at a trial purporting to be a confession of the accused, it is found to contain the memorandum required by s 164(3), a presumption arises under this section that all the necessary formalities purporting to have been performed have in fact been performed and the document is admissible in evidence without further proof If, however the memorandum does not appear or is defective the document is inadmissible [illegible] by the exam nation of the Magistrate who

[illegible]

such a defect would be curable If the explanation had not in fact been [illegible] the statement could not be held to have been duly made and s. 533 cannot be [illegible] 1925

[illegible]

Cas 257=23 Cr. L J 673, *Queen Empress* v *Sundar Singh*, 12 A [illegible] R. 261 Confessional state- [illegible] Section 80 of the Evidence [illegible] nfession [illegible] So far [illegible] the pre- [illegible] respect of the document purporting to be a confession of the accused. *San Baw* v *Crown*, 1 L B R 340 (F. B.), see also [illegible] Magistrate during the course [illegible] red by s 164, cannot be [illegible] made. *Emperor* v *Radhe*, 7 C. W. N. 9 [illegible] be made under the section [illegible] in which it w[illegible] A Magistrat[illegible] whether a co[illegible]

Section 80 of the Evidence Act, expressly provides for proof of the document, distinguishing it from a record of evidence as well as s. 533 Criminal Procedure Code. *Lalu* v *Empress*, 2 P. R. 1894 Cr. **S.**

Dying declarations. A dying declration is not admissible in evidence without proof that the deceased actually made the declaration Even if it bears a Magistrate's attestation it is not admissible under s. 80 where the Magistrate was not the committing Magistrate The person who took the statement should be subject to cross-examination as to the dying man's state of mind when he made it, and as to other circumstances. *Reg* v. *Fala Adiji*, 11 B H C 247, see also *Hasim* v. *Empress*, 9 P R 1900 Cr. = P L. R 1900 p. 49 When a dying declaration has appended to it a
deponent and declared to be
recorded the statement, s. 80 of
circumstances under which it is stated to have been taken are true, the investigation by the Magistrate being a judicial proceeding *In re Karrupan Samban*, 16 Cr. L. J. 759 = 31 Ind Cas 359

Previous admission Before a previous admission can be used against a party it must be put to him and an opportunity afforded to him to explain it if it is capable of explanation *Maryam* v *Nagina*, 12 Lah L J 161

Presumption as to Gazettes, newspapers, private Acts of Parliament and other documents

81. The Court shall presume the genuineness of every document purporting to be the London Gazette or the Gazette of India, or the Government Gazette of any Local Government, or of any colony, dependency or possession of the British Crown, or to be a newspaper or journal, or to be a copy of a private Act of Parliament printed by the Queen's Printer, and of every document purporting to be a document directed by any law to be kept by any person, if such document is kept substantially in the form required by law and is produced from proper custody.

Principle The intolerable inconvenience of having to prove the genuineness of printed matter purporting to be published by the Government has led tc
porting pub-
constantly

concerned

superintend
the printing The object of this provision was to furnish the people with authentic copies; and from their nature, printed copies of this kind, either of public, or private laws, are as much to be depended on as the exemplification verified by an officer who is the keeper of the record I am for admitting the printed copies authorized by the Legislature, either of this or any other state, whether the law be public or private" But the question whether the copy of a Government Gazette or any other publication can be treated as evidence of the contents of the original is not one relating to proof of documents but to the

81. admissibility of the secondary evidence *Jeremiah* v. *Vas,* 36 M 457 = 12 Ind Cas 961.

Gazette s an authoritative m In the same case B ority is admissible to g or which has passe *rial,*

burn, 5 Esp 234; *Att-Gen* v *Theakstone,* 493, *R* v *McCarthey,* (1903) 2 Ir R 146 nce Act, 1868, s. 2 amended by the Documentary Evidence Act, 1882, s 2, the Gazette any proclamation, order, or regulation issued by or any principal department of State See also *I..* *Exparte French,* 52 L J Ch 48; *Exparte Learoyd,* 10 Ch D 3; *Exparte Geisel,* 22 Ch D 436; *Boaler* v *Power,* (1910) 2 K B 229 C. A *Van Omeron* v *Dowick,* 2 Camp 44, Stat 31 & 32 Vict C 37, ss 2, 5 But the entire gazette must be produced *Rex* v *Lowe,* 15 Cox 286. Under the provisions of this must be presumed, though it is not *p* v *Emperor,* 7 Lah L J 264 = 88 1078 – A I R 1925 Lah 299 In

Gazette print

v *Emperor,* A I R 1931 Lah 273 = 32 Cr L J 1227.

Newspaper Printed matte marks of authors resting upon s substan of writi printin

copy and the one read by the same press i e. the defen 15 M & W. 319, 336, *A* whether there is reasonable

for genera blic at large would in one or have no same type

such provi ration of Books Act (XXV of 1 British Ind ment may,

to the
publishe
506=12
the new
presump
purport.

"It is contended that under section 81 of the Evidence Act, the Court is bound

include a presumption

document purport-

to public documents, but it is very doubtful whether the language of the section supports it It the punctuation may be taken to throw any light on the . the word 'journal' is against the

'newspaper or journal'
question further, as I am of opinion that the presumption of the genuineness of a newspaper does not inclu
published by the person by w
the English Law According
tion of a d of
was publ the
accused t In
Gathercole v. *Miall*, 15 M & W 319' *Parke B* was of opinion that as the defendant had been proved by t
publisher of the paper,
to the one produced in
defendant According to section 7 of Act XXV of 1867, the production of an
prove
ial to
quire
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Act
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mous
statement *Beua Sarup* v *Emperor*, 88 Ind Cas 22=7 Lah L J 261=26 P L R 566=26 Cr L J 1078, but see *Ram Chandra* v *Emperor*, A I R 1930 Lah 371=31 Cr L J 168

Presumption as to document admissible in England without proof of seal or signature

82 When any document is produced before any Court, purporting to be a document which by the law in force for the time being in England and Ireland, would be admissible in proof of any particular in any Court of Justice in England or Ireland, without proof of the seal or stamp or signature authenticating it, or of the judicial or official character claimed by the person by whom it purports to be signed, the Court shall presume that such seal, stamp or signature,

2. is genuine, and that the person signing it held, at the time when he signed it, the judicial or official character which he claims,

and the document shall be admissible for the same purpose for which it would be admissible in England or Ireland

Origin of this section. This section consolidates ss 9, 10, 11 of Stat 14 & ... ute runs ... fter to be ... Court of ... signature

extent and for the same purposes in any Cour
any person having in Ireland by law and
receive and examine evidence, without proof o
authenticating the same, or of the judicial
appearing to have signed the same." Section 10 runs as follows "Every

shall be admitted in evidence to the same extent and for the same purposes in any Court of Justice in England or Wales or before any person having in

in any Court of Justice of any of the *British Colonies*, or before any person having in any such colonies, by law or by consent of parties authority to hear, receive, and examine evi
authenticating the same,

Ibid) So British Colony included British India But section 11 of Lord Brougham's Act was repealed in India by the Indian Evidence Act section 2 and schedule and from the Statute Book by Statute Law Revision Act of 1874 The Indian Evidence Act has repealed section 11 above but has given effect to the object of that section by enacting this section

Scope of the English law There are many instances where records are kept by persons occupying public office, or engaged in occupations of a public nature. These records, though somewhat similar in kind to those of which the Court may take judicial notice, do not usually have a sufficient degree of publicity to bring them within the limits of that class of matters. They are however, deem
admissible if
a person having
readily discove
of duty also enters into the case Usually the person keeping the record is under some obligation, official or otherwise to keep them, and this brings them close to those entries in account books which are admitted because made in the regular course of business, pursuant to duty The application of this exception to the hearsay rule in the early cases caused the admission of acknowledgment of deeds made before a Court of record, enrolments of deeds, fines and recoveries, and many records of similar nature *Stuart* v *Williams* 1 Salk. 280 *Lynch* v *Clerk*, 3 Salk. 154 It is necessary conditions to the

admissibility of a public record or document that it shall have been intended to S.

this exception. He says at page 214: "What a public document is within that rule, is of course, the great point which we have now to consider.... I do not think that 'public' is to be taken there as meaning the whole world. I think an entry in the books of a manor is public, in the sense

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...must be a

...ink that

d be made for the purpose of being

it may have access to it afterwards."

nt even by the Common Law of England was by means of examined copy, that is, a copy taken on behalf of the party, generallly by some clerk or other private persons, who produces it in the witness box and proves that he has copied it accurately from, or examined it

parties authority to hear, receive and examine evidence, provided it be proved to

and burials which have been kept in pursuance of canon and statute law answer his description, [*Re Hall's Estate* (1852) 22 L J Ch 177; *Re Porter's Trusts*, (1856) 25 L. J. Ch 688]; but it seems doubtful whether it could be held to

beneficial effect of the enactments was much diminished In order to remove

d that—

ce any certi-

joint stock

or othe. ... of any document, bye law, entry in any reg... proceeding, shall be receivable in evidence of any p... or either house of ... judicial proceeding, ... they respectively ... and signed, as signed, or signed ... without any proof directed by the ... the signature or ... n appearing to have signed the same, and ... every case in which the original record coul... in evidence." The general result of these two Statutes seer... and ... tion ... the ... doc... the ... *Ev* ... 14 ... L. R 2 C C 85 The re... of parliamentary ... poll books were provable und... 75 The bye-laws of a rai... 8 & 9 Vict. C 20, ss 108-111, ... the secretary of the company in whose custody they are ... As to proof of bye-laws *Counties*, 7 C B N S 58 = 29 L J M C 57 As to proof of bye-laws of a municipal corporation under Stat 45 & 46 Vict C 50, s 24, *vide* *Robinson v Gregory*, (1905) 1 K B 531 For a complete list of Statutes which contain provision making certified copies evidence, *vide Roscoe's Digest of the Law of Evidence, Eighteenth Ed* Vol. I pp 98 100 For an exhaustive list of documents which are provable in England by means of certified copies under particular Acts of Parliament *Vide* §§ 1602-1609 of *Taylor on the Law of Evidence*, *Wills on Evidence, 2nd Ed Appendix A* pp. 422-465.

Scope of the Section The object of this section is to give currency in the Courts of India to the presumptions which, with regard to certain classes of documents, are recognised in the English Courts Such documents are declared by the section to be admissible in India as they would be in England, and it is no more necessary in Indian Court, than it would be in an English Court to prove the seal or signature or to prove that the person signing held the office which he claims *Cun Ev* 11th Ed 175 The chief magistrate of the city of Glasgow being a person lawfully authorized to administer oaths, a declaration as to the execution of a power of attorney taken before him and authenticated by his certificate and the common seal of the city of Glasgow and by a Notorial certificate is sufficient proof of the execution *In the goods of Hend*... the declarations purport to have been made under ... Will IV C 62); se... 567; *In the goods* ... *In the goods* ... *goods* ... *s of William* ... *of Hen*... *nina Hinde,* ... *Cornell* ... a deceased, *Ibid* ... n appointed ... application must be refused *In the goods of* ... delivering the judgment *Norris J* said 'Section 85 of the Evidence Act provides that the Court shall presume that every document purporting to be a power of attorney, and to have been executed before and authenticated by a Nortary Public or any Court, or Judge, Magistrate, British Consul of Vice-consul, or Representative of Her Majesty or of the Government of India, was so executed and authenticated. This power of attorney is not executed

before or authenticated by any of the persons mentioned in the section, and in order to comply with the provisions of the section, the power of attorney
of those persons Therefore
It is submitted that *Norris*
Section 85 of the Evidence
acilities to prove powers of
attorne than that allowed by that
section
Court

to have been executed in

been held in Calcutta that, in as much as the execution is not proved in the manner indicated in section 85 of the Evidence Act, the application for letters of administration ought to be refused (*In the goods A J Primorse*, 16 C 776) In arriving at this decision, *Mr Justice Norris* seems to have assumed that the provisions contained in section 85 is of an exhaustive character and no other mode of proving the execution of a power of attorney is admissible That assumption however, is, in my opinion, not w

not to apply to affidavits
prescribed by the statute of
oath I am of opinion that
I am told
to receive
But certi-

and section 35(5)
N 355 = 13 M L
T 385 = 24 M L J 517 = 19 Ind Cas 452

83 The Court shall presume that maps or plans purporting to be made by the authority of Government were so made, and are accurate, but maps or plans made for the purposes of *any cause must be proved to be accurate.*

Presumption as to maps or plans made by authority of Government

Principle The general ground of reception is that such documents contain the results of inquiries made under competent public authority and concerning matters in which the public are interested *Phipson*, 313 The very office of a surveyor is to run lines and establish boundaries for the purpose of applying the terms of grants and patents and thus of perpetuating the settlement of boundaries, it is therefore a nat
authority to make a written
maps are admissible in evidence

be so. The fact does not of itself prove any title, but only that the person fills the office."

3. *Per Patteson J* in *Bouley* v. *Barness,* 8 Q B. 1037. The well-known maxim of *omnia præsumuntur rite esse acta* applies

Scope of the section :
purporting to be prepared
9 M L T. 415 This sectioi
of a private map If such
depend upon the relevancy of the map in relation to the question in controversy *Shib Charan* v *Nil Kantha Mahato,* 16 Ind Cas. 747=17 C. L J 612. In the absence of evidence to the ... may be properly judicially received in ... *Gyua* v *Ma Nque,* 2 L B R 56 A ... in the ... the silted bed of a ... 83; but it is a ... before it can be ... 23 C 385 In a ... valuable evidence which should be conside
Ranee v *Gireedharee,* 20 W
ment, while in charge of
only that of a private prop
a presumption of the acci
574; *Ram* v *Bansidhar,* 9
making a *thak bust* map
what lands were *debutter*, but only to lay down and to map boundaries, *held* that this map could not be treated as raising a presumption of correctness within this section, on the question as to the amount of *debutter* land in one of the villages mapped Where statements as to what lands were *debutter* appeared on the face of the map to have been made as pointed out by agent on behalf of the proprietor of the mouzah and the principal tenants, in the presence of the agent of the holders of
section has not the
v *Lalon Mont,* 18 C 2
accuracy of drawings and measurement It has no reference ... 25 W R 179.

must be presumed to be accurate under this section. *Rahimatullah* ... *of State,* 113 P L. R 1913=112 P W R ... 18 Ind. Cas. 799 No presumption of accuracy can
within this section *Madhabai* v *Gagan*
section a *thakbust map* must be presumed
22 W. R 519, see also *Photal* v *Ranee,* 19 W R ...
Government survey map having been prepared does not affect the presumption of accuracy, under this Act of an earlier superseded map. *Joggessur Singh* v. *Bycunt Nath,* 5 C. 823=6 C L R 519 A copy of a map prepared by an Amin employed by Government,
for possession It was adm
ultimately rejected by him,
was made by the High C

as correct when made *Gopal Lal* v *Mariamunnissa,* 84 Ind. Cas. 435=A ... 1924 Pat. 719 The signature of a revenue-surveyor on a thakbust map signifies

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not that the thakbust map is correct, but that the demarcation boundaries laid down in the course of thakbust survey have been correctly picked up on the [illegible] e survey map *Sashibhusan* v. [illegible] =83 Ind Cas 205 There is [illegible] no preference over a *Thak* map. [illegible] agree, where they differ, the one that more nearly agrees with the [illegible] land marks is the one which should [illegible] incumbent upon the [illegible] may, if it considers the [illegible] rvey map *Maharaja of Cooch Behar* v *Raja Mohendra Ranjan*, 66 Ind Cas 923; see also *Abed Hossein* v. *Doneuny*, 6 C W N 629, *Bum* v *Ichambit*, 20 W R 14, *Kanab* v. *Gopinath*, 13 C L J 625 (632), *Amrita* v *Sheraudlin*, 19 C W N 565 (576) But where the Thak proceedings and the decision of a dispute took place in the presence of the predecessors of the parties to a suit, that map must be treated as valuable evidence in this suit between the successors of the persons who were present *Maharaja of Cooch Behar* v *Raja Mohendra Ranjan*, 66 Ind Cas 923; see also *Surja Kanta* v *Sarat Chandra*, 18 C W N 1281 P C, *Dunne* v *Dhanan* [illegible] a *Sudan* 2 W R 210; *Gunga* v [illegible] W R 179, *Nobo* v *Gobind*, 9 C L [illegible] *lal* v *Kuan*, 7 C W N 819 The tha[illegible] the state of things at the time th[illegible] they show conclusively what was the state of things at the time of permanent settlement *Secretary of State* v *Hazed Ali* 65 Ind Cas 867, *Jagadindra* v *Secretary of State*, 7 C W N 193 P C, see also 20 C W N 1028; 35 Ind Cas 132 Presumption both as to physical features and to statements as to possession may be made from kistwari map 64 Ind. Cas 326

The question whether a map is a public document within s 74, Evidence Ac. [illegible] in [illegible] the [illegible] state, is a [illegible] ion has no [illegible] 3=10 Ind [illegible] ortion of a [illegible], *and the* [illegible]

the Government, acting not in its sovereign capacity, but as the land lord of *certain holding is admissible in evidence, if not under this section, under* section 13 of the Act *Upendra* v *Chairman of the Calcutta Corporation*, 16 C W N 116 [illegible]

received in evidence as correct when made *Jagadindra Nath* v *Secretary of State*, 30 C 291=7 C W N 193=5 Bom L R 1; see also *Satcouri* v *Secretary of State*, 22 C 252, *Maung Than* v *Maxxan*, 44 Ind Cas 247, *Syama Sunderi* [illegible] 784; [illegible] *n* v. [illegible] V. [illegible]

s. 13 when it is not known whether they were acted on for the pur[illegible] of re[illegible]tion proceeding or if in fact reliance was placed upon them by

& the purpose of
5. Ind Cas. 85 = A
without enquiry
be placed on it
C L. J. 319
ment on which
evidence, there
such matters as to which it is admissible in evidence *Secretary of State for India* v. *Ananda Mohan*, 31 C L J 205; see also *Naresh Narayan* v *Secretary of State*, 71 Ind Cas 1048 = 32 M L T 162 = 50 C 446 = 45 M L J 444 = 28 C W N. 453 P. C, *Haridas Acharyya* v *Secretary of State*, 43 Ind. Cas 361 = 26 C L J 590 = 22 M L T 438 = 20 Bom L R 49 (P. C), *Secretary of State* v *Kalika*, 15 C L. J. 281.

Presumption as to collections of laws and reports of decisions.

84. The Court shall presume the genuineness of every book purporting to be printed or published under the authority of the Government of any country, and to contain any of the laws of that country,

and of every book purporting to contain reports of decisions of the Courts of such country.

Principl
ness of print
to a general c
publications
stantly issued
however, are
to be printed
original, and secondly, the presumption of genuineness of a particular printed document purporting to be of such official origin The two questions are seldom separated, either in decisions or in statute; a sanction of the former principle has usually been regarded as carrying with it a sanction of the latter also" *Wigmore* § 2151

Scope of the section The words "any country" are wide enough to

as section 38 reports of cases recognised by the Courts of a country will be evidence; and be relevant and receivable *Nort Ev* 202; see also notes under section 38.

Presumption as to powers-of-attorney

85. The Court shall presume that every document purporting to be a power-of-attorney, and to have been executed before, and authenticated by, a notary public, or any Court, Judge, Magistrate, British Consul or Vice-Consul, or representative of Her Majesty, or of the Government of India, was so executed and authenticated.

Principle. The genuineness of certain purporting official seal impressions need not be evidence otherwise than by the production for inspection of the document bearing them. What is the significance of this rule? What is it that Courts actually do, evidentially, when they accept such seals with *no further* evidence? When a document bearing a purporting official seal—a notary's

certificate to a power of attorney, for example—is offered in Court the accept- S

ocument purports to be
net result of the first three
ry, did make this written
and the document was
merge (i e the purport-
ing J S'
ly in the case of a
seal that
and yet another
person n
third elements are
always judicially united, i e any presumption of genuineness, whenever made covers both elements Hence, in effect, the situation, for seal or signature alike, is reducible to the following elements and is so in practice treated (1) that there is an official of that name (2) (3) that this document was genuinely executed by him Now the remaining element (4) that this hearsay statement of his is admissible, is obviously concerned with the Hearsay rule

Of these, the elements (2) and (3) are obviously pure questions of authentication, i e, the acceptance of the document signifies that we have somehow assumed that this document was genuinely executed by one J S What is the true nature of the process? Is it the process of Judicial Notice? It is some-

soon as the party alleged by counsel that J S had executed an alleged document, the Court must notice that as a fact, and no production of a purporting seal or signature would be necessary; but this is obviously not the practice Further more it is conceivable that a Court might judicially know what the design of a certain public seal was but this would not of itself enable the Judge to declare that the specific impression offered in Court was genuine or forged It would seem, then, that what is actually done is not done by virtue of any doctrine of jud
cient
The
of an
this may well serve as sufficient evidence because the forgery of the seal or signature would be a crime, and detection would be fairly easy and certain On the other hand the element (1) noted above, namely that J S who has thus genuinely executed this document is the official that he purports to be, is a real result of the principle of Judicial Notice This element is wholly separable from that of the authenticity of the paper *Wigmore* § 2161

and authentication of a power-of attorney when such execution was done before and authentication was done by any of the officials mentioned in this section. The section is an extension of the provisions contained in the Registration Act, with reference to powers of-attorney executed for the purpose of procuring the registration of conveyance or other such instruments *Cun Ev 11th Ed* 178 Where a power of-attorney was neither executed before nor authenticated by any persons mentioned in this section, letters of administration to the estate of a deceased
the goods of
execution a
not exhausti
16 C 776

5. been executed before, and authenticated by, a Notary Public, is produced before the Court, an affidavit of identification as to the person, purporting to make the

. the goods
is admis
genuine-
for, the
III, rule
Ind. Cas
England
ed by his signature alone without
ıds of Bridoon, Nov 19th 1899, per

ıe term "power of attorney' is given
the *Indian Stamp Act*, "power-of-attorney" includes any instrument (not chargeable with a fee under the law relating to Court fees for the time being in force) empowering a specified person to act for and in the name of the person executing it So a power or letter of attorney is a in such case is called the attorney of a t, in the stead of another; as to person; transfer stock or give possession upon a deed of feoffment It is either general or special, i e, general in respect of the conduct of all affairs of a person, as where he leaves the country; special in respect of any one or more named matters, as to receive money This instrument gives the attorney authority to act in his name exactly as the party giving it would himself do until revocation *Bank of Bengal* v *Ramanatham*, 43 C 527, *Venkataramana* v *Narasinha*, 38 M 134—24 M L J 180=1913 M W N 72=18 Ind Cas 137; *Permanand* v *Sat Prasad*, 33 A 487=19 Ind Cas 617 (F B), *Reference under the Stamp Act, s 46*, 15 M 386, *Rughu* v *Ramchunder*, 10 W. R 39=11 B L R 55 (F. B), *Jogi* v *Mohammad*, 80 Ind Cas 467, *Bryant* v *Banque du Peuple*,

the power of attorney was a proper power under s 33 of the Registration Act. Section 34 of the Registration Act imposes upon the registering officer the duty of enquiring as to the due execution of the document, and by s. 35, he registers the document on being satisfied as to the various particulars mentioned, so that when th
tion of *omnia*
in his procedu
v. *The National*
v *Jamal*, 28
375=27 C W N 437 P C; *Kristonath* v *Brown* 14 C 176; *Jambu* v *Muhamad*, 42 I A, 22=37 A 49=19 C W N 282 As regards deposit of original instruments creating powers-of-attorney; *Vide* section 4 of the Powers-of-Attorney s Act (VII of 1882) Powers of attorney should be strictly construed. *Krishna* v *Tribhuban*, 114 Ind Cas 305=A I R 1929 Oudh 12, *Bank of Bengal* v. *Ramanathan*, 43 C 527=13 I A. 48

Notary Public In the interests of commerce the rules of evidence have been so extended that the acts of notaries public in the discharge of their duties under the law merchant are judicially noticed in all Courts, and their proper official acts under the law merchant are *prima facie* sufficiently authenticated
ooke v *Brooke*,
n of a notary to
d I not affect

S.

Ineff, 24 L J Ch 120, under s 138 of the Negotiable Instruments Act (XXVI of 1881) the Governor General in Council is authorized to appoint notaries public within any local area and by s 139 of the same Act power is given to the same authority to make rules for notaries public

Presumption as to certified copies of foreign judicial records.

86. The Court may presume that any document purporting to be a certified copy of any judicial record of any country not forming part of Her Majesty's dominions is genuine and accurate, if the document purports to be certified in any manner which is certified by any representative of Her Majesty or of the Government of India *[in or for] such country, to be the manner, commonly in use in that country for the certification of copies of judicial records

†[An officer who, with respect to any territory or place not forming part of Her Majesty's dominions, is a Political Agent therefore, as defined is section 3, clause (40), of the General Clauses Act, 1897,‡ shall for the purposes of this section, be deemed to be a representative of the Government of India in and for the country comprising that territory or place.

Principle The theory of judicial records is that the judgment roll, as finally made up embodies in itself alone the entirety of the controversy as adjudicated, and thus supersedes the miscellaneous mass of oral and written pleadings, motions, and orders, which have gone to make up the proceedings *Wigmore* § 2450 The doctrine about producing the original of a document, or d when the original is not of the original judicial

under the Great Seal of a State in as m proof than inspection, the seals of state of other nations which have been recognized by their own sovereign *Greenleaf Ev* 479) They may be authenticated by a copy, proved to be a true copy by a witness who has compared it with the original, roperly authorized by law to give a copy, ly authenticated *Buttrick* v *Allen*, 8 er 152, *Church* v *Hubbort*, 2 Cranch 228, subject is thus stated by *Marshall C.* The sanction of an oath is required for their establishment unless they can be verified by some other

So this section authorises the representatives of his Majesty or the Government

* These words in s 86 were substituted for the words "resident in," by the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891), s. 8

† This paragraph was added to s 86 by s 4 of the Indian Evidence Act, 1899 (5 of 1899), in substitution for the paragraph added by s 8 of the Indian Evidence Act (1872) Amendment Act, 1891 (3 of 1891)

‡ X of 1897.

86. of India in or for such country to give such certificate. So if the copy is merely certified by an officer of the Court, without other proof it is inadmissible. *Appleton* v *Lord Braybrook*, 2 Stark 7, *Thompson* v. *Stewart*, 3 Conn 171.

Scope of the section This section does not exclude other proof *Vallabdas* v *Pra*
So a c
Court i
being
If the
cker, 1 Campb
proved, even
urin v *Start*,
1 Stark. 525, *Fudt* v *Atkins*, 3 Campb 215 n And if it is clearly proved
that the Court has no seal,
entitle it to credit *Black* v
Cowen 434 If the copy is mer
other proof, it is inadmissible
section says that if a copy of a
a given way, the Court, may pr
exclude other proof The as
and that she gave evidence bef
evidence of those matters His
and by ss 65 and 66 of the I
public documents, which they a
party, when the person in po
not subject to the process of the Court, which is the case here" *Per Lord*
Hobhouse i
L R 562,
this sectior
1924 Lah
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are not dul
Cas 929
with merely because it can be ol
of depositions of a Court of
due course does not make them
Achut Das, supra. So also
authenticated in accordance with the
prescribed by the English Extradit
the records were admissible under it
C W. N 1053=14 C L J 375
instance of documents to which s 65 cl (f) seems to refer. *Hurish* v *Prosonno*, 22 W R 303

Section 14 of the Civil Procedure runs as follows "The Court shall presume, upon the production of any document purporting to be a certified copy of a
s pronounced by a Court of competent
the record; but such presumption
jurisdiction" The presumption is a
Hadjee Isup, 6 C W N 829=29 C
31, *Udhe* v *Puran*, 41 P. L R 1910;
Ramanthan v *Lakshmanan* 24 M L J 343, *Sita Devi* v *Gopal Saran*, 9 Pat. L. T. 397=111 Ind Cas 762=A I R. 1928 Pat 375, *Ishri Prasad* v *Sri Ram*, 25 A L J 887=105 Ind Cas 186=A I R 1927 All 510

546 In th
of the 8th
regarding :
the Governor General in Council had, under s. 434 of the Civil Procedure Code, notified that decrees of Coach Behar Courts might be executed as if they were decrees of British Indian Courts, was a compliance with the provisions of s 86 of

the Evidence Act, when there was a representative of the Government of India resident in Coach Behar. The notification referred to above is of no use when ... ent of India in Coach Behar, so that ... och Behar cannot then be received in ... 86 of the Evidence Act S. S.

87 The Court may presume that any book to which it may refer for information on matters of public or general interest, and that any published map or chart, the statements of which are relevant facts and which is produced for inspection, was written and published by the person and at the time and place, by whom or at which it purports to have been written or published

Presumption as to books, maps and charts

Scope of the section In proving matters of public or general interest the declarations will not be confined to those which are merely oral Thus in England *ancient maps showing public roads and the boundaries between counties,* towns, parishes and manors are admissible, when it is proved that they have been made or recognized by persons having knowledge of the subject who are since deceased *Hammond* v *Bradstreet* 10 Ex 390 *Pipe* v *Fulcher* 28 L J Q B 12, *Reg* v *Milton* 1 C & K 58 But this section authorises a Court to presume that book on matters of public or general interest and any published map or chart, was written or published by the person and at the time and place, by whom or at which it purports to have been written or published A Court is

28 C L J 306=48
legitimately be made to the work of Mr Crokes on Castes and Tribes on the North western Provinces and Oudh as an authoritative custom prevalent among the Erahi sect of Mahomedans Great weight attaches to the accuracy of survey maps but they are not conclusive In the absence of evidence to the contrary, however they should be presumed to be accurate *Secretary of State* v *Radha Kishore*, 38 Ind Cas 379 P C =21 C W N 291=44 C 328

88 The Court may presume that a message, forwarded from a telegraph office to the person to whom such message purports to be addressed, corresponds with a message delivered for transmission at the office from which the message purports to be sent, but the Court shall not make any presumption as to the person by whom such message was delivered for transmission

Presumption as to telegraphic messages

Scope of the section To prove a telegram sent by the accused the writing handed to the telegraph office not the copy received is the original *R* v *Regan* 16 Cox Cr 203, *Hinkel* v *Pape* L R 6 Ex 7, *Godwin* v *Francis*, L R 5 C P 295 Whether in proving the terms of a telegram the despatch sent or the despatch delivered and received is the one to be accounted or depends upon the substantive law involved *Wigmore* § 1230 In *Durlee* v *Ro. Co*, 29 Vt 127, 140 (a *Vermont Case*) *Redfield C J* said 'It depends upon which party is responsible for the transmission across the line, or in other words whose agent the telegraph is ' Where the received despatch is the legally material document, it must be accounted for, a recorded copy of it would ordinarily ' be preferable to mere recollection, and the message as handed in by the sender perhaps might also serve as a copy, but where the party to whom the communication is made is to take the risk of transmission the message delivered to the operator is the original ' *Wigmore* § 1236 This section allows the

S. 89. Courts to treat telegraph messages received as if they were the originals sent,

addressed In the absence of such evidence, the telegram cannot be held to have been proved *Thaclau Singh* v *Emperor*, 4 Ind. Cas 240. The Court is forbidden by the express provisions of this section to make any presumption as

telegram to ask the Court to presume that it was sent by a supposed sender But there is nothing in the section to prevent the telegram once admitted from being considered along with the rest of the evidence *Emperor* v *Abdul Gani*, 49 B 878 = 27 Bom L R 1373 = 91 Ind Cas 690 = A I R 1926 Bom 71

Presumption as to due execution, etc, of documents not produced.

89. The Court shall presume that every document, called for and not produced after notice to produce, was attested, stamped and executed in the manner required by law.

Principle A circumstance sometimes treated as an extra judicial admis-

the paper) Everything is to be presumed *in odium spoliatoris*'; and had it certainly appeared that the destroyed paper purported to be an agreement such as is attempted to be established, it would have sufficed for the admission it

he can be fixed with the must be proved to have been who have not papers which it would be not only innocent but prudent to destroy If the paper destroyed were shown to have been an agreement for the land, it would raise a presumption of identity, sufficient to dispense with the ordinary proof of execution, and let in the contents of the paper (as proved by another witness) (But the witness

identity and consequent execution." *Wigmore* § 2132. So this section proceeds on the maxim, *omnia praesumentur contra spoliatorem* (Every presumption is made against a wrong doer)

Scope of the section. There is a presumption also in favour of innocence, the law esumed, produce Yort Ev nature of his case would be manifested, every presumption to his disadvantage will be

adopted" 1 Smith L C 10th Ed 353; 1 Vern 19. According to the same S
principle, if a man withhold an agreement under which he is chargeable, after a notice to produce, it is presumed as against him, to have been properly stamped
Anderson, 1 Stark N P C 35, *Marine,*
625 This section is restricted to cases,
party It does not extend to cases, where a summons to produce is delivered to a stranger to the suit *Mark Ev* p. 68 See also *Ahmad Raza* v *Saiyaid Abid,* 38 A 494=21 C W. N 265 So where any document is not produced after due notice to produce, and after being called for, it is presumed to have been duly stamped, (*Closmadence* v. *Carrel,* 18 C B 44), unless it be shown to have remained unstamped for some
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The Act
sumed to
nents In
case (*a*) they are presumed to have been made after the execution of the Will *Simons* v *Rudall,* 1 Sim N S 136 In case (*b*) they are presumed to have been so made that the making would not be an offence *Gordon's Cas* Dear Sl & P 592 *per Jervis C J, Stoke's Anglo Indian Code,* Vol II p 909 Where the

gagee and where the mortgagor failed to produce the deed before the Court though called upon to do so *Held* that the execution of the mortgage deed was in view of s 89 of the Evidence Act satisfactorily established, irrespective of the provision of s 68 *Jang Bahadur* v *Chandraj Singh,* 41 Ind Cas 171

Presumption as to documents thirty years old

90. Where any document, purporting or proved to be thirty years old, is produced from any custody which the Court in the particular case considers proper, the Court may presume that the signature and every other part of such document, which purports to be in the handwriting of any particular person, is in that person's handwriting, and, in the case of a document executed or attested, that it was duly executed and attested by the persons by whom it purports to be executed and attested

Exlpanation —Documents are said to be in proper custody if they are in the place in which, and under the care of the person with whom, they would naturally be, but no custody is improper if it is proved to have had a legitimate origin, or if the circumstances of the particular case are such as to render such an origin probable.

This explanation applies also to section 81

Illustrations.

(*a*) A has been in possession of landed property for a long time He produces from his custody deeds relating to the land, showing his titles to it The custody is proper

(*b*) A produces deeds relating to landed property of which he is the mortgagee The mortgagor is in possession The custody is proper

(*c*) A, a connection of B, produces deeds relating to lands in B's possession which were deposited with him by B for safe custody The custody is proper.

Principle The
First, after a long
saw the document's ex

90. exists for resorting to circumstantial evidence Secondly, the circumstance of

been found amongst deeds and evidences of land may be given in evidence, although the execution of them can not be proved; and the reason given is, 'that it is hard to prove ancient things, and the finding them in such a place is a presumption that they were fairly and honestly obtained and reserved for use, and are free from suspicion of dishonesty" *Wigmore* § 2137; *Wynne* v. *Tyrwhitt*, 4 B & Ad 376; *Andrews* v *Motley*, 32 L J C P 128, 131. So as a rule of procedure, the

witnesses in provin

procedure or practice

of convenience may

to writings thirty years old are conclusively presumed to be dead,—so that execution of such a deed, will or other document need not be proved *Chamberlayne's Ev* § 1165 As the question is one of procedure and not of logic, this presumption is not allowed to be rebutted by proof that such witnesses are alive and actually in Court *Doe* v *Wooley*, 8 B & C 22, *Doe* v *Burdhet*, 4 A. & E 19, *Marsh* v *Collnett*, 2 Esp. 655; *Phip Ev 7th Ed* p 504

the case may be, by persons

state or otherwise identify the means or characters of the parties to it, some sort of evidence will be necessary before it will be admissible *Wills Ev, 2nd Ed* 384

The rule is T.

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665) but als ... *ns*,

6 Dow 149, ... 92,

Doe v *Bu*

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purporting to be ancient is not likely to escape exposure, when subjected to the

... 98 The in-

documents

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rule and to admit, under proper restrictions, ancient documents purporting to constitute part of a transfer of title or

3 App Cas 603 "The proof of

difficulty Time has removed the witr

nection with many different kinds of docu-

Doe v *Samples*, 8 A. & E 151), Wills

, bonds (*Chelsa* v *Couper*, 1 Esp 275) memo-

28 L R 144), leases (*Plaxton* v. *Dare*, 10

. *Thornbury*, 29 L J M. C. 109), cases stated

for counsel's opinion (*Meath* v . S.
containing entries of the receipt

years old, they need not be proved, provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were

title which such documents profess to create *Luteeffunnissa* v *Goor Sarun*, 18 W R 485 The rule regarding the proof of documents more than thirty years old is that they need not be proved provided they have been so acted upon or brought from such a place as to offer a reasonable presumption that they were honestly and fairly obtained and preserved for use, and are free from suspicion of dishonesty *Hari Dhangonr* v *Biru Dasee*, 5 B H A C 135 In order to establish the authenticity of an ancient document it is not necessary to show that it was accompanied by possession *Bisheshur Bhattacherji* v *George Henry Lamb*,

than 30 years old and that it was produced from proper custody, yet before
ce, it must be shown that it is
Evidence Act *Mathura Pershad*

thirty years old and is produced from proper custody, the Court may under this section presume its genuineness and more particularly that of the signature appearing on it *Bhupati Sigh* v *Khetal Singh* 21 Ind Cas 274, *Nur Muhamad* v *Allah Wasal*, 5 P W R 1915=35 P L R 1915=27 Ind Cas 562, *Gulab* v *Mahomad*, 35 Ind Cas 598, *Dwarka* v *Maka*, 49 Ind Cas 419 The Will in dispute having been duly registered and the document being over thirty years old, it must under this section, be presumed that it was a genuine document, and the fact that it was registered raised the presumption that the testator was of sound mind at the time of the execution of the Will *Babu Badri Prasad* v *Anupurna Kuer*, 6 O L J 311=52 Ind Cas 837 A Will of 1873

the attesting witnesses except one were dead and the surviving attesting witness

of the law may not have been given to the purchaser, there is no reason why the Court should presume that no possession was given *Pandurang* v *Basappa*,

0. A. I. R 1923 Bom 364.
rently from proper custod
show that it was not acted
nature to be acted upon, the presumption as to the title created by such document falls down *Mahadeo* v *Ragotrai*, 1923 Bom 293 In the case of a document more than 30 years old executed by an illiterate person but registered, there is from this two circumstances a presumption of its being genuine *Bhim Sankar* v *Mani Ram*, 9 O & A L R 893 A deed more than 30 years old and executed before the Transfer of Property Act, even if not signed by the executant but only by some scribe at his instance will be presumed to be genuine *Gaya Singh* v *Surajbali* A I R 1924 All 832 If one is dealing with a document some thirty years old the main fact that the proof of consideration is not at all satisfactory, is by itself a slender ground for holding that the document known to have come into existence was entirely unreal *Sailaja Nath* v *Raja Resheecase* 51 C 135=39 C L J 380=81 Ind Cas 493 The document was more than 30 years old and was produced from proper custody and all the witnesses were dead *Held* that the presumption must be made under s 90 of the Evidence Act that the attestation ... *der*, 12 O L J
ore than 30 years
that the Record
Held, the presump-
was no proof that it
proof establish that the
)0 *Purna Chandra* v.
Radhakamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe is dead the persons who purport to have been the attesting witnesses are dead,
receipt of consi-
io is also dead,
d by this section
udh 510=4 O
a document was
executed by the person who purported to be the executant, but the Court cannot presume the correctness or genuineness of every statement appearing in the document *Kshetra Mohan* v *Bhavab Chandra*, 98 Ind Cas 1021=A. I R 1927 Cal 229; *Abdul Ghani* v *Faquir Mahomed*, 111 Ind Cas 361 Genuineness of *jama wasil baki* papers more than seventy years old, can be presumed under this section *Nirod Krishna* v *Prodyat Coomar*, 45 C L J 129 The presumption of execution of the document extends to the marks man *Shailendra* v *Girija*, 58 C 686=A I R 1931 Cal 896 This section does not contain any restrictions that a presumption should not be drawn thereunder if the person claiming under the document in question is out of possession or has not actually signed or thumb marked the document itself *Iman* v *Natha*, A I R 1932 Lah 43=32 P L R. 626.

Purporting Section 90 of the Evidence Act, does not enable a Court to presume that unsigned accounts, which do not purport to be in the handwriting of

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would be excluded were it not for this section, which contains an excellent provision, if it is not misunderstood *Mark Ev* p 68

Thirty years—Mode of reckoning Since the chief reason for the rule is the impossibility of obtaining living testimony to the signing or to the hand-

writing, the necessity does not arise until time has made such testimony unavailable At first under the English Common law, this requirement was satisfied by the simple and indefinite notion that the deed must be ancient In some of the old books the average age of a man was computed to be sixty years,

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enson v.

Olive, Bunbury 280, *Clarkson* v *Woodhouse*, 3 Doug 169 But this reckoning was too strict, because the witness were more

persons and therefore at least thirty years of age,

suffice to bring them near the end of the span

1700 S, the period of thirty years has sufficed to constitute an ancient document.

I v *Baker*, 1 Atk 21, 49, *R.*

252, *Chelsea Water Works* v

Wigmore § 2138 The period

have forged the written date

years ago must be somehow shown *Forbes* v *Hale*, 1 W. Bl 532 In the above named case *Lord Mansfield* said; 'If the length of the date is alone sufficient to establish it a man has nothing to do but to forge a bond with a very ancient date" *Wigmore* § 2138 But it seems that this section does not require any such extra evidence Hence in the case of a Will the period of thirty years is reckoned not from the testator's death, but from the date of execution of the instrument *Doe* v *Holley*, 8 B & C 22 In applying the presumption allowed by s 90 of the Evidence Act, the period of thirty years is to be reckoned not from the date upon which the document is filed in Court, but from the date,

or otherwise becom

R 135 But in an

years old when it was produced, there is no presumption as to its genuineness

thirty years old on the date when arguments were heard *Mahadeo* v *Nasiban*, 54 Ind Cas 368 The period of thirty years mentioned in this section is to be reckoned from

the date when

233=75 Ind C

Thirty years should be counted from the date of its genuineness being subjected to proof *Konda Reddi* v *Pichi Reddi*, A I R 1925 Mad 184

Proper custody The mere production of an ancient document by a party affords no proof of proper custody and it is for the party producing it to explain how the document came to be in his custody *Trimbak Das* v *Mattabai*, 27 N L R. 75=124 Ind Cas 609=A I R 1930 Nag 225, *Ramnaresh* v *Chukut*, A I R 1932 Oudh 227=9 O W N 379 The Court added that it was only necessary to show the age of over thirty years, and that they came from a natural and reasonable cu

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or any other custody which in the circumstances of the case appear to the Court to be consistent with its genuineness *Doe* v *Phillips*, 8 Q B 158, *Doe* v. *Keeling*, 11 Q B 884, *Wills Ev 2nd Ed* 385 In *Meath* v *Winchester*, 3 Being. N C 183, 200, *Tindal C J* said: "It is not necessary that they should be found in the best and most proper place of deposit. If documents continue in such custody, there never would be any question as to their authenticity But it is when documents are found in other than the proper place of deposit that the investigation commences whether it was reasonable and natural under the circumstances in the particular case to expect that they should have been in the place where they are actually found. For it is obvious that whilst there can be only one place of deposit strictly and absolutely proper, there may be various and many that are reasonable and probable though differing in degree, some

90. A. I. R 1923 Bom. 364. . . .
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v *Sumbali*, A. I R 1924 All 832 If one is dealing with a document some
thirty years old the main
factory, is by itself a

custody and all the witnesses were
dead *Held* that the presumption must be made under s 90 of the Evidence Act
that the attestation was duly made *Mahomed Hasan* v *Ali Hider*, 12 O L J
1=85 Ind Cas 509 A partition *chitta* purporting to be more than 30 years
leposed that the Record
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collectorate custody was proper custody within section 90 *Purna Chandra* v.
Radhalamohan, 90 Ind Cas 722 Where all the executants are dead, the scribe
is dead, the persons who purport to have been the attesting witnesses are dead,
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s section is that a document was
executed by the person who purported to be the executant, but the Court cannot
presume the correctness or genuineness of every statement appearing in the
document *Kshetra Mohan* v *Bhanab Chandra*, 98 Ind Cas 1021=A. I R
1927 Cal 229; *Ablul Ghani* v *Faquir Mahomed*, 111 Ind Cas 361 Genuineness
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the impossibility of obtaining living testimony to the signing or to the hand-

Horner, (1913) 2 Ch .
thereof so far as t
which, judging from
tances of the case, it would naturally be expected to reside, then the document ought to be treated as authentic to such extent as to become admissible in evidence between the parties *Chundra Kant* v. *Brojonath*, 13 W R 109. Whether the custody of a document is a proper one under section 90 of the
s of each case.
documents sixty
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uld be admitted
Pat L T. 474=5
than 30 years
old comes from custody of the mortgagee, the presumption of proper execution readily arises and it is proof of the mortgage *Ramachari* v *Sadho Saran*, A. I. R 1924 All 869 The mere fact of a certain document having been produced from a Court where it had been filed does not necessarily bring that document within the requirements of this section *Rajendra* v *Gopal* 4 Pat 66=A I R. 1925 Pat 442

May presume It is in the discretion of a Court whether it will raise the presumption, in favour of a document for which s 90 provides But this discretion is not to be exercised arbitrarily but must be governed by principles which are consonant with law and justice And while, on the one hand, great care is requisite in applying the presumption, on the other hand, it is clear that very grave injustice may be perpetrated, if an ancient document coming from proper custody is rejected by a Court capriciously or for inadequate reasons *Govinda Hazara* v. *Protap Narain*, 29 C 740; *Ram* v *Chukut*, A I R 1932 Oudh R 227=9 O W. N 379 When a document, which is over thirty years old, has b
which is a
mentioned
ment, stating its reasons in the latter event and, in the former, whether the presumption has been rebutted or not *Srinath Patra* v *Kuloda*, 2 C L J. 592 The effect of the presumption is weakened by circumstances which tended to raise doubts as to its athenticity *Madan Mohan* v *Kumar Rameswar*, 7 C. L J 615 The presumption allowed by this section is not a presumption which the Court is bound to make *Honuman* v *Ramchunitra*, A W N 1901, 28. As to the presumption which a Court may make under s 90 of the Evidence Act, the power thereby given must be exercised with great discretion in a country where documents are written on such material as *parabick* and palm leaf, and where in Burmese time neither parties nor witnesses were ever in the habit of attaching their signatures, so that the term execution is rather a convenient

it be more than thirty years old and purports to come from proper custody and that under the circumstances of the present case the discretion was rightly exercised *Safiq unnissa* v *Shaban Ali Khan*, 7 O C 290 The words "may presume" in this section, ought generally to be construed in the more rigorous of the sense allowed by s 4 and in view of danger of a blind acceptance of a document as genuine for all purposes, merely because it purports
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at the time, and as to whether it has ever been acted on previously to its production in Court *Mehar Amir* v *Nur Muhammed*, 110 P. L. R, 1902. So it

90. is not obligatory, under this section, upon a Court to assume that the document produced is genuine merely because it purports to be thirty years old and is produced from proper custody. The Court has a discretion in the matter, but the di
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Mahabir Prasad, [illegible]
presumption with regard to the genuineness of a document under this section is one in which the Court has to exercise its discretion and when that discretion has been exercised with due care and the presumption allowed by law has been made an appellate Court should be slow to interfere with such discretion *Mahomed v Rahim*, 57 P W R 1918 = 44 Ind Cas 559 The presumption [illegible] to a deed executed by an illiterate

[illegible]

in refusing to draw the presumption under s [illegible] of the deed nor would such presumption be

[illegible]

[illegible] to prove the genuineness of a document but such evidence [illegible]

[illegible]

age of the document [illegible]
R 1930 Bom 39.

[illegible]

in my opinion, lays down more a rule of expediency than a [illegible]
of law"

Unsuspicious appearance. A third requirement is that the document must in appearance be unsuspicious *Wigmore* § 2140 'On inspection it must

[illegible]

is suspicious, on the face of it, and when the very place of importance has been erased and re-written, presumption under this section does not arise *Baldeo Misir* v. *Bharos Kunbi*, 95 Ind Cas. 261 = A I 1926 A. 537 Where a document more than 30 years old purporting to come from proper custody, is required by the Court before which it is produced to be proved and is left unproved, and there are circumstances, both external and internal, which throw great doubts upon the genuineness of the document the Court can, in the exercise of the discretion vested in it under s 90 of the Evidence Act, decline to admit it to evidence without formal proof and their Lordships of the Privy Council will be always slow to overrule the discretion exercised by a Judge under s 90. *Shafiqq-un nissa* v *Shafan Ali*, 6 Bom. L R. 750

Old Copies The use of raises two or three questions ficance, moreover, of the circumst

but this rule does not enable one to use an unauthorized record Thus, when the record is unauthorized, some other mode of proving the deed must be resorted to. Keeping these principles in mind, the various situations may be distin-

cular mode of proof has been prescribed by the Act *Krishnaswami* v *Ananthachar* 4 Mys L J 264, *Sarju Dey* v *Ram Bunakh*, 18 Ind Cas 250 This section of the Evidence Act does not make it incompetent for the Court to draw any presumption
a copy of the sa

which
section
id was
94 = A
218,
Nanu Nair v *Kantan Ashta*, 2 L W 509 = 29 Ind Cas 386 But this section

M W N 454 = 73 Ind Cas 66

Where the alleged ancient original is lost, and proof of its contents (including the purporting signatures) is offered to be made by one who having seen it before its loss, recollects its contents or took a copy, the difficulty in

any witness and the presumption in section 90 cannot apply, for that only relates to documents which purport or are proved to be thirty years old, and . . This is not one of such documents, and, section 90 can not apply. One of the . . . gent for admitting Exhibit E is *Ponnam laleth Porapmaran v Karoth Sankaran*, 12 Ind. Cas 153, but from the brief judgment of
the contrary,
the copy."
copy is offered, made by a private hand, and the purporting maker being unknown a
and the co
2143. The
an alleged official record copy offered, though
Ibid. When a copy of a document is exhibited in a suit and the original document is not produced, though the original purports to be more than thirty years old, the presumption which, under s 90 of the Evidence Act, may be made where a document over thirty years
not to be made *Appathura v. Gopala,*
cases in which the document is actually produced in Court,
secondary evidence of an ancient document is admissible, without proof of execution of t
have been last l
P. R 1910=1
case of a copy
Court to presume that the copy is in the hand-writing of the person in whose . . . purports to be. Though this section does not refer to stamps,

Evidence Act regarding the same on the production of certified copy.
Bahadur v . . . The presumption mentioned in . . . *Banwarilal* v. *Dwarkanath,* . . . v. *Subramania Aiyar*, 16 L . . . 2=(1922) M W. N 611=46 M . . . authenticating, a copy *Seethaya* . . . Bom L R 756=4
this section with
as well as originals
be made in favou
Prosad, 6 O W N 880=A I R 1929 Oudh 483 The Court may presume the genuineness even of an unregistered document thirty years old from a copy of such document, if the original is proved to have been duly executed, and further it is also proved that the original is since lost But such a presumption can only be made after a careful consideration of all the circumstances of the

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The words 'duly
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whether she has fully understood S.
question of execution The term
only an abbreviated form of expression intended to connote the necessity of bringing home the transaction to the executant and of proving that it was fully explained to and understood by the pardanashin lady *Afsar Begam* v *Mahomed*, 5 Luck 526=8 O W N. 55=130 Ind Cas 861=A I. R. 1931 Oudh 103

Presumption of genuineness whether presumption of executant's authority to sign or grant Where the executant of a document purports to sign it on behalf of others, the fact that it is more than thirty years old, though it would, under the provisions of section 90 of the Evidence Act, raise a presumption in favour of the genuineness of the document, would not dispense with proof of the authority of the executant to sign it on behalf of others so as to bind them or those claiming under them *Ubilack Rai* v *Dallial Roi*, 3 C 557. Where it is not shown that the executant of an ancient document was entitled to grant such a document, mere production of it would be no proof of title *Uggar Kant* v *Hurro Chunder*, 6 C 209 The provisions of s 90 of the Evidence Act merely establish that the document was executed by the persons whose signatures it purports to bear, but that can not and does not
rim v
Lagan,
Ganga,
?9 So
power
sumed
only the execution of the deed, but not, in the absence of the power or evidence thereof, the authority of the solicitor to execute it *Re Airey*, (1897) 1 Ch 164, *Phip Ev 7th Ed* 505

This section does not prove the authority of the person who has made the grant, the genuineness whereof is presumed by the Court under the provisions of that section. *Kashi Nath* v *Jagat Kishore*, 20 C W N 643=23 C L J. 583=35 Ind Cas 298 The presumption that arises under s 90 of the Evidence Act only extends to the genuineness of old documents coming from proper custody, it does not further go to the extent of holding that the document was in fact executed by persons possessed of the requisite authority *Tarakeswar Pal* v *Sirish Chandra*, 27 C W N 964 Although in the case of sale deeds more than 50 years old the presumption of law was that they were executed by the persons who purported to execute them, there was no presumption that the scribe who signed these documents
executants to do it *Haji Shaikh*
Ind Cas 989, *Ramani Kant* v *Bhu*
Cas 220

Full Bench case has held that the
e Act in the case of a document
executed by the party by whom it purported to be executed includes the presumption that when the signature of the executant purports to have been made by the pen of the scribe, the latter was duly authorized to sign for him *Haji* v *Sulkhani*, A L J 837=1925 All. 1=47 A 31 (F B), *Ballotan* v *Mt Dulai*, 24 A L J 920=97 Ind Cas 292

7 O C 299=31 I A
Cas 773 When the
applicability of the pro
the High Court can
7 In *Parankura Zate*
said. "The presumptio

Act as to the genuineness of a document 30 years old, is one of fact and stands

that the District Munsiff had drawn the presumption under this section in

Vayya Dayan, 108 Ind Cas 112

Ancient document—Corroborative evidence It is well settled that mere production of an ancient doc
evidence of acting under it is nc.
be corroborated by evidence
by other equivalent or explanatory proof, it is then presumed to have constituted part of the actual transfer of property mentioned, because this is the usual
gh absence of proof of possession does
tedly affects the weight to be attached to
a, 12 C L J 14=89 Ind Cas 747=A I R 1925 Cal 1189

later when even that attesting witness was dead There was no reasonable explanation about the delay after 1910 in making the application for probate There was no evidence as to the custody of the Will before 1907, *held* that the applicant cannot get the benefit of s 90 *Channulal* v *Mt Puna*, 75 Ind Cas 660=1923 Nag 169 Where circumstances of suspicion surround the genuine character of a document thirty years old, the question of applying to it the present rule is one largely of administration Should the evidence in the case explain and account for these circumstances to the satisfaction of the presiding judge, he may admit the writing to the benefit of the rule of procedure *Chamberlayne's Ev* § 1165

Rule should be applied with proper care and caution The rule laid down in s 90 of the Evidence Act as to proof of execution of documents thirty years old ought to be applied with special care and caution *Trailokia Nath* v
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Allah
Din, 241 P. L R 1913=19 Ind. Cas. 964 Before a Court is justified in making

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be i

presumption contained in this section *Gobinda* v *Pulin Behary*, 31 C W N 215 = 98 Ind Cas 147 = A I R 1927 Cal 102

Explanation This is to provide for cases in which the custody is not, perhaps, that where it might most reasonably be expected, but yet sufficiently reasonable to constitute such custody not improper Thus in the two first illustrations, (a) and (b), the documents are produced from their natural place of custody; in (c) the documents ordinarily would be with the owner B, but

v *The Bishop s* the see *laxton* v

Dare, 10 B & C 17, or of the lessee *Hall* v *Ball* 3 M & G 242

CHAPTER VI

OF THE EXCLUSION OF ORAL BY DOCUMENTARY EVIDENCE

Evidence of terms of contracts grants and other dispositions of property reduced to form of document.

91 When the terms of a contract, or of a grant, or of any other disposition of property, have been reduced to the form of a document, and in all cases in which any matter is required by law to be reduced to the form of a document, no evidence shall be given in proof of the terms of such contract, grant or other disposition of property, or of such matter except the document itself, or secondary evidence of its contents in cases in which secondary evidence is admissible under the provisions hereinbefore contained

Exception 1—When a public officer is required by law to be appointed in writing, and when it is shown that any particular person has acted as such officer, the writing by which he is appointed need not be proved

Exception 2—Wills *[admitted to probate in British India] may be proved by the probate

Explanation 1—This section applies equally to cases in which the contracts grants, or dispositions of property referred to are contained in one document and to cases in which they are contained in more documents than one

Explanation 2—Where there are more originals than one, one original only need be proved

Explanation 3—This statement in any document whatever, of a fact other than the facts referred to in this section, shall not preclude the admission of oral evidence as to the same fact.

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* These words in s 91, *Exception* 2 were substituted for the words under the Indian Succession Act" by the Indian Evidence Act Amendment Act 1872 (18 of 1872), s 7

91.

Illustrations

(a) If a contract be contained in several letters, all the letters in which it is contained must be proved.

(b) If a contract is contained in a bill of exchange, the bill of exchange must be proved

(c) If a bill of exchange is drawn in a set of three, one only need be proved

(d) A contracts, in writing, with B, for the delivery of indigo upon certain terms The contract mentions the fact that B had paid A the price of other indigo contracted for verbally on another occasion

Oral evidence is offered that no payment was made for the other indigo The evidence is admissible.

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judgment, the contract, the devise, etc, it is in reality declaring a doctrine of the substantive law of these subjects, namely in the case of a written contract, that

rule of sub tantive law. It does not exclude certain data because they are for one or another reason untrustworthy or undesirable means of evidencing some fact to be proved It does not concern a probative mental proces ,—the process of believing one fact on the faith of another What the rule does is to declare that certain kinds antive law; and this of course (like

when desired, (c) its cribed forms, it any, and (d), the Int external objects affected by it. Of these four, the first and the fourth are necessarily involved in every jural act, the second and the thi important, but are always possible elen

deemed by law to be the sole n document was intended by the parti between them and therefore to Wigmore § 2401 The practical parts, in their former and incohate shape, have no longer any jural effect, they are replaced by a single embodiment of the act, in other words: When a jural act is embodied in a single memorial, all other utterances of the parties on the topic are legally immaterial for the purpose of determining what are the terms

of their act Wigmore § 242) This rule is based upon an assumed intention on S.
the part
contract,
disinclina
agreemen
niteness, and to put their ideas in such shape that there can be no misunderstanding, which so often occurs where reliance is placed upon oral statements Written contracts presume deliberation upon the part of the contracting parties,
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cited with approval by *Lord Carson in M Subramonian* v *Lutchman*, 50 C 338=38 C L J 41=28 C W N 1=44 M L J 602=50 I A 77 P C

instruments, or to contradict or alter them This is a matter both of principle and policy of principle, because such instruments are, in their own nature and origin, entitled to a much higher degree of credit than parol evidence of policy because it would be attended with great mischief if those instruments, upon which me by loose collateral evidence . *Charan*, 5 W R 68 (69) 'which requires the

Statute of Frauds In all these cases, the law having required that the evidence of the transactions should be in writing no other proof can be substituted for that, as long as the writing exists, and is in the power of the party *Greenl Ev* § 86 In the second place oral proof cannot be substituted for the written evidence of any contract which the parties have put in writing Here the written instrument may be regarded in some measure, as the ultimate fact to be proved especially in cases of negotiable securities and in all cases of written contracts, the writing is tacitly agreed upon by the parties themselves, as the only repository and the appropriate evidence of their agreements The written contract is not collateral, but is of the very essence of the transaction If for example, an action is brought for the use and occupation of real estate, and it appears by the plaintiff's own showing that there was a written contract of tenancy, he must produce it, or account for its absence, if he were to make out a *prima facie* case, without any appearance of a written contract, the burden of producing it, or at least of proving its existence, would be developed on the defendant *Brewer* v *Palmer*, 3 Esp 213, confirmed in *Ramsbottam* v *Tunbridge* 2 M & S 431, *R* v *Rauden* 8 B & C 708 *Strotter* v *Boor*, 5 Bing 136, *Per Parke J* But if the fact of the occupation of land is alone in issue without

91. respect to the terms of the tenancy, this fact may be proved by any competent ... larations of the tenant, notwith- ... an agreement in writing; for ... n question *R* v *Inhabitants of* ... ing 239, 241. The same rule applies to every other species of written contract *Greenl Ev* § 87. Save and ... itings, there is a third class of document ... existence of which is disputed, and which is ... the parties, or to the credit of witnesses ... be proved in accordance with the provisions of section 64 *supra*, "I have always" says *Lord Tenterden*, in *Vincent* v. *Cole*, 1 M & M 258, 'acted most strictly on ... only be proved by the writing itself ... danger of relying on the recollection ... contents of written instruments; the ... the purposes of justice r ... the writing does not ... there is no ground fo ... written communication ... latter may ... of the writing ... may be pro ... 4 Esp 213; ... *Vide* Ill 3 to this section In stating that oral testimony cannot be substi- ...

... although they relate to the ... , which are directly in issue in the cause ... *Parke B*, *Newhall* v. *Holt*, 6 M & W ... ; *Bethell* v *Blencowe*, 3 M & Gr 119, *Howard* v *Smith*, 3 M & Gr 254 "The reason" ... Baron Parke "why such statements or acts are admissible, without ...

... ters, may reasonably be presumed to be" *Taylor* § 410 But in illus- ...

... the genuineness of a document produced is in question (*Vide* s 22) When ... d to be ...

... limitation it must be taken that even a third party if he wants to establish a ...

... made orally there being no docu- ... is in fact reduced to the ... be determined on a ... and the circumstances ... e terms are not reduced to the form of a document registration is not necessary and while the writing cannot be used as a document of title it can be used as a piece of evidence, *e g*,

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settlement made Any antecedent documents and maps can be used solely

in the plaint, to the effect that he would make good any loss the (plaintiff) purchaser might incur in respect of the property sold, is not excluded by section 91 of the Evidence Act, and renders proof of the agreement unnecessary *Sadhu* v. *Nga Si*, U B R 1907, Evidence 1' When men agree to preserve by writing the remembrance of past event of which they wish to create a memorial either with a view to lay down a rule for their own guidance, or in order to have in the instrument a lasting proof of the truth of what is written, the truth of the written act must be established by the acts themselves, that is, by the inspection of the originals *Upendra* v *Umesh Chandra* 12 C L J 25=6 Ind Cas 346 The consent in writing by the landlord to the division of a tenure has the effect of substituting a new contract for the old It should
terms of the new cont
section 91 of the E
the terms of the co

application *Ganoda* v *Girish*, 4 Ind Cas 400 As required by ss 250 and 251, of the Code of the Civil Procedure, the warrant must have been in writing and therefore, under s 91 of the Evidence Act, the fact, that the warrant gave

admissible *Sheo Ko* v *King-Emperor*, 3 L B R 128 Previous conviction should, regard being had to the provisions of this section, and section 511 Cr Pro Code, be proved by copies of judgments or extracts from judgments or by any other documentary evidence of the fact of such previous conviction,
of those convictions is, having
warrant or justification *Iasin*
70 When a dying declaration
not evidence, but the precise
by the Magistrate who recorded
the statement or some one who heard it This section does not apply to such a document *Govindas* v *Emperor*, 36 C 659=13 C W N 680=10 Cr L J 186=2 Ind Cas 841 Section 91 of the Evidence Act has no application to matters embodied in the special diary under s 172 of the Criminal Pro. Code,

1. Ind Cas 766 An agreement within the meaning of section e record of Court, i e., reduced

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gift has been validly made in accordance with Muhammadan law *Ali Baksh* v *Ghuras*, 28 Ind Cas 180 = 18 O C 122 Where the terms of a compromise are found to be set out in a petition, the petitioner is to prove the terms of the compromise and oral evidence would not be admissible to vary or alter its terms *Bharora* v *Sikhdar*, 12 A L J 998 There is no rule of law that the only evidence of an agent's authority admissible in evidence is a written power of attorney The fact can be proved by evidence, *aliunde*, and so far as third parties are concerned, non the-less so because the agent was appointed under a written document executed by the principal. There is nothing in section 91 or section 92 of the Evidence Act to preclude such third party from proving the existence of a particular relationship between the persons who respectively executed and accepted the power of attorney, though the terms which govern such relationship appear to be in writing *Lala Nanakchand* v. *Mahammad Abzal*, 279 P W R 1912 The object of s 10 A of the Dekkan Agriculturists'

the parties but embodies only some of the conditions, oral evidence to prove

judicial determination of the meaning of the language of parties to an agreement though the parties may not testify as to their intention. *Morris* v *David Jones*, 125 Ind Cas 867 = Ind Rul (1930) P C 231 It is not necessary to get a family settlement reduced into writing and get the writing registered Oral evidence on the point of the alleged settlement is therefore admissible *Rangu* v. *Lakshman*, A I R 1930 Bom 438

When the terms of a contract or of a grant, or of any other disposition of property have been reduced to the form of a writing Where a transaction

memorial may be terme l the Integration of the act i e, its formation from scattered parts into a integral documentary unity. The practical consequence of this is that its scattered parts, in their S.

material for the purpose of determining wh it are the terms of their act *Wigmore* § 2425. It is for this reason that whenever the parties to any contract or grant or other disposition of property have set out its terms and conditions in a writing, which they presumably intend to be a record of the transaction, the law forbids any attempt to establish any other terms by means of oral evidence. *Powell Ev* p 181. The moment an oral contract is reduced to writing, it is not open to any of the parties thereafter to seek to prove the term of contract referring to the original oral agreement and this section applies not only to cases where the contract is brought about or conclu led by the writing, but also where the contract having been originally made by parol is subsequently reduced to writing Where the parties reduce the terms of a contract into writing, it clearly indicates the contemplation of the parties that the terms would be reduced to a form where there could be no question at all as to what the terms were and the undoubted policy of the law is that whichever parties have taken such precaution it is the document itself that must be produced and proved as evidence of the contract subject of course, to any rules as to seco dary evidence *Kappu Swami* v *China Swami*, 28 L W 234-111 Ind Cas 671=A I R 1923 Mad 546 Thus, where a contract of agency had been orally made between the parties, but had subsequently been put into writing and signed by them, it was held that the document was only admissible evidence of the agreement *Morris* v *Delobbel Flipo*, (1892) 2 Ch 352; *Phip Ev 7th Ed* p 547 Having regard to the terms of this section, what the Court has got to do is to find out the real contract between the parties *Meenakshisundaram* v. *Chenchu*, 109 Ind. Cas 18=A. I R 1928 Mad 459 The fact of partition may be proved by oral evidence although the deed embodying the terms of partition cannot be proved because of the inadmissibility of the document *Maung Tan* v *Ko Tu*, 111 Ind Cas 472=A I R 1928 Rang 196 But where an award in writing which effected a partition of joint family properties, plainly and unambiguously effected an out-and out partition among all the members of the joint family, *held* that extrinsic evidence was admissible to explain or control its terms, to show for instance that there was no separation between two of the members *inter se* *Babu* v *Gakuldass*, A I R 1928 Mad. 1064=55 M L J 132=112 Ind Cas 184 The agrement to refer to ar' other disposition of property and so th *Ram* v *Lala Ram*, 116 Ind Cas 853=A *walf* may be created by word of mouth, been put in writing the document itself or secondary evidence of the same should be tendered *Mahomed* v *Bibi Marian*, 8 Pat 484=117 Ind Cas 638=A I. R 1929 Pat 410 When a plaint alleges that possession of immoveable property has been given to the defendant as security for a loan of hundred rupees or upwards, but wi hout the execution of a registered instrument, oral evidence is not admissible to prove the transaction. *Maung Sa* v *Maung*

have been reduced to the form of a document, ex ept the document itself or secondary evidence of its contents in cases in which secondary evidence is admissible *Maung Pan* v. *Ma Bwe*, U. B. R (1892 1896) Vol. II, 347.

1. Terms of a contract. The general rule laid down in section 91 of the Act is, that when the terms of a contract have been reduced to writing, no evidence shall be given in proof of terms of the contract except the documents itself, or, in certain cases, secondary evidence of its contents *Sri Daiji v Bodri,* 15 R. D 309, *Nasir* v. *Ram Mohan,* 53 A 114=1931 A L J 61=A I

From the mere fact that a bill of exchange or hundi has been executed, it does not necessarily follow that the whole of the contract between the parties

dence of an agreement as well as of what took place when the agreement was made to prove the agreement if the written instrument is not produced *Tyan-katesh* v *Ganesh,* 61 Ind Cas
whenever the terms of a contr
inadmissible in evidence the
Ishar Das, 3 Lah. L J 157=60 .
23 Bom L R 767=63 Ind
parties been reduced to writing and the
of the contract of loan but if the hundies

then it is the oral terms
proved and this section is
180=57 Ind Cas 394 If
contract contemplate the e
it is a question of constru
is a condition or term of
desire of the parties as
to will in fact go through
either because the condit
a contract to enter into
and the reference to the mere formal document may be ignored 4 Pat L J. 580=(1919) Pat 305=53 Ind Cas 832 When it was admitted that the terms of the contract were reduced to writing and as no oral evidence was admissible to prove the said terms, the suit should have been brought within three years of the date of the transaction if it could be maintained on the original consideration. *Gobinda* v *Ram Chandra,* 29 C L J 508=51 Ind Cas 945 Oral evidence to prove
admissible under tl
22 C W N 416=4

controlled by final expression of obligatior
his own language *Maung Po Thet* v *Irna*
Vol II,
into at a
the writt
N 147 (P C)=32 C. 96=31 I A 188 A question as to who the contracting parties are is not a question as to the terms of the contract, within the meaning of this section *Venkata Subbiah* v *Gobindarajulu,* 18 M L J. 1=3 M L T 259=31 M 15 Where an agreement is inadmissible, oral evidence is barred.

Samsam v *Ram* S.
rocedure does not
eed to the form
the suit or in
roceedings The
agreement or compromise itself, that is made out of Court may be in writing or by word of mouth If the Court did not record the terms of it, this section is no bar to the suit being brought on the terms of the compromise *Bija* v *On Gaing*, 3 L B R 243 Ordinarily when the terms of a contract preceded by proposals, negotiations conditional acceptances, counter proposals and so on are reduced finally to the form of a document signed by one or both of the parties the strong presumption is not that there are two independent contracts (the first an oral contract the second written contract) but that the written contract is the only final contract between the parties and when a contract is once reduced to writing no other evidence can be given of its terms *Kotam Reddi* v *Vennalalant*, 20 M L T 41–(1916) 2 M W N 33–31 M L J 240=35 Ind Cas 18 When the terms of contract for payment of interests were
was excluded from evidence by
Court of Waras Act oral evidence
idence Act to prove the terms of
contract *Ram Bahadur* v *Dassuri* 17 C L J 399=19 Ind Cas 818 The rule of evidence, which excludes evidence of the terms of a contract which has been reduced to the form of a document has nothing to do with an action for money had and received the basis of which action is not the contract reduced to the form of a document but the doctrine of equity that a person who has received a sum of money from another for a consideration which has wholly failed must return the money to the payer *Baij Nath* v *Sahaj Ram* 16 Ind Cas 33

Promissory note—Proof of oral contract of loan Apart from the promissory note there is always a contract to repay a loan and such contract can be proved independently of the instrument It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself So even in cases where the lending of the money and the execution of the promissory note are contemporaneous the plaintiff is entitled to maintain a suit for recovery of the money lent and to adduce evidence other than the instrument or the promissory note itself in order to prove the loan *Dhanesuar* v *Ramrup Gir* 7 Pat 845=111 Ind Cas 482=9 Pat L T 471=A I R 1928 Pat
bserved "It is a well
a contract to repay
ransaction, cannot be
ing in law to prevent
and if he can satisfy
o reason why a decree
Mahamad A I R
1931 Pat 293=133 Ind Cas 685, see also *Iwaj* v *Ram* 130 Ind Cas 347,
T 506 But a Full
Khan v *Ram Mohan*
que tion differently
between cases where
the transaction is separable from the promissory note and cases where the execution of the promissory note and the payment of the money are part and parcel of the same transaction, it being held that in the former case the debt could be held proved, although the promissory note was not admissible in evidence, while in the latter cases it could not and the suit must fail if the promissory note itself be inadmissible in evidence In that case the cases of
Sima 34 A 153=13
Ind overruled see
also *Khan* 7 C
256= The case of
Sheik *int* v *Bhoj*
Chan Ind Cas 646
But the case in *Sheikh Akbar* v *Sheikh Khan, supra* was sought to be explained away in a later case in the same Court in *Promotha Nath* v *Dwarkanath*, 23 C 851 In the Madras High Court in *Yarlagadda* v *Gorantala*, 29M 111=15 M L

L. J. 484 and in *Muthu* v *Vishuanatha*, 38 M 660 = 21 Ind Cas 864, s 91 of the Evidence Act was relied upon and it was held that in circumstances similar to the Allahabad Full Bench Case, oral evidence could not be given in proof of the loan; see also *Alimam* v. *Kolisetti*, A I R 1932 Mad 693 = 63 M L J 303. In *Chandra* . , A I R 1922 Lah 307 = 66 Ind Cas 201 = 2 . . also took the same view The point of vie whether the fact of payment of a sum of money can be regarded as a term of the contract does not seem to have been considered by the learned Judges who decided the case In a recent full Bench case of the Oudh Chief Court, it has been held that inspite of the provisions of s 91, it is open to the party who has lent money on terms recorded in a promissory note which terms ought to be inadmissible in evidence for want of proper stamp duty to recover his money by proving orally the advance of the loan *Kunuar Bahadur* v *Suraj Bikh*, A. I R 1932 Oudh 235, see also *Krishnan* v *Rajmal*, 24 B 360 = 2 Bom L R 25; *Duarla* v *Idu*, 74 Ind Cas 813 = 26 O C 361, *Narlu* v *Ganga*, A I R 1929 Oudh 349, *Maung Kyi* v. *Ma Ma*, 10 L B R 51 = 54 Ind Cas 84 (F B) For further discussion on the subject *vide* pp 1007—1009 *infra*

Terms of a grant Under this sect . . . to grant when *it has been reduced to the form of* . . secondary evidence of its contents is ad admissible only under the terms of section . . . is not proved to have been lost, cl (c) of s 65 cannot be invoked *Mahomed Khan* v. *Sheo Bhikh*, A I R 1929 Oudh 447 = 6 O W N 850 Under section 85, sub section (2) of the B n . . .

Oral evidence of such grant is also excluded by section 91 of the Evidence Act *Janip Khan* v *Durfa Bewa*, 16 C L J. 144 = 15 Ind Cas 116 = 17 C W N 59

want of registration—whether secondary he . . n, contract can be received *Nga Shew* The combined operation of s 49 of the Evidence Act is to completely partition In other words it would prevent the plaintiff from proving that in th . n d

intention of 927 Nag 113 property can to determine *van* 103 Ind Cas. 153, see T 276 = 103 Ind Cas 281 = A. I Cas 47 = 1923 Rang 57; *ngdas* v *Uttamchand*, A I R deed can be used as evidence

terms of a partition deed. *Mg Po Leen* v. *Ma E Mai*, 1 Bur. L J 111. Secondary

evidence of a lost unregistered document affecting an interest in an immovable S.

oral agreement to lease made before the execution of the document, in order to support a claim
Kashiram 71 In
1923 P 111 W
tered, the tenant
formance *Damodar* v *Masoodan Singh*, 105 Ind Cas 172: *Ilaram* v *Sukka*, 111 Ind Cas 358=A I R 1928 Nag 338 Though a lease for agricultural purposes for more than a year c fact reduced to writing, it cannot be recei Act unless registered The document shuts out other evidence of the transaction Pat. 349=79 Ind Cas 26=5 Pat L T 541, *Ram Chandra* v *Tama*, 11 Bom L R. 390=36 B 500=15 Ind Cas 830, *Jasoda Kanwar* v *Ram Kuar*, L R 34 537, *Budhan Teli* v *Madanmohan*, 3 Pat L T 185=68 Ind. Cas 653 An unregistered deed of lease is not admissible to prove that the property to which it relates was let for a term of three years nor can oral evidence of the terms of the lease be tendered in such a case *Nadar* v *Raul*, 63 Ind Cas 90 The plaintiffs having agreed to convey a house to P received the purchase money, executed a sale deed,
suit for possession of
deed, secondary evide
Held, on second appeal, that under s the deed was compulsorily registrable, and prove the sale Section 91 of the Evidence secondary evidence of sale deed *Gangabisan* Cas 241. Section 49 of the Registration Act prohibits unregistered lease from being given in evidence whether the suit be for specific performance or for damages, and section 91 of the Evidence Act forbids any other evidence from being given of the agreement *Sreeramulu* v *Ramasuami* 33 M L J 596 Where the tenant wrote to the landlord to grant a lease in pursuance of an oral conversation and the landlord sent a reply which in law amounted to an agreement to lease but which was rendered inadmissible for want of registration and the tenant thereupon sought to fall back on prior oral agreement, held that if there was a prior oral agreement, it was either the same as that in interest or it was modified by the letters and that in neither case did s 91 of the Evidence Act admit oral *Bakam Chand*, 125 Ind C 1930 Lah 675

Docu her evidence —A pro note payable otherwise than on demand, bearing an one anna stamp is an insufficiently stamped document and is, under section 34 Stamp Act, inadmissible in evidence for any purpose even on payment of penalty In such a case a person is not entitled to fall back upon the original consideration of the contract as no other evidence of the terms of the document which is the best evidence in the case is admissible under this section *O Gorman* v *Mahtab Singh*, 92 P R 1898, *Chandan Singh* v *Amritsar Banking Co*, 2 Lab 330=1923 Lah 307=66 Ind Cas 201.

Where a plaintiff is able to prove the loan independently of and without the assistance of a promissory note, which cannot be admitted in evidence for some reason, he can fall back upon a claim for money lent *Ram Sawrup* v *Jasodah* 9 A L J 72=34 A 158=13 Ind Cas 138 [Since over ruled by 53 A 114 (F B)] So a creditor can fall back on the original transaction and recover his money on its basis when it is found or conceded that the document or instrument which he had obtained from the debtor was ineffective to establish any contractual relation of debtor and creditor between them so as to serve as a basis for a suit in a Court of law. *Udaram* v. *Laxman*, 104 Ind. Cas 470=A. I. R, 1927 Nag 241. Where a person

91. sued to recover money on the duly stamped but the said hat appeared to be a held, that if the plaintiff was able to prove al ndant had the money he was entitled to a decree Launjari Chaube v Parsotom Chaube, 25 A L J 567=103 Ind Cas 631=A I R 1927 All 503

The mere existence of an unstamped receipt which is inadmissible in evidence does not prevent other ay-ment Ram prosad v Nathu Rai . .

If a creditor has a cause . or has executed a promissory note separate from and independent of the note he can recover upon such cause in case the note for any reason as for want of being properly stamped cannot be put in evidence Kashi Prosad v Panna Lal, 74 Ind Cas 379=L R 4 A 377=1923 A 729 A promissory note which is insufficiently stamped if sued upon may give rise to three kinds of transactions Either the contract may be considered as contained wholly in the promissory note or bill of exchange as in ll (b) to s 91 of the Indian Evidence Act, in which case the plaintiff cannot sue on the promissory note,—he can not sue at all, or secondly the promissory note may be regarded as a conditional payment of the amount of the loan in which case, of course, if the promissory note is insufficiently stamped it is only the plaintiff may sue on the loan; or thi passed as security for the loan, in which case plaintiff to sue on the promissory note at all a or not, he can bring a suit on the loan Jacob 132=102 Ind Cas 138=A I R 1927 Bom note there is always a contract to repay a loan independently of the instrument It is only the other contract relating to the rate of interest which can only be proved on reference to the instrument itself Dhaneshwar v Ramrup 7 Pat 845=111 Ind Cas 482=9 Pat L T 171=A I R 1928 Pat 426, Chedu Singh v Jagannath, 26 A L J 416=108 Ind Cas 912=A I R 1928 All 297, Naulu Singh v Girja Bux, 6 O W N 649=119 Ind Cas 865=A I R 1929 Sind 399, Ram Sarup v Jasodha Kunwar, 9 A L J 72=13 Ind Cas 138=31 A 158 But where the money was borrowed simultaneously with the execution of a promissory note by the borower and it appeared that the note was unstamped Held that the promissory note could not be sued upon and that it was not a case in which the suit was maintainable on the basis of the original contract either as there was none Venkata v Munammal 6 Mys L J 157 If a hundi is an embodiment of the whole of the contract between the evidence and cannot be looked at for the the contract, other evidence to prove the allowed But where the hundi embodies form

57 Ind Cas 300

the original consideration, even when a pro note has been executed and when for any reason the document is excluded The reasonings of the several decisions apply not merely to unstamped documents, but to any case in which reliance cannot be place of,
or a collateral G
White, U B ions

under section 34 of the Stamp Act, cannot according to ss 65, 91 of the Evidence Act, be given *Bakshi Ram* v *Kokka Ram*, 42 P R 1895 A person who takes a promissory note on account of a pre existing debt, may, if the document becomes inadmissible in evidence sue upon the original consideration, disregarding the instrument, provided he has not endorsed, lost or parted with the same But if the original cause of action is the promissory note itself and does not exist independently of it, he cannot succeed without the instrument, according to s 91 of the Evidence Act, as the instrument is the only contract between the parties *Sheo Das* v *Kanhaya Lal* 61 P. R 1898 Where a promissory note itself is the agreement of loan a plaintiff cannot sue on the original consideration and the promissory note must be proved *Ram Singh* v *Perumal*, 9 S L R 150=32 Ind Cas 582, *Ballj Singh* v *Bhuguan*, 7 Bur L T 95=23 Ind Cas 975=7 L B R 101

When it is proved that certain *hundis* were renewed from time to time and
the suit, but the
r and could not be
upon the *hundis*
that were given prior to the last renewals and secondary evidence could be admitted to prove them *Jagan Prasad* v *India Mal*, 12 A L J 361=36 A. 259=23 Ind Cas 589 Where the contract in case of a loan and a simultaneous promissory note has been reduced to writing in the form of the note which contains the definite terms of the contract, Courts cannot resort to inconsistent or consistent implied contracts in such cases, simply because the contract as entered in the promissory note cannot be admitted in evidence *Muthu Sastrigal* v *Viswanath Pandara*, 14 M L T 520=(1914) M W N 58=26 M L J 19.

Any matter is required by law to be reduced to the form of a document Oral Evidence can not be substituted for any instrument which the law requires to be in writing, such as records public and judicial documents, official information or examinations, deeds of conveyance of lands, Wills, other than nuncupative, promises to pay the debt of another person, etc, *Taylor* § 399 In all these cases the law having required that the evidence of the transaction should be in writing no other proof can be substituted for that, so long as the *writing exists, and is in the power of the party Ibid Instances of this class* in India are —

(1) Judgments and decrees in civil cases *Vide* Or XX, and Or XXXI, of the Civil Procedure Code

(2) Depositions of witnesses in civil cases, *Vide* Order XVIII of the Civil Procedure Code

(3) Judgments and orders in criminal cases *Vide* §§ 367, 424 of the Criminal Procedure Code

(4) Deposition of witnesses in criminal cases *Cr Procedure Code*, sections 354—362

(5) Examination of an accused person *Cr Pro Code s 364*

(6) Confessions of an accused person *Cr Pro Code s 364*

(7) Lease of immovable property from year to year or for any term exceeding one year *Vide s 107 of T P Act* But this does not include an agreement to lease *Nanda* v *Sarat*, 5 Ind Cas 562

(8) Deed of mortgage when the principal money secured is one hundred rupees or upwards, other than a mortgage by deposit of title-deeds *Vide s 59 of the T P Act*

(9) Gift of immovable property *Vide s 124 of the T P Act*

(10) Sale of immovable property of the value of one hundred rupees and upwards *Vide s 54 of the T P. Act*

S. 91. (11) ... ndred rupees and upwar...

(12) ... Vide s. 511 of the Criminal Pro Code

(13) Acknowledgment of debt under s. 19 of the Limitation Act.

(14) Acknowledgment of debt by part payment of debt under s 20 of the Limitation Act

(15) Assignment of copy right. Vide s. 5 of the Copy Right Act.

(16) Agreement without consideration (Vide s. 25 of the Contract Act)

... oox *Pitumal* v ... nderlying s. 360 ... n the grounds of ... on oath if the accuracy of the record of such examination is to be vouchsafed, particularly when it is to be utilised as a basis for a possible perjury in future for it would be unsafe to use against a complainant what on face of it purports to be only a substance and not the full version of his examination But under the present state of the law, it cannot be contended that the substance of the oral examination is inadmissible in evidence under s 91 of the Evidence Act in proof of the statement therein contained *Bhagirathi Bai* v *Emperor*, 89 Ind. Cas. 713=26 ... nal ... f a ... ne, ... be ... a ... ut ... ur-able. *Queen* v *Nga*, L B R (1872—1892), 572

Mortgage When in a suit for redemption of a mortgage the existence of the mortgage ... ossession on the strength ... ground of a contract of sal... evidence to rebut the existence of such a contract *Held* also that a *pyat paing* which reported an actual sale could not be considered as a document recording the terms of a contract for the purpose of section 91 of the Evidence Act. *Maung Kin* v *Maung Sun*, 5 Rang 679 Where on the back of a mortgage deed an endorsement of the payment was made and it was also added that the mortgages were extinguished, the endorsement requires registration But oral evidence is admissible to prove the payment of mortgage amount, apart from the endorsement *Labhu Ram* v *Sazawar*, 100 Ind Cas 129=A I R 1927 Lah 237. If ...

... transfer and have an account taken as to what was due on the mortgages ...)=A. I. R 1926 ... ontract relating to ... ment, no evidence ... document itself ... Where a mortgage ... stantial evidence

such as recitals in deeds referring to the mortgage, extracts from account books and by a transfer of a share of the mortgage *Held* that the written

per mensem compoundable yearly and the defendant alleged in a suit on the
ble interest
agreement
al v *Abdul*
a mortgage
s produced,
transaction.
Maung Po v. *Ma Le,* 3 Bur L J 238=84 Ind. Cas 468=A I. R. 1923 Rang. 102 A mortgage which ought to have been by a registered instrument cannot be so proved by other forms of evidence *Maung Tun* v *Maung Khan,* 2 Rang 441=A I R 1925
title deed, in the
open to the plaint
document was depo
But as the defendant executed a document in writing the Court must refer to it in order to ascertain what the contract was *Chunilal Lal* v *Vital Das,* 24 Bom. L R 502=68 Ind Cas. 1005=A I R 1922 Bom 440 According to section 91 of the Evidence Act, the terms of a mortgage can only be proved by the production of the mortgage deed or of secondary evidence of its contents, in case it is shown to be lost or destroyed,
ment fails to produce it after notice
1907, 4th Qr Evidence 13, *Fateh Sing* v
Samandar, 276 P L R 1913=20 In
of transaction completed independently of them and not embodying terms of
evidence
ut where it
nature of
the transaction *Holka* v *Nanupan,* A I R 1932 All 259=1932 A L J 101.

Sale Where propety is
the document cannot be relied up
be referred to for the purpose
ween the parties and to prove delivery of possession To such a case this section does not apply *Keshwar Mahton* v *Sheonandan,* 10 Pat L T 449=A I R 1929 Pat 620 An unregistered sale deed can not be made basis for suit for specific performance as if it were merely document creating right to obtain another document *Duan* v *Guba Chan,* A
227 *Section 49 of the Registration Act*
17 of that Act and s 91 of the Evidence Act
an unregistered document, which is
being given in evidence as to the
Pe v *Maung Sein,* 7 R 411=A I R
evidence of the terms of a dispositi
applicable to both classes of documents mentioned in section 91 Consequently

91. to take effect for want of registered conveyance *Mg Myat* v *Ma Dun*, 3 Bur. L J 78=81 Ind Cas 857=A I R 1924 Rang 214 Where unregistered deed of sale is inadmissible in evidence other evidence of the contract of sale is inadmissible *Parmeshri* v *Autar Singh*, 3 Lah L J 173; *Baggu* v *Tara Singh*, 5 P L R 1919 So also where an agreement to relinquish ex proprietary rights which should be in writing and registered was not executed, held that oral evidence was not admissible regarding the agreement *Ram Nath* v *Special Manager*, 12 L R 1 Rev The plaintiff can rely upon an oral sale accompanied by delivery of possession in a case where a sale deed was executed in evidence

Ma Nuai Paul, 34
property under a reg
the production of
evidence with regard
section 91 of the Evidence Act *Safar Ali* v *Mohesh*, 23 C. L J. 122=34 Ind Cas 956 After acknowledging the receipt of consideration in the deed of sale, a vendor is not estopped from showing that he had not actually received the consideration stated in the deed *Puthi* v *Nand Kishore*, 25 Ind Cas. 27.

Deposition Since the act of deposing is a physical act which can always be proved by any one who has heard the statement being made, the fact of deposing might be proved by any one who has seen and heard the witness *Ganapathe* v *Sakharayappa*, 115 Ind Cas 140=A I R 1929 Mad 187. But under Order 18 rule 5, C P Code, it is necessary that the deposition of a witness in an appealable case, in order to bind him to the statement recorded therein, should be read over to him This provision is mandatory and not directory. The omission to do so renders the deposition inadmissible in evidence against him on his subsequent trial for perjury Section 91 of the Evidence Act excludes
or
10
Ir
S
37
a
record thus made is the only admissible proof of what was said, but in a ... trial, the Magistrate need not generally record the evidence, and where no obligation is laid upon the Judge or presiding officer by law to reduce depositions or statements to writing, they may be proved by the presiding officer or by persons who heard them, in order to establish the fact that they were made *Howard* v *Rustamji*, Rat Un Cr C 334 The accused was charged in the
constable in
Held, that the

writing, was
as to such sta
the present be
his memory
the oral evidence of the contents of the accused's deposition at the trial before the Magistrate was inadmissible under this section *Queen Empress* v *Bapu Narain*, Rat Un Cr C 401 Under section 91 of the Evidence Act the document embodying the deposition is the only evidence of the statement charged having been made under section 80 of the same Act, it is admissible only when it was taken in accordance with law *Kadir Pakiri* v. *Emperor*, 18 Cr L J. 966=42 Ind Cas 326.

cused before S,
a Bom. L R.
10 compromise
a s nine, seven
of nd admitted
having received rupees five from S, but when he was prosecuted he denied the
and proved the
but a confession
e been recorded
ar being recorded
when departmental enquiry was going on was not a matter required by law to be in writing, and section 91 of the Evidence Act had no application The Magistrate therefore was competent to prove the confession. *Haidar Raza* v. *King Emperor*, 12 A. L J 306–36 A 222=15 Cr L J 569=25 Ind. Cas 321. Where statements made by an accused person are inadmissible in evidence, secondary evidence of the contents of those statements are inadmissible also under this section *Queen Empress* v *Viran*, 9 M 224=2 Weir 125; *Reg.* v. *Bai Ratan*, 10 B H C 166 The confession of an accused person made to a Magistrate holding an enquiry is a matter required by law to be reduced to the form of a document within the meaning of section 91 of the Evidence Act, and no evidence can be given of the terms of such a confession, except the record, if any, made under s 364 of the Code of Criminal Procedure *King Emperor* v. *Gulabu*, 11 A L J 286=14 Cr L J 211=19 Ind Cas 507=35 A 260

Acknowledgment of debt. Secondary evidence of the contents of an acknowledgment, used to keep alive a cause of action beyond the ordinary period of limitation, can be given, where the original is proved to have been lost or destroyed, the effect of paragraph 2 of section 19 of the Limitation Act of 1877 not being absolutely and always to exclude secondary evidence in such a case Para 2 of the above section belongs to that branch of the law of evidence contained in section 91 of the Evidence Act *Shambu Nath* v *Ram Chandra Saha*, 12 C 267 Section 19 of the Limitation Act (XV of 1877) says clearly that oral evidence of the contents of an acknowledgment may not be received; nor has the Act made any saving of acknowledgments received or given back before the Act came into operation *Zulnissa* v *Motidev*, 12 B 268.

Search list A search list is not evidence of the facts stated therein and this section, therefore has no application to it It is simply a declaration, not on oath or affirmation or subject to cross examination, made by a police officer and the person's presence at the search that certain formalities were observed and certain events took place Oral evidence may, therefore, be given as to what took place at the time of the search *Public Prosecutor* v *Saralu Chennaya*, 2 Weir 776 This section, presupposes that, where a certain matter is required by law to be reduced to writing the writing is itself evidence of the matter so reduced, and the section does not apply if the writing is not evidence of the matter *A search list is not evidence of the matter stated therein and it does* not therefore exclude oral evidence of such matter *Public Prosecutor* v *Sarabu*, 33 M 413=8 Ind Cas 808=11 Cr L J 716 The search list prepared under s 103 Criminal Pro Code, is proper evidence of the matters which it should contain, *viz* the properties found and the place where they were found *In re Mammadi*, 2 Weir 47=2 Weir 515 The provisions of this section do not apply to the case of search list prepared under s 103 of the Criminal Procedure Code, *In re Solai Ndick*, 8 Ind Cas 178=21 M L J 281=11 Cr L J 576

Application of section 91 to an oral statement made by a witness to a Police officer "In discussing the non applicability of section 91 of the Evidence Act to an oral statement made by a witness to a police officer and entered by him in his special diary I shall show that the distinction between the [illegible]

[illegible]

Procedure prohibits the use of oral statements made by a witness to [illegible] gating officer and that is the point in question In the [illegible] 91 of the Indian Evidence Act has no application to an oral [illegible]

to an investigating police officer, for it is not a matter, which is required by law to be reduced to the form of document (see *Reg* v *Uttam Chand,* 11 B H C R 120 and *Empress* v *Kali Churn,* 8 C 151). In the third place the entry in the diary of the police officer, correctly speaking, is not the statement either oral or written by the witness for any legal purpose It is by habit of thought with the depositions of witnesses statement made by a witness by the try in ordinary parlance This calls t speech and writing are two distinct objective entities perceptible by two different senses Speech is heard by the ear and writing is seen by the eye A deaf person is not a possible witness to a speech nor a blind person to a writing Both are means for expressing ideas A may state orally that a certain event happened or may write that it happened, but in order to constitute the oral or the written statement of A to be his act in the eye of the law it must have been made with a consenting mind as his own juristic act A making an oral statement within the hearing of B C and D The oral statement of it under section 8, illustration (c) of the Evidence
direc. ev
and so
writing
made by A, ... cannot be allowed to

... deemed to represent his own oral statement and his own juristic act' Per *Karamat Husain J* in *Rustam* v *King Emperor,* 7 A L J 168 (181)

Exception 1 ... fice is raised by showing that the p ... er This strictly involves two element ... or openness of such action, or, as ... officer But often the first element alone is mentioned as essential *Greenl Ev* § 38(*a*) This presumption is based on the maxim *omnia præsumuntur rite esse acta,* that is that will be presumed to have been done which ought to have been done The general rule is that where the contents of a writing are desired to be proved, the writing itself must be produced, or its absence is sufficiently accounted for before other evidence of its contents can be admitted *Greenl Ev* § 563 (*a*)
For sin
turbed
general,
are pro
the offic
arises
party to
366, *M*
Cross v
Campb 131, *R* v *Verelst,* 3 Campb 432, *Greenl Ev* § 563 (*g*)

Will annexed when no executor is therein appointed or the appointment of executor fails), or other proof tantamount thereto of the admission of the Will

in the Probate Division is legal evidence of the Will in any question respecting personality. *William on Executor, 11th Ed.* 206. It can only be granted to an executor. *Behary Lall* v. *Jaggo Mohan*, 4 C. 1. Probate of a Will can not be refused on the ground simply that it is what lawyers in ancient time called "inofficious" *Rammal* v *Kalalkoli*, 22 S.

Under this exception the contents of a Will
may be proved by the probate. Section
(XXXIX of 1925) lays down that probate of
Will from the death of the testator, and renc
the executor as such
madans as well as to the
do not belong to the P
do not live within the loc
the High Courts of Ju

the executor by virtue of the Will, not of the probate The Will gives property to the executor; the grant of probate is the method which the law specially provides for establishing the Will So long as the probate exists it is effectual for that purpose *Kamal Lochun* v *Nilruttun*, 4 C 360 (362) The law on the subject is the same as in England *In re Ezekiel Joshua Abraham*, 21 B 139. Probate is an evidential ceremony *Smith* v *Miller*, 1 T R 480, *Ganapathi Iyer* v. *Sw mali*, 36 M 375, *Mathuradas* v *Gokuldas*, 10 B 468; *Jehanger* v *Kukibai*, 27 B 281; *Bai Harkar* v *Manick lal*, 12 B 621 The probate is only conclusive as to the appointment of executors and the validity of the contents of the Will *Hormusjee* v *Bai Dhanabai*, 12 B 161, *Whicker* v *Hume*, 7 H L C 124, *Brajnath* v *Anandamoyee*, 8 B L R O C 208, *Balgangadhar* v *Sakuarbai*, 26 B 762, *Chintaman* v *Ram Chandra*, 34 B 589. The probate shows that it was duly executed by the executor *Bhabangana* v *Harendra*, 17 C. W. N. 445=16 Ind Cas 48

Explanation I. "The learning on this head" says *Mr Norton* "must be sought for in work
grant, or disposition
Take the familiar i
from a series of letters passing between the parties" *Allen* v. *Bennett*, 3 Taunt. 169; *Jackson* v *Lowe* 1 Bing 9, *Phillimore* v *Barry* 1 Camp 513 *Warner* v *Wellington*, 25 L J
suffice if the contr
party, provided su
together *Spardlow*
a letter in which the
with the letter *Pearce* v *Gardner*, (1897) 1 Q B 688, *Taylor* § 1026 It is sufficient if the contract can be plainly made out in all its terms from any writings of the party, or even from his correspondence But it shall be collected from the writings, verbal testimony not being admissible to supply any defects or omissions in the written evidence *Boydell* v *Drummond*, 11 East 142, *Greenl Ev* § 268; *Cox* v *Middleton*, 23 L J Ch 628, *Ridgway* v *Whorton*, 21 L J Ch 46, *Caddick* v *Skimore*, 3 Jur N S 1185

Telegrams "Telegraphic messages are instruments of evidence for various purposes and are governed by the same general rules which are applied to other writings If there be any difference, it results from the fact that messages are first written by the sender, and are again written by the operator at the other end of the line, thus causing the inquiry which is the original The original message, whatever it may be, must be produced, it being the best evidence, and in case of its loss,
next best evidence the

rk from which
message, and the
party sending

91. returned, are what would govern in construing the contract, provided both parties voluntarily and of their own accord sent their messages by the telegraph and thus adopted the company as their agent So when a contract is made by telegraph, which must be in writing by the Statute of Frauds, if the parties authorize their agents, either in writing or by parol, to make a proposition on one side and the other party accepts it through the telegraph, that constitutes a contract in writing under the Statute of Frauds; because each party authorizes ... rite for him; and it makes ... r the acceptance in the ... , with a steel pen an inch long attached to an ordinary penholder, or whether his pen be a copper wire a thousand miles long In either case the thought is communicated to the paper by use of the finger resting upon the pen, nor does it make any difference that in one case common record ink is used, while in the other case a more subtle fluid, known as electricity, performs the office . We know that by the admirable system regulating the government of the telegraphic companies, the original despatch is preserved and may be at all times procured for the proper purposes The paper filed at the office from which the message is sent is of course the original, and that which is received by the person to whom it was sent purports to be a copy If the despatch is sought to be used in evidence the original must be proved and its execution proved precisely as any other instrument, ... ie same mode, before the copy can be receive ... H 488, *Lurr Jones* § 53 By the decided weight ... r the communication sent in or the one received is to be deemed the original depends upon which party is responsible for its transmission, in other words, upon the question for whom the telegraph company is agent. If there is but a single communication, the despatch as delivered at the place of destination is the best evidence In such case the telegraph company is the sender's agent, but if the message were sent in response to a request by letter to telegraph a reply, it appears to us that the company would be the receiver's agent and the despatch as handed for transmission the original And generally in controversies arising between sender and the receiver, when the ... the messa ... *Durkee* v ... by telegr ... the point ... for transmission *Burr Jones* § 210.

Broker's ... negotiation, as t ... ness books and ... of the transact ... and that which ... *Sales* § 276 A ... two parties (*Sto* ... frequently acts ... a proxy, a factor agent, but with this differnce that the broker being employed by persons who have opposite interests to manage, he is as it were agent for both the one and the other to negotiate the commerce or affair in which he concerns himself Thus his agreement is twofold and consists in being faithful to all the parties in execution of what every one of them entrusts him with ' (*Dumat, Bk. I, tit 17, cited in story on Agency, p 28, in notes*) But primarily he is deemed merely the agent of the party by whom he is originally employed To make the other side liable to pay him brokerage, it must, we think, be shown that he has been employed by such party to act for ...

... no parol evidence is admissible, but if they intend only to reduce into writing

ract, then I think they are entitled to give S
did not intend to reduce into writing
exchanged, is it usually intended that
these notes should constitute the whole of the contract? I think not. *Mr. Benjamin* in his work on the law of 'sales" lays down as the result of the authorities that the bought and sold notes do not constitute the contract I think this proposition is clearly borne out by the case of *Sievwright* v *Archibold*, 20 L J Q B 529=17 Q B 115 [See especially the decision of *Mr Justice Erle* in that case] and also by the case of *Pitton* v *Crofts*, 33 L J C P 189 In both these case the distinction between making a contract and a memorandum showing that the contract has been made is pointed out The result of those cases is that broker's notes as a memorandum may satisfy the Statute of Frauds but not exclude parol evidence In *Clarton* v *Shaw*, 9 B L R 252, *Sir Richard*

have been falsified the plaintiff
Durga Prosad v *Bhajan Ali*,
iscussion as regards the evi

defen
as having been made between a third person and the defendant In a suit

Court as to whether the mistake in the sold note was a bar to the plaintiff's suit for damages on the contract. *Held* that there was a contract between the parties for breach of which the plaintiff could sue for damages *Mahomed Bhoy* v *Chutterput*, 20 C 854 In *Ah Shain Shoke* v *Moothia Chetty* 4 C W N 453—27 C 403 (P C), a contract was made through a broker for the purchase of a quantity of paddy at a settled price The bought and sold notes were in
taken with the
wrote thereon
ot if wet The
ion until after
y of yellow rice
ondent sued for

Explanation II Where a document is executed in several parts, each part is primary evidence of the document Where a document is executed in

Nort Ev 269

terms (a) of
re a document
s for instance,
tten contract,

etc., (*Sreequtty* v. *Loharam*, 7 W. R C R 384), it relates to some other indepen-
money [Illustration
ceipt
Smith
& J.
ntract or a grant or
tion and it does not
l Narain, 80 Ind Cas
which is inadmissible in
prove discharge by pay-
a document relied on,
eds is held to constitute a
inadmissible in evidence
is admissible to prove
of the Evidence Act is no

41 M L J 297

ed by this section to
g, or by action, and so
admissible in evidence,
Vansittart, A. W N.
require to be
n for a contract
at Chandra v
ere a receipt for
amount can be
proved *aliundi* by virtue of section 91 of the Evidence Act *Chhutan* v *Mul Chand* 8 P R 1917 = 28 P W R 1917, see also *Sharaf Ali* v *Jogandar* 98 P R 1916

Existence as distinguished from terms of contracts, or of a grant or any other disposition of property Extrinsic evidence is sometimes admissible to

reduced to the form of a document, no evidence shall be given in proof of the terms of such a contract, grant or disposition of property except the document itself This however refers only to the method of proof of the terms of contract, grant or disposition of property,
and this being so, the
lduced in proof of the
I R. 1922 P 222 The
oral evidence, although
be proved for want of
ah) 43 = 61 Ind Cas.
render, where there has
been a writing is not produced, section 91 of the Evidence Act unlike as in the case of documents required to be in writing only bars proof of the terms of the

if there be any. *Nago* v. *Tukaram*, 49 Ind Cas. 843 Where the plaint in a suit for rent showed that the suit was not based exclusively on a *Kabuliyat* executed by the defendant, but also on the collection of rent, and the plaintiff did not produce the *Kabuliyat*, but filed collection papers to prove that the defendant was holding at the rate claimed by the plaintiff in the year, collection papers were admissible in evidence, as they were not put in proof of the terms of the *Kabuliyat*, and section 91 of the Evidence Act did not apply. A raiyat

g year *Gouri* S
d deed cannot

properties claim
joint properties
Ind. Cas 83
of the contract.
the parties sigr
case must be decided upon its own facts, and the real question is whether a document in question is a true award of arbitrators, or merely a deed of partition by the parties themselves disguised in the form of an award in order to escape
the only evidence
document itself,
m proving *alundi*
, plaintiffs could
1 partition *Sukh Dial* v *Mani Ram*, 29 P R 1915=27 Ind Cas 489=29 P R. R 1916.

432; *R* v *Langton*, 2 Q B D 296) *Phip Ev.* p 509 The fact of birth, baptism, marriage, death, or burial, may be proved by parol testimony, "though a narrative or memorandum of these events may have been entered in registers which the law required to be kept" The reason for the above is that the existence or contents of these registers form no part of the fact to be proved, and the entry is no more than a collateral or subsequent memorial of the fact, which may furnish a satisfactory and convenient mode of proof, but can not exclude other evidence, though its non-production may afford ground for scrutinizing such evidence with more than ordinary care *Jivandas* v *Framji*, 7 B H C R 45 p 63, *Evan* v *Morgan*, 2 C & J 453, *R* v *Alison*, R & R. 190; *Lady Limerick* v *Lord Limerick*, 32 L J P & M 22; *Taylor* Vol I 5th Ed. 413.

Exclusion of evidence of oral agreement

92. When the terms of any such contract, grant or other disposition of property, or any matter required by law to be reduced to the form of a document, have been proved according to the last section, no evidence of any oral agreement or statement shall be admitted, as between the parties to any such instrument or their representatives in interest, for the purpose of contradicting, varying, adding to, or subtacting from, its terms·

Proviso (*1*).—Any fact may be proved which would invalidate any document, or which would entitle any person to any decree or order relating thereto such as fraud, intimidation, illegality, want of due execution, want of capacity in any contracting party, *[want or failure] of consideration, or mistake in fact or law.

Proviso (2) —The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, may be proved. In considering

* The words "want or failure" were substituted for the words ", want of failure" by s 8 of the Indian Evidence Act Amendment Act, 1872 (18 of 1872).

2. whether or not this proviso applies, the Court shall have regard to the degree of formality of the document.

Proviso (3).—The existence of any separate oral agreement, constituting a condition precedent to the attaching of any obligation under any such contract, grant or disposition of property, may be proved.

Proviso (4).—The existence of any distinct subsequent oral agreement to rescind or modify any such contract, grant or disposition of property, may be proved, except in cases in which such contract, grant or disposition of property is by law required to be in writing, or has been registered according to the law in force for the time being as to the registration of documents.

Proviso (5).—Any usage or custom by which incidents not expressly mentioned in any contract are usually annexed to contracts of that description, may be proved.

Provided that the annexing of such incident would not be repugnant to, or inconsistent with, the express terms of the contract.

Proviso (6).—Any fact may be proved which shows in what manner the language of a document is related to existing facts.

Illustrations

(*a*) A policy of insurance is effected on goods "in ships from Calcutta to London." The goods are shipped in a particular ship which is lost. The fact that that particular ship was orally excepted from the policy cannot be proved

had always been regarded as part of the estate and was meant to pass by the deed cannot be proved

(*d*) A enters into a written contract with B to work certain mines, the property of B upon certain terms. A was induced to do so by a misrepresentation of B's as to their value. This fact may be proved

(*e*) A institutes a suit against B for the specific performance of a contract, and also prays that the contract may be reformed as to one of its provisions, as that provision was inserted in it by mistake. A may prove that such a mistake was made as would by law entitle him to have the contract reformed

(*f*) A orders goods of B by a letter in which nothing is said as to the time of payment, and accepts the goods on delivery. B sues A for the price. A may show that the goods were supplied on credit for a term still unexpired

(*g*) A sells B a horse and verbally warrants him sound. A gives B a paper in these words "Bought of A a horse for Rs 500." B may prove the verbal warranty

(*h*) A hires lodgings of B, and gives B a card on which is written—"Rooms, Rs 200 a month." A may prove a verbal agreement that these terms were to include partial board

A hires lodgings
up by an attorney,
A may not prove that

(*i*) *A applies to B for a debt due to A by sending a receipt for the money* B keeps the receipt and does not send the money In a suit for the amount A may prove this

(*j*) A and B make a contract in writing to take effect upon the happening of a certain contingency The writing is left with B, who sues A upon it A may show the circumstances under which it was delivered

Principle *The principle underlying this section is the same as that* underlyi
single m
from sca
quence of this is that its scattered parts, in their former and incohate shape, *have no longer any jural effect, they are replaced by a single embodiment of the* act In other words, when a jural act is embodied in a single memorial, all other utterances of the parties on that topic are legally immaterial for the purpose of determining what are the terms of their act *Wigmore* § 2425 So there is a general rule sometimes spoken of as the "oral evidence rule," which declares evidence, the effect of which is to vary the terms of a written instrument, or to change cut down or alter the effect thereof to be inadmissible *Mc*

the Courts to defeat this object When persons express the agreements, in indefiniteness, and to understanding, which so nts Written contracts

disinclination to disturb the condition of act of the parties The general rule, therefore, precludes the introduction of testimony to show that the parties meant other than they have said in the writing itself But it sometimes happens that writings are procured to be executed by fraud, or do not contain all the agreements between the parties, having been used only to cover certain matters, while others are left to oral understanding *or there may be other circumstances which make it unjust to*

These cases are usually rictly such *Mc Kelvey's*

the
writing, it is conclusively presumed between themselves and their privies that they intended the writing to form a full and final statement of their intentions and one which should be placed beyond the reach of future controversy bad faith or treacherous memory *Phip L*
Lord Bacon said "The law will not cou
which is of the higher account, with
account in law' (*Bacon's Maxims*, Reg
matters in writing made by advice an
import the certain truth of the agreement

1 P & D 117, *Davis* v *Symond* 1 Cox Cc 403), sometimes on the doctrine of estoppel, for 'in each the party is precluded by his acknowledgment in writing ... so acknowledged'—*in estoppel however it is a matter of*

another ...
where and in what sources and materials are to be found the terms of jural act.

92. *Wigmore* § 2425 Gibson also remarks that the rule is one of substantive law directed not against parol evidence as an improper mode of proving the contract, etc, but (1) against such evidence as an improper mode of making it and (2) against extrinsic facts (however proved) being received to affect the meaning of written instrument *Gibson* §§ 418 54; see also Thayers' Pre Tr Ev. 401, 17 Harv L Rev 240

Scope of the section When the terms of a contract, grant or other disposition of property have been reduced to writing by the parties, it is to be considered as containing all those terms, and therefore there can be between the parties and their representat . . . .
of the contract, grant
of the writing The
to be reduced to the fo
In *Pickering* v *Dowson*, 4 Taunt 779, 786, *Gibbs J* said . 'I hold that if a man brings me a horse and makes any representation whatever of his quality and soundness, and afterwards we agree in writing for the purchase of the horse, that shortens or corrects the representations, and whatever terms are not contained in the (written) contract do not bind the seller, and must be struck out of the case" So 'where the whole matter passes u
be taken together as forming part and p
be
can
2 B *Abbott C J* in *Kain* v *Old*,
secti *Knight* v *Barber*, 16 M & W 66,
says *Lord Blackburn* in *Angell*
Dale, 3 L T Rep N S 320, "that, where there is a contract in writing, it should not be added to, if the written contract is intended to be the record of all the terms agreed upon between the parties Where there a collateral contract,
Wigmore § 2425

d on
that that writing
ell 4 H & N. 1, 7
ere is a deed in
writing, it will admit leed" *Irnham* v
Child, 1 Bro C C 92 contract, and put it
argain." *Per Martin*
en v *Blake*, 13 M

a written document,
etc., is not governed
that oral evidence
provisions of this sec
'The language of this section is" says *Mr Field* 'not quite free from ambiguity, the words No evidence of any oral agreement or statement shall be admitted as between the parties to any such instrument, etc, correspond with and have clear reference to the words 'contract, grant, or other disposition of property' in the beginning of the section; but their application to any matter required by law to be reduced to the form of a document
quired by law to be reduced to writing be a d
an oral statement appears to be admissible
the writing in cases other than those inc
Field Ev 8th *Ed* 501 But according to *Mr*
contradiction Section 91 deals with three
contract, grant, or any other disposition
been reduced to the form of a document (2) contract grant or any other disposition of by law to be reduced to
the form such as deposition of
witness, co reduced to the form
of a docu , so as to bring it under
section 91, an act involving a

single pa
parties)
contracts,
been reduced to the form of a document by the parties, as well as those bilateral acts which the law requires to be reduced to the form of a contract Therefore these acts or matters must be contracts, grants or other disposition of property. So this section does not include such matters which the law requires to be reduced to the form of a document which are not contracts, grants or other disposition of property. *Woodroffe Ev 8th Ed* 611. The deposition of a witness does not fall within this section and oral evidence is admissible to contradict
raised by section 80 is only a
Ev p 611 Section 92 is also
s
ict that a
in fact
r portion
of the transaction *Cockle Cas Ev* 340 In *Allen* v *Pink*, 4 M & M 140, *Lord Abinger, C B* said "The general principle is quite true that if there has
terwards reduced by the parties into writing,
ed to ascertain the terms of the contract, but
, there was no evidence of any agreement by
should be reduced into writing by the defendant, the contract is first concluded by parol and afterwards the paper is drawn up, which appears to have been meant merely as a memorandum of the tran-
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the document
I R 1929 Rang
240 While or
written document
by virtue of sec
law for the time
being in force,
of Act applies that bar ceases to operate and the Court can make enquiries, that bar of statutory prohibition no longer existing because of section 10 A of that Act *Dada* v *Bhanu*, 29 Bom L R 1419=105 Ind Cas 754=A I R 1927 Bom 627 This section merely prescribes a rule of evidence It does not better the Court's power to arrive at the true meaning and effect of a transaction in the light of all the surrounding circumstances *Munna* v *Narain*, 107 Ind Cas 658 See also *Baijnath* v *Hajn Valley*, 26 Bom L R 787=48 M L J 339 (P C) In a suit on promissory note, the defendant can prove a
condition precedent to the attaching of any obl
by the promissory note was that there should
under it unless there was a final balance
against the defendant which he failed to pay. *Bhogi* v *Kishori*, 50 A 754=26 A L J 696 A lessee under a registered lease wanted to prove an oral agreement regarding his preferential right to purchase the leased property if it was brought to sale The lease was silent on the point *Held* that under s 92, evidence of

of lease
sible to show
Cas 897=
of showing
that one of the parties to the contract had acted as agent is admissible *Lachomal*
neous oral evidence is
r The parties must
terest and compound
interest and if they deliberatly have chosen to use one expression they cannot be
a v *Ganpati*, A I. R 1931
Act it is immaterial whether
subsequent to the dispoSI-

92. tion *Gopala* v *Sankara*, 1930 M W. N. 240=125 Ind. Cas 545 In the case of a covenant for title which is presumed to go with a sale under s. 55 (2) of the T P Act a contract to the contrary cannot take the shape of an oral agreement since it would be inadmissible in evidence under s. 92 of the Evidence Act *Mahammed Siddq* v ... Ind. Cas 185=A I R 1930 ... duced to writing no evidence ... between the parties to show that the document was not to take effect forthwith as mentioned in the document but after the expiry of a certain period *Parmeshwari* v *Lachman*, 129 Ind Cas 439=A I R 1930 All. 824=1930 A L J 1066 In case of a deed of gift by husband to wife the husband can prove that the same is of a fictitious nature *Mahommed* v *Sayed*, A I R. 1931 Oudh 177=8 O W N 349

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contract and such an agreement can be proved *Irpan Ali* v *Jogendra*, A. I R 1932 Cal 708=36 C W N 645=59 C 111. Oral evidence is not admissible to prove an agreement between mortgagor and mortgagee whereby a contract in the registered mortgaged bond was split up *Ram Barman* v *Sanat Kumar*, 25 C L J 24=44 C 162=21 C W N 740 Oral evidence is admissible to show that a mortgagee's possession of a certain plot was terminated by the payment of a certain amount of money *Baid Ram* v *Tila Ram*, 15 A L J ... to certain paddy ... be divided *Held*, ... section 92, cl (2) of ... d not been divided ... *ala*, 4 L W 329=34 ... and so far as the ...

adjective law is concerned, the code ... to be followed but also as to the extent ... en the ... England; and Courts of India are not justified ... statute law in the same way, as Courts of Equity ... of common law The effect of section 92 is ...

... it, by proof of an entirely different contemporaneous oral agreement, is not sound *Gujarmal* v *Sitaram*, 3 N L R 19 An acknowledgment is not a document contemplated in section 92 *Chhedilal* v *Monohari*, A I R 1930 Nag 298=26 N L R 320.

... circumstance that some ... collection of the terms of ... sole memorial of the ... There may have been ... attempt to make the ... merely to furnish an aid ... other party's satisfaction. The essential idea remains for it, that the writing is something distinct

from the transaction itself. *Wigmore* § 2429; *Dalison* v. *Stark*, 4 Esp. 163; S.

Parsons v. *N. Zealand Co.* (1901) 1 K. B 548; *Phip. Ev.* 555 When the parties during their negotiations reach a final agreement, but provide therein that the terms shall be reduced to a single memorial, the failure to execute such an agreed memorial does not preclude resort to the prior negotiations to ascertain

memorial was a

until supplanted.

referring to an

for the parties. *McKelvey's Ev.* § 297.

Partial integration; General test for applying the Rule; Collateral agreement. The most usual controversy arises in case of partial integration, i e, where a certain part of a transaction has been embodied in a single writing, but another part has been left in some other form. Here obviously the rule against disputing the terms of the document will be applicable to so much of the transaction as is so embodied, but not to the remainder. It is of course

may within the same half-hour sign articles of incorporation, authorize an overdraft, assign a mortgage and join in a committee's report to stockholders. Or a purchaser of land, negotiating with a broker, may at the same sitting accept a deed of grant of one piece of land and appoint the broker his agent

clearly distinct,

g wholly distinct

duced to writing

stances in which

a negotiation concerns one general subject—such as the purchase of a single

"parts" of the same transaction, and therefore, if reduced to writing at all, must be governed by the same writing. In searching for a general test for

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be known till we know what there was to cover

the negotiation. *Wigmore* § 2430 In *Webb* v

Balyby J said "Where there is a written agre

naturally to be expected that it will contain al

if it is entirely silent as to the terms of quitting.

the country as to that particular If, however, it specifies any of those terms we must then go by the lease alone" *Dickson* v *Zizinna*, 10 C. B 602, 610 Where the writing covers only part of the transactions between the parties and there are oral agreements relating to the same subject, such agreements may be shown If it appears that the parties did not intend the writing to embody all the transactions between them, the rule is that such transactions as do not purport to be covered by the document, but which supplement or complete it, may be proved Here, again, there is no varying of the terms of a written instrument

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for the purpose of adding to a deed a stipulation to which the parties did not intend by that deed to

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satisfied by those means but the part

to the terms which, though not

plied in it, there is no reason why he

that where

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N. Y. 216.

It is also held that the collateral oral agreement must have an independent consideration in order to be admissible *Coe* v. *Hobbey*, 72 N. Y. 141. As a principle of the law of contracts, it would seem that no collateral agreement would be of any effect in modifying the original unless there was a consideration to support it, and these decisions are therefore strictly logical *Mc Kelvey's Ev* § 296.

Parol evidence rule—Nature of. Notwithstanding the phraseology generally employed in the cases relating to what is called the "Parol Evidence

of them illustrate anything in the law **S.**
cerned with questions about the legal effect
ive law, of requiring or agreeing upon a
writing, or with the principles governing the construction of documents or the like; and not with merely evidential quality or operation of extrinsic facts, or any rules of law relating to these. As when it is said that parol evidence is not admissi[illegible]
any thir[illegible]
reason [illegible]
is of r[illegible]

in the other. *Thayer Cas. Ev.* 2nd Ed. 820.

As between the parties t[illegible] to the suit were not the parties to the [illegible] xcludes parol testimony for the purpose of [illegible] contract, is

[illegible]

of others *Greenl Ev* § 279. *Holt* v. *Collyer*, L R. 16 Ch. D 718; *Chemical E.*

[illegible]

stranger to it, either party may show that the instrument does not speak the truth, and that the general rule does not apply as it does in cases where the controversy arise between the parties to an instrument which they have made the written memorial of their agreement *Venable* v. *Thompson*, 11 Ala. 147; *Pawel* v. *Young*, 51 Ala 518, *Burr Jones* § 44[illegible]

[illegible]

by the statutory restrictions"
22 C W N. 257 (262) = 45 C. 320;
A. I. R 1929 R. 86; *Annada* v.
4 N. L R. 115; see also *Jagat*
v. *Panchoo*, 28 A. 473 = 3 A. L. J.
[illegible] v. *Collector of Gorakh-*
1930

2. the terms of a contract which have been reduced to the form of a document "as between the parties to any such instrument or their representatives in interest." In the case of 10 A 421 the words quoted above were construed as meaning between the parties to the instrument on both sides and not on one side only as between t

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not prevent the proof of a fraudulent dealing with a third person's property, or proof of notice that the property purporting to be absolutely conveyed in fact belonged to a third person, who was not a party to the conveyance *Maung Kyin v Ma Shwe La*, (1911) 2 M W N 30=14 C L J 276 (P. C)=13 Bom L R 797=1 A L J 1181 Sale deeds and mortgage deeds are essentially transactions

mortgagee

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that they agree to make provisions for certain relations or dependants does not make such persons parties to the instrument and oral evidence given by a person concerning maintenance allowance to

cannot be excluded by reason of section 92,

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ve" documents between the contracting parties *Vodiah v Vorada*, 9 Mys L J 203

Section 92 limits its operation to cases where the issue as to the real nature of the written transaction arises between the parties thereto or their privies. It leaves out cases of strangers to the instrument wishing to adduce extrinsic evidence in order to prove that the real transaction was different form what it purports to be *Saboji v Aaual Sing*, 104 Ind Cas 736; *Mahomed Sultan Mohideen v Amthal*, 101 Ind Cas 603=52 M L J 557, *Ma Mi v Maung Aung*, 111 Ind Cas 832=A I R 1928 Rang 244, *Mahomed Ishaq v. Fahemunnessa*, A I R 1928 Oudh 472=5 O W N 825, *Maung Thein v. Maung Pyu* 5 Rang 836=108 Ind Cas 734=A I R 1928 Rang 61, *Narra v. Koganti*, (1925) M W N 214=87 Ind Cas 246=A I R 1925 Mad 775=48 M L J 280; *Hiraji v Vishnu*, 1923 Bom 429, *Bhullan v Kushi*, 21 A L J. 932; *Jairam v. Rajnarain*, 20 A L J 777, *Sukumiasi v Kalipada*, 45 Ind Cas 13 If a father

be between the nominal purchaser and the vendor, and in cases of dispute between the nominal and the real purchaser, there being no writing between them, no difficulty can arise, under this section, in proving oral agreement. *Laxmibai v Keshav*, 18 Bom L R 134=33 Ind. Cas 396; see also *Pathammal*

statement is admissible in such proceeding for the purpose of contradicting

mortgagor was placed in possession of a part of the mortgaged premises, the income whereof was sufficient to wipe out the annual debt *Held* that as the arrangement was not in supersession or even variation of the mortgage, oral evidence was admissible to prove the transaction *Ramavatar* v *Tulsi Prosad,* 14 C L J. 507. The liability undertaken by the drawer and the acceptor of a bill of exchange is in
different ways and are
of section 132 of the
preclude the acceptor of a bill from proving that he never received any consideration for the bill but that he accepted it only for accommodating the drawer or some other party. *Pagose* v *The Bank of Bengal,* 3 C. 174.

Extrinsic evidence to control document is inadmissible Evidence of oral agreement between the parties to a written and registered document, distinctly adding to its terms, another term which had been antecedently agreed

the defendants sought to show that the written contract was varied by adducing parol evidence as to the matter on which the document was silent *Held* that such evidence was not admissible under section 92 of the Evidence Act *Jadu Rai* v *Bhubotaran,* 17 C 173 The executants of bond as principals, are not competent t
Saing v *Nga Lu Aun*
bond are clear and
it was an assignment
oral evidence of intention is not inadm
deed or ascertaining the intention of the pa
L R 523=22 A 149=4 C W N 153
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as to the consent of the donee of the life estate to such an arrangement *Held,* that such oral evidence was clearly inadmissible *Nabooma* v *Khedar Hussain,* 108 Ind Cas 637=A I R 1928 Mad 613 Contemporaneous oral agreement not to charge compound interest though bond may stipulate therefor and the fact of simple interest only being realised cannot entitle a party to vary effect of written contract *Abdul Aziz* v *Amanmu'* A I R 1925 Cal 276 Evidence of conduct of parties is inadmissible to contradict an unambiguous grant, *Gopal* v *Ramadhar Singh,* A I R 1925 Pat 228, see also *Kesho* v *Thakur,* A I R 192
person under
deed and or
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till he got possession of the entire property is inconsistent with the terms of the

deed it is not open to the executants to set up and prove an agreement that the rate of interest to be charged was lower than that agreed upon. *Sukh Lal* v.

2. *Murari*, 95 Ind Cas 1019=A. I. R 1926 Oudh. 273 Evidence of subsequent oral agreement not to charge compound interest is inadmissible to vary the original contract which is a registered one *Jogendra Nath* v. *Khoda Baksh*, 1924 Cal 280, *Abdul Aziz* v *Amanmal*, 78 Ind Cas 742=1925 Cal 276 An entry in certain account books evidenced a contract to sell goods and they were described as arriving by a certain ship *Held* that oral evidence cannot be let in to show that there was an agreement to deliver goods within a fixed time *Firm of Jivanjo* v *Firm of Mathabari*, A I R 1924 Sind 127

In a suit on a joint and several promissory note payable on demand executed by A and B A cr
as security for B
oral agreement wi
under the note in th
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formed the foundation of the suit formed a completed contract, whilst the defendant vendor urged that it was only a provisional arrangement conditional to the preparation by a vakil of a formal document evidencing the contract *held* oral evidence to show what actually took place on the occasion when the *parties entered into the agreement relied upon by the plaintiff is irrelevant* and inadmissible *Harichand* v *Govind* 44 M L J 608=47 B 335=28 C W N. 73=50 I A 25=37 C L J 440=(1923) P C 47. Where the terms of an
was to
prove
the
s 19
Evidence of an oral agreement substituting a new executory contract in lieu of a decree is inadmissible *Lachmi Das* v *Babalal*, 44 A 258=20 A L J 65=69 Ind Cas 990 It is not permissible to a person who wishes to impeach a
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L R 239=66 Ind Cas 865 Where a pro note is sought to be enforced according to its tenor, it is not open to the defendants, to let in evidence an alleged
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it by way of security for others cannot be tried or determined except so far as it affects the question of consideration *Durgacharan* v *Lakhi Narain*, 47 Ind Cas 917 In a suit to recover possession of the properties conveyed under a sale deed, evidence was adduced to show that the parties to the document intended to give simple mortgage rights to the alleged purchaser for the sums which one had promised to pay to the creditors of the other party *Held* that such oral evidence is clearly inadmissible to prove that a different mode of operatation was

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the express terms of the promissory note be proved *Muthu Erulappa* v

e and it was sought to

recited *held* that such

tion *Narra Reddiar* v

=3 L W 589—35 Ind.

Cas 301

Where the terms of the mortgage contract are reduced as required by law to writing, an oral agreement varying those terms can not be admitted in evidence *Muthu Kumar* v *Govinda*, A I R 1932 Mad 218=35 M L W 145 where according to the terms of the registered mortgage deed the whole of the mortgage money is payable on demand with interest, evidence of a contemporaneous oral agreement between the parties that the amount would not be payable on demand but shall be accepted on instalments, is inadmissible under the express provisions of s 92 *Mohammad* v *Kishori*, A I R 1932 All 375—1932 A L J 414 But when a mortgage bond is silent as to how the money due on it is to be paid and the mortgagee executes a *kist bandi* which merely provides that mortgagor is to pay the amount then due in certain instalments spread over a certain member of years with a proviso that in default of any *kist* the entire amount under the mortgage bond would become due, the *kist bandi*, shows the arrangement between the parties and does not alter or vary the terms of the mortgage bond and it i

Ram, A I R 1932 Ca

provided that each one of

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Section 92

an v *Sanat*

be rent, it

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raised, and any length of payment of a lesser rent will not help the tenant. *Maharaja of Bobbili* v *Appala Naidu*, (1916) M W. N 139=32 Ind Cas 703. Where in a suit by the payee of a Hundi against the drawer and the acceptor, the Hundi is silent as to interest, the plaintiff is entitled only to 6 per cent

2. Evidence of a contem
not admissible under
l Pat L J. 71=35 Ind
ot one for satisfaction
of the term
of the deed
Muhammad
party to a written contract to prove a contract the terms of which are clearly inconsistent with terms of the written contract *Baranashi* v *Lulla Mal*, 29 Ind Cas 950

Where a promissory note executed by defendants 1 and 2 contained an uncond is not admis sible to be conditional on the ariation of the contra clearly forbids eviden ble exceptions to the *Narasimma* v *Ra* 336=18 Ind Cas 696 Where the subject matter of an appeal is compromised by the parties by means of a written agreement, which recited that "all matters in dispute" was adjusted, it is not open to any of the parties to tender oral evidence of a separate agreement not on the

therein as 400 bighas
was not the stated area within the specified boundaries Extrinsic evidence as to the negotiations which led up to
construction of the lease *Raja Durga*
N 66=19 C L J 95=11 A L J
sale deed recites as consideration a cash
contract that the amount was really
of the sale price is a term of the contract within the meaning of section 92 of the Evidence Act Evidence cannot be admitted to vary the provisions of the ation fixed for the same *Adityam Ayar*
M W N 847=25 M L J 632=21
to contradict or vary the express and unambiguous terms of a written instrument by reference to preliminary negotiations or previous conversations *Saiyid Abdulla* v *Saiyid Basharat*, 17 C. W. N 233=13 M L T 182=(1913) M W N 131=35 A 48=17 C L J 312=25 M L J 91 (P C) Oral evidence is not admissible to prove that a document which in terms is an out an out gift was really meant to be *donatio mortis causa* *Benode Kishore* v *Ashutosh Mukhapadhya* 16 C W N 666=14 Ind Cas 720 Oral evidence to prove that parties to a sale deed, which was duly executed and registered, subsequently rescinded it by mutual consent, is inadmissible under section 92 of the Evidence Act *Bypulallu* v. *Teddula* 15 Ind Cas 282 Oral evidence to show that one of the executants of a note of hand signed it only as a security and that his liability was only to the extent of standing as surety for a month is inadmissible under this section *Harek* v *Bishnu* 8 C W N. 101 Neither a contemporaneous oral agreement nor the subsequent acts and conduct of the parties can be proved under this section to

mortgage, it is only agreed
to be made by the mortgagee to
the season's crop such agreem
as such, would be inadmissible

S. 9

Act. *Moran* v. *Muttu Bibee*, 2 C 58 Under this section no oral evidence is admissible to show that certain deeds of sale are not deeds of sale, but deeds of gift *Rahiman* v. *Elahi Baksh*, 28 C 70 Where the plaint in a suit for specific performance of a contract to sell a certain share of a house, set out a written contract, and alleged that, on its having been subsequently discovered that the share was less than it was originally believed to be, the price was reduced by verbal agreement, *held* that the written contract must be taken as intact save as to the price, and that no evidence could be given by the defendants in contradiction of the other terms of the document *Brown* v. *Cutts*, 5 C L R 487 Where a written instrument provides for a joint tenancy and joint contract by all the parties executing it to pay the whole rent of a village without any reference to the quantity of land in the holding of each, oral evidence is not admissible to show that separate specific contracts have been entered into by each of the parties, and it makes no difference that the evidence is put forward as evidence of a custom *Mr G Lee* v *Panchananda*, 5 M H C R 135 Defendant was lessee under a joint lease by K and P. co owners of the premises Plaintiff having purchased an undivided moiety from P gave defendant notice to quit the moiety from the termination of the lease and sued for possession The defendant set up an oral agreement giving him an option of renewal of the lease, but it could not be proved as being

instrument whose terms are in themselves clear and undoubted *Rambuddin* v *Ranee Sree Koonwar*, W R 1864 Act X Rul 22 Bought and sold notes together may form the contract in accordance with the custom of merchants in Calcutta So, parol evidence was not admissible to vary or add to the terms

of rent of a holding held under a registered lease, nor is the conduct of the

issible to prove the

Kabuliyat was granted

partly in cash, and

in kind was not duly

um *Held* that oral

had agreed to pay the

price of the paddy at the current market rate, and not at the rate specified in the *Kabuliyat*, upon failure to deliver it duly *Godai* v *Sarju*, 12 C L J 649=7 Ind Cas 842

The Writing is really not the con

paper in writing, which purports to

contract, may be produced, it is still

92. Cas 929, see also *Woodroffe's Evidence 8th Ed* p 613 But in a recent Allahabad cases *Ashworth J* said: "The Appellant's counsel has referred to the following dictum in *Woodroffe and Amir Ali's* well known commentary, the Indian Evidence Act 'Though evidence to vary the terms of an agreement in writing is not admis ib ... ement at all is admissible' In suppo ... are relied upon namely, *Harris v. Ricl.* ... *m v. Campbell,* 6 El & Bl 370=25 L ... no authority for the dictum as stated ... the whole of a ...

92 of Evidence Act There is no authority for holding that evidence in any supp can be admitted for the purpose of showing that there was agreement at all or in other words, that a deed was meant to be inoperative" *Lachmandas* v. *Ramprasad*, 49 A 680=A I R 1927 All 422 (424)=100 Ind Cas 1029=25 A L J 349, see also *Gujar Mal* v *Sitaran*, 3 N L R 19.

Cases where the oral evidence is admissible "The cases in which parol evidence when objected to is apart from fraud or mistake receivable to correct written instruments are cases where, for example, the evidence supplements but does not contradict the terms of the deed; or where the provisions of the deed leave the question doubtful whether merely a mortgage and not out and out sale was intended, or where the language sought to be explained in evidence s language in an ordinary conveyancing form not exhaustively accurate but ... Instances of each of these will be found ... *Burton* v ... *Personal* ... *urgh* in *Tsang Chuen* v *Li Po Kwai*, A I R 19 ... Where there was a mortgage by which a fixed rate of interest was agreed to be paid, and there was a contemporaneous oral agreement that the mortgagee should go into ... he was ... reement, ... was not ... s of the written agreement, that it was merely a provision as to how the interest should be paid and that therefore the oral agreement was valid *Brindaban* v *Umrao*, A W N 1887, 61 In a suit for money due on a promissory note payable on demand the defendant pleaded a contemporaneous agreement in writing allowing ...

agreed not to be executed against the judgment-debtors is not inadmissible by reason of the section *Ganga* v *Ram Oudh*, 113 Ind Cas 760=A. I R 1921 ... persons jointly, a ... the joint ... e 56 I A ... C) Oral ... which the ... under the ... settle- ... h and ... future ... idence which shows that two documents executed and registered on the same day are

...ount to leading evidence so as ... v *Ramlal*, 25 A L J 723=103 ... oral agreement providing for repayment of a mortgage debt from the usufruct of the mortgaged property may be proved Such an arrangement does not amount to a lease nor does it constitute an usufructuary mortgage. It is only a means of discharging the debt by putting the simple mortgagee in possession of the mortgaged property. *Nookamma* v *Dharmayya* 53 M. L J 863 This section prohibits only the proof of any contemporaneous oral agreement between the parties in variance of the terms of the document Where the father purchased certain properties and took a sale deed in joint names of his two minor sons and subsequently the individual share of each of the vendees was sought to be proved by evidence relating to the intention of the father *Held* that section 92 of the evidence Act was not a bar to the admissibility of such evidence as the sale-deed was silent regarding the share of two vendees *Mohammed* v *Amthal*, 101 Ind Cas 653=52 M L J 557=38 M L T (H C 247) In the case of an outright sale by registered deed, an independent contract to re-sell either orally by unregistered deed can be proved, but where the contract is not an independent transaction but froms part and parcel of the original transaction and together constitutes a mortgage, such contract cannot be proved If the facts p... of each other, b... oved for want o... endent of each ... leed is one of an outright ... *Ma Nan* v *U Yaing*, 6 Bur. ... 314 There is nothing to prevent the parties from entering into an oral agreement for the settlement of decrees for money They have the same freedom to do so as to make narrative of contract by an oral agreement modifying the previous written contract so long as the contract is not required to be in writing and registered It cannot be said that the judgment debtor selling upon a verbal agreement by the decree-holder to accept some variations is ... Evidence Act *Ma Shue* v *Mang San*, ... Oral evidence to prove that the def... plaintiff on the understanding that it sl... when the liability arise upon his part to restore to the plaintiff his share of the capital is inadmissible *Sheo Prosad* v *Gobind* 49 A 464=100 Ind Cas 332=25 A L J 305 A I R 1927 All 292 This section is no bar to the admission of oral evidence of circumstances to show the relation of the written language ...

... out of the rents for a certain charity, to pay also the cist and credit the balance of the rents towards the mortgage debt The plaintiffs alleged that the defendant failed to pay the said sum of Rs 200 and the cist and that the mortgage debt had bee... admissible and that section ... case because it was not oral ... mortgage deed at all *Ram*... 85=107 Ind Cas 808=A I... that the amount of Rs 50... mensem" The question was whether interest should be at one rupee per mensem or only one rupee for Rs 500 per mensem *Held* that oral evidence was admissible to prove that the parties intended that interest should be paid at 1 rupee per cent per mensem, under proviso 1 to section 92 of the Evidence Act. *Venkataramappa* v *Rama Setty*, 3 Mys L W 146 Oral evidence is admis-

2. sible to prove a discharge and satisfaction of a mortgage bond *Krishnaji* v *Kashirao*, 90 Ind Cas 450 A recital on a sale deed that there is no incumbrance or that the vendor has a good title to convey is not one of the terms of

succeeded to the estate of their father made an oral partition of the same and also arranged orally to extinguish their mutual rights of survivorship It appeared from the evidence that two lists had been drawn up of the properties as divided and mention was made in those of the right of survivorship having been extinguished The lists were not produced but oral evidence was let in regarding the same *Held* section 92 of the Evidence Act did not apply and the oral evidence was admissible *Nelakanta* v *Sundarasiva Row*, 48 M 933=22 L W 398=(1925) M W N 643=A I R 1925 Mad 1267=49 M L J 266

Even where an agreement is silent as to the consideration under this section oral evidence is admissible to determine what the consideration was *Rameshwar das* v *New Jooria*, 94 Ind Cas 371=A I R 1926 Sind 202 This section has no application where evidence of the conduct of the parties and their rights of the various members is let in to prove partition by the defendant in a suit *Ramuchetti* v *Panchammal* 92 Ind Cas 1028=A I R 1926 Mad 402 Where a promissory note is executed by two persons, oral evidence is admissible rety for the other *Moolji* v This section does not prohibit ischarge of a debt secured by a 710=96 Ind Cas. 11=A. I R 1926 Cal 906 by payment and partly by the release to roved by oral evidence *Mahim* v *Ram* Cal 170 In a mortgage suit it is open to the mortgagor to prove that the mortgagee had been satisfied not merely by payment in full of the amount which was due thereon but by part payment and remission of the balance *Bhaba Sundari* v *Ramkamal* 44 C L J 269=A I R 1927 Cal 27 See also *Ramchandra* v *Kailash*, 1931 Cal 667=58 C 532 An oral agreement between the lessor and the lessee that the lessor should give credit for certain sums for having cut certain trees is admissible as the transaction is a mode of payment or a discharge or waiver of a portion *rao*, 94 Ind Cas 169=24 A L J of Lading evidences a contract varying its terms is admissible Where in a suit on a bond the nd evidence is offered to show that the money due under the bond was meant to be the premium for a lease agreed to be executed by the creditor but which in fact was never executed, *held* that the evidence was excluded by section 92 of the Evidence Act. *Baldeo* v *Ram Autor*, 22 A. L J 850=82 Ind Cas 347 Where all the terms of a contract have not dence is admissible to prove the terms not *Coalfields of Burma* v *H H Johnson* Rang 128 Where a date is fixed in the oral evidence to extend the period is terms of the contract so as to make it 76 Ind Cas 62 Where a promissory note is endorsed on the back by a person who is neither the maker nor the holder, oral evidence can be let in to prove a contract of guarantee *Thakersay* v *Kishendas*, 76 Ind Cas 282=1925 Sind 9 agreement between the mortgagee and of redemption as regards the terms on assign his interest *Sailesh Chander* v arol evidence is admissible to prove a debt acknowledged in writing by the debtors when such acknowledged writing being unstamped is inadmissible in evidence *Thalhan Ram* v *Lall*, 74 Ind Cas 939=1923 Lah was wrongly ent real intentic 301 (Rev) evidence of a contemporaneous oral agreement to the effect that the

S. 9

agreed to treat it as a mortgage is admissible *Talak Chand* v *Atmaram*, 25 Bom L R 818=A I. R 1924 Bom 58 Oral evidence is admissible as to negotiations antecedent to execution of the mortgage instrument, showing that what was intended to be offered and accepted as security was a certain ancestral share

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cured by a promissory note does purpose for which the advance was 239=64 Ind Cas 33 Where an oral agreement is made, which in respect of the manner of payment rescinds or required by law to be in payment if made in accord- partial satisfaction of the not exclude evidence of the payment or the oral agreement that explains it It does, however, exclude evidence of the agreement in respect of future payments not n accordance

L J 387=18 A L J 359=55 Ind. Cas 522=47 I A 17 (P. C) Where in agreement for the sale of land, it was impossible to reconcile the statement in the body of the agreement with the recital in the schedule as to the extent of the land to be conveyed, extrinsic parol evidence is admissible to explain the facts that led to the execution of the agreement, in order to reconcile the different statements regarding the property sold *Hussonally* v *Mangoldas*, (1920) M W N 726 (P C) There is nothing in this section to exclude evidence of an oral agreement which contradicts varies, adds to, or subtracts from not the terms of the contract, but some recitals in the contract itself, *Mukhi Singh* v *Kishun*, 51 Ind Cas 320 Where there is an oral agreement to grant a lease section 92 of the Evidence Act does not stand in the way of proof that there has been an agr

the circumstances as to the time of the

Chandra v *Bijoy Kanta*, 23 C W

Kabuliyat executed and registered by a tenant is proved by the tenant in a suit there is nothing in the Evidence Act to prohibit the landlord from showing that he never assented to or accepted the *Kabuliyat* *Hemanta* v *Birendra*, 47 Ind Cas 1003 Oral evidence of a sale by the mortgagor to the mortgagee

agreement made out of Court between the parties as a ground of adjournment does not purport to be and is not a record of the terms of the compromise: and additional evidence to add to the terms of the compromise is not inadmissible under section 92 of the Evidence Act *Sambanda* v *Chinnasuami*, 29 Ind Cas 860 Where the ostensible consideration shown in a document was the payment of a certain sum of money said to have been made by the defendant, oral evidence is admissible to show the real nature of the transaction *Narayan* v *Vithoba*, 11 N L R 34=28 Ind Cas 355 A receipt which says 'I release you from the liability to pay compound interest as written in the said mortgage bond' is admissible in evidence Registration is not necessary and the receipt operates as a full acquittance for the money already paid *Kailash Chandra* v. *Sheikh Chennu*, 42 C 546 A executed a usufructuary mortgage in favour of B in respect of one property Subsequent to this mortgage, there was an arrangement between A and B whereby the mortgagee was put into possession of another property, or the understanding that the profits derived from the latter were to be applied to payment of the princip[illegible] evidence to prove sub-sequent arrange[illegible] v *Shib Sahai*, 18 Ind Cas 324 P[illegible] one of the contracting parties was acting for himself or on behalf of a principal; for such a question [illegible] under section 92 of the Evidence Act [illegible] M L J 501.

In a suit for m[illegible] on demand, the defendant pleaded a contemporaneous agreement in writing allowing the repayment by instalments *Held* that the contract was as contained in the two documents, and the defendant was entitled to prove the contract by showing that [illegible] between the [illegible] lence Act [illegible] nge rights, [illegible] nption by [illegible] I W N [illegible] er written contemporaneously with a sale deed can be admitted in evidence to prove that [illegible] Neither ection 92 of the [illegible] t, would apply so as to [illegible] *Mutha Venkata* v *Pyanda*, [illegible] ecution of a mortgage bond, the mortgagor placed the mortgagee in possession of the mortgaged premises under an agreement by which the mortgagee was to continue in possession for seven years and to receive the profits in full satisfaction of his dues under the [illegible] to alter, [illegible] merely to [illegible] l by oral [illegible] v *Babu* [illegible] ral assurance given by the grantor of the lease, that it was intended to last, for ever, is admissible *Narsingh Dyal* v *Ram Narain*, 30 C 883 Where a document records the terms agreed to at the time of the execution of another document, the parties being the same, there is no objection, under s 92 of the Evidence Act, to the [illegible] varies [illegible] *ta* v [illegible] ular [illegible] n of [illegible] n to [illegible] It is [illegible] *h* v [illegible] on [illegible] the [illegible] tain [illegible] that [illegible] t no [illegible]

oth [illegible]
does [illegible]
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consideration that has passed, by showing that the actual consideration was something different to that alleged *Vashudeva* v *Narasamma*, 5 M 6; *Dookha* v *Ramlal*, 7 W. R
Indarjit v. *Lalchand*, 1
Bomaya Naik v. *Vir*
rent is admitted by the lessor, the lessees can rely on it This section does not affect the case *Satyesh Chunder* v. *Dhunput*, 24 C 20 Where the plaintiff executed a mortgage instrument to the defendant and the consideration recited therein was that the defendant was to pay certain debts, and the instrument was not signed by the defendant nor was there any promise by the defendant to pay the debts, the ... e instrument, does not c ... may be tendered which ... *Rangasami*, 7 M 19 ... greement entered into between the parties, when some others have been reduced into writing in letters exchanged between the parties *Ambika* v *Gaullstaun*, 13 C W N 326

and not a sale—the question being regarded as purely one of intention *Ismail* v *Hafiz*, 10 C W N 570 (P C)=3 A L J 353=33 C 773 Section 92 of the Evidence Act, only enacts that oral evidence cannot be given to vary or contradict the express terms of a document and does not prevent a party from giving evidence to prove that certain persons caused the document to be executed in favour of certain others mentioned in the document *Shaikh Muhammad* v *Ram Dutt*, 5 P R 1896, see also *Tani Mahesha* v *Secretary of State*, 67 P. R 1894
Liabili
person
upon
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a case
1903
and re
able from any oral agreement to vary the terms of mortgage contract and can be proved without the evidence of such agreement *Suppanchetti* v. *Yegnarayan*, A I R 1932 Mad 141

Evidence of conduct or intention for varying, contradicting etc The acts and conduct of the parties can only be proof either (1) of a contemporaneous oral agreement varying the terms of the registered contract, or (2) of a subsequent oral agreement having the same effect In the former case the evidence

tional sales, which it has always been permitted to be shown to be mortgages As pointed out in *Rahiman* v *Elahi Baksh*, 28 C 70 such cases are admitted ... idence Act But ... eption to the rule ... f the plea of the

question wa
Banerjee, 5
Full Bench
was really varied by a verbal promise to reconvey on repayment of money, making it in fact a mortgage" In answering the question in the negative

2. *Peacock C J* representing the views of the majority of the *Full Bench* said "I am of opinion that verbal evidence is not admissible to vary or alter the terms of a written contract in cases in which there is no fraud or mistake, and in which the parties intend to express in writing what their words import. If a

e executes to

, he cannot

both parties

intended that their contract should not be such as their written words express but that which they expressed by their words to be an absolute sale should be a mortgage It is said that there is no Statute of Frauds, and therefore parties may enter into verbal contracts for the sale of lands in the Mofussil without writing But admitting that the law allows sales of land or other contracts relating to land to be made verbally, it does not follow that, if the parties choose to reduce their contract into writing, they can bring forward mere verbal evidence to contradict the writing, and to show that they intended something different from that which the writing expresses and was intended to express That would be contrary to a well

(see *Starkie* on *Evidence*, pages 648, 65

holding that every rule of the Eng

transactions in the Mofussil, I have no hesitation in saying that a rule of evidence allowing a contract expressed in writing in words which the parties intended to use, and of which they knew the import could be varied by mere verbal evidence that the parties did not intend that which they expressed in writing but something very different, would lead to grossest fraud, and would open the widest door to perjury in support of fraud . If mere verbal evidence is admssible in this case to contradict a written contract, it would apply to every other case, and a man who writes 'one thousand' intending to write 'one thousand' might prove that by verbal agreement the words 'one

and that he was never possibly ous

or follow the absolute bill of sale, . the

transaction therefore, becomes material

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purchase money advanced, and to the value of the interest alleged to be sold, and the acts and conduct of the parties, they intended to act upon the deed

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us is consonant to equity, good conscience, and public policy It is not equitable or right that parties should be allowed by a formal instrument to

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ly is any understanding or

Nath, 23 W R. 167; see also *Madhab Chandra* v *Gangadhar*, 11 W R 450= **S.**
3 B L R A C 83 ... 300=4 C L R
419 it was held that ... by *Peacock C J*
in *Kashi Nath* v *Chan* ... *Ram Dayal* v
Heera Lall, 3 C L R 50 What is the effect of this section on the Full Bench
case was again considered in *Hem Chandra* v *Kali Charan Das*, 9 C 528 There
Garth C J for the Court consisting of *Garth C J* and *Miller J* observed: "It
has now been argued ...
to established the la...
was passed in 1872, ...

... so altered the law If I could see any
ground for supposing, that the Full Bench case is not law at the present day,
... made, or intended to make, any
... prevailed here before the Act was
... in the Full Bench case, I should
consider that our proper course was to refer the question to another Full Bench;
but whe...
seems ...
rule as ...
which the judgment in the Full Bench case proceeded is one which, in my
opinion, is perfectly consistent with that rule It is a principle which has
constantly been ... England, as well as by the
...
the present ... *Wright* had brought an action of ejectment against *Lincoln* to
recover certain land, which the latter had conveyed to him by a deed, which
appeared on the face of it to be an absolute conveyance *Lincoln* then brought
a suit in equity to restrain the ejectment, on the ground that the transaction
was in reality a mortgage, and he relied in support of that contention, partly
upon a parol agreement, and partly upon the acts and conduct of parties
Turner L J says "The principle of the Court is that the Statute of Frauds
...

9 C 898

So although parol evidence will not be admitted to prove directly that
simultaneously with the execution of a bill of sale there was an oral agreement
by way of defeasance, yet the Court will look to the subsequent conduct of the
parties, and if it clearly appears from such conduct that the apparent vendee
...

2. real intention and purpose of the parties at the time The exercise of this remedial jurisdic ... raud
The Courts of I ... exer-
cising a simil ... 115,
covers the wh ... That
section does not say that, in order to constitute an estoppel, the acts which a

...

s ... te of what the English Cour
call 'past perform ... n the Indian rule of estoppel
But the ground up ... Courts in India may most
safely be rested, ... them to prevent fraud The
Courts will not allow a rule or even a statute, which was passed to suppress fraud, to be the most effectual encouragement to it and accordingly in England
the Courts for ... t aside the
common law ... rts in India
have the same ... terposed by
the Indian Ev ... sections 91
and 92 of the Act, ... of
the Legislature,
Specific Relief Ac
Indian Evidence Act so as to bring them into conformity with the practice of the English Courts of Chancery *Bakshu Lalsman* v *Govinda*, 4 B 594 So
the principle of law laid down in the ... *ndy*
Churn, 5 W R 68 was approved or ... ses
Pheloo v *Geerish*, 8 W R 515; *Ha* ... n
Sheikh Parabal v *Sheikh Mohammed*, 1 B L R A C 87; *Behary* v *Tejnarain*, 10 C 764, *Nundo* v *Prosunno*, 19 W R 333, *Bholanath* v *Kaliprashad*, 8 B L R 89, *Venkataratnam* v. *Reddiah* 13 M 494 ' *Rahlen* v *Alageppudayan*, 16 M 80, *Kader* v *Nepean*, 21 I A 96=21 C 882 (P. C) see also *Balkishen Das* v *Legge*, 19 A 434, *Holmes* v *Mathews*, 9 Moo P C 413, *Mutty* v *Annundo*, 5 M I A 72, *Barton* v *Bank of New South Wales*, L R 15 App Cas 379 The question was again considered by a Full Bench of the Calcutta High Court in *Pranath Sha* v *Madhusudan Bhuiya*, 2 C W N 562=25 C 603 (F B) There *Banerjee* and *Wilkins JJ*, in their order of reference reviewed all the previous cases on the subject *Maclean C J* in delivering the judgment of the Full Bench observed "In regard to the question of law, which was the main ground for this reference, namely, whether oral evidence as to acts and conduct of the parties was admissible to prove that the deed in this case was intended to operate as a mortgage and not as an out and out sale, the learned vakil who appeared for the Appellant stated that having regard to the authorities he could not successf ll contend that such evidence was not

...

oda Baksh, 26 In Cas 717
v *Legge*, 4 C W N 153 (P C)=
y Council In that case the question was whether certain deeds executed by the respondent in favour of the appellants constituted a mortgage transaction or an out and out sale with a contract of repurchase *Lord Davy* in holding that oral evidence of intention was not admissible for the purpose of construing the deeds or ascertaining the intention of the parties, said. "By section 92 of the Indian Evidence Act (I of 1872) no evidence of any oral agreement or statement can be admitted, as between the parties to such instrument or their representatives in interest, for the purpose of varying, or adding to, or subtracting from, its terms, subject to the exceptions contained in several provisos It was conceded that this case could not be brought within any of them The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their Lordships any application to the law of India as laid down in

S. 92

the Acts of the Indian Legislature. The cases must therefore be decided on a

of the parties, that is, evidence of the repayment of the money, the return of the deed and the exercise of the acts of possession by the vendor, and not ... s by the parties . If that was ... ection 92 of the Evidence Act does ... the parties The view we take is supported by a Full Bench decision of this Court in the cas of *Preo Nath* v *Madhu Sudan*, 2 C W N 562=25 C 603 It was contended by the learned vakil for the appellant that the decison must be taken to have been in effect overruled by the decision of the Privy Council in the case of *Balkishen* v *Legge*, 27 I A. 58=4 C W N 153 We do not consider the argument sound The evidence that their Lordships considered inadmissible in the case just referred to was certain oral evidence of intention which had been admitted in the Courts below and the ground upon which their decision is based is that such evidence is excluded by section 92 of the Evidence Act. Their Lordships

evidence of the acts and conduct of the parties not being in the nature of an oral agreement or statement" See also *Mahomed Ali* v *Mir Nazar Ali*, 5 C. W N 326=28 C 289; *Ali Sheikh* v *Imam Ali*, 35 Ind Cas 102; *Miriam* v *Ibrahim*, 28 C L J 306=48 Ind Cas 561; *Kamala* v *Nandan*, 11 C L J. 39, *Ramauatar* v *Tulsi*, 16 C W N 137, *Sharadi* v *Jamal*, 17 C W N. 1053 In the last named case B executed in favour of A a deed of out and out sale with a condition of re-purchase of a house but no date was fixed for the repurchase On the same date B executed a *kabuliyat* in favour of A by which he acceped a lease of the housesold The Court took into consideration how the language of the document was related to the existing facts such as that the vendor continued in possession, paid rent at the usual rate of interest, etc, and further that the value of the property was much more than the consideration paid In delivering the judgment *Jenkins C J* said "The argument before us has been that it was not open to the Appellate Court to regard the transaction as a mortgage I designedly use the word 'transaction' because that with which we have to deal is not contained in one document but in two, and what we have to consider, in the circumstances is, whether there is anything in section 92 of the Evidence Act or in *Balkishen* v *Legge*, 22 A 149—which is in opposition to that section—that would compel us to hold that the decision of *Mr Justice Chatterjee* is erroneous We would certainly

in Calcutta But it appears to me that all these authorities to which allusion has been made are beside the point in this case, for I cannot find that the learned Judge of this Court has relied on any evidence of oral agreement or statement or of intention, with a view to coming to the conclusion at which he arrived He took the transaction as it is expressed in the documents He also took into consideration those facts which may legitimately be proved with a

principal document is expressed in qualified terms, and it is only open to the suggestion that it is an out and out sale, if and so far as it can be said that the express terms of the deed must be disregard

In *Narendra Lal* v *Bhola Nath*, 27 C W N 337=77 Ind Cas 154, cases of *Preonath Shaha* v *Madhu Sudan*, 25 C 603=2 C W. N 562; *Khankar Abdur* v *Ali Hafez*, 28 C 256 and *Mahomed Ali* v *Nazar Ali*, 28 C 289=5 C W N 306 were followed, see also *Kailash Chandra* v *Darbaria*, 20 C W N 347; *Manindra* v *Durga Sundari*, 20 C W. N 680; *Arjad Ali* v *Sheikh*, 50 Ind Cas 12; *M*

Priyabarta, 26 C W

an instrument, only

of showing that the transaction is not what it purports to be *Krishna Lal Singh* v *Sri Raj Kuar*, 104 Ind Cas 299=1 Luck C 97=A I R 1927 Oudh 278, *Mariam Bibi* v *Ibrahim*, 28 C L J 306=48 Ind Cas 561 The rule, that the conduct of the parties in respect to an instrument may be looked to in construing a document, is subject to this reservation that it can be admitted only after every other means to construe a deed have been exhausted *Devjee Trikamjee* v *Dayamoy*, 108 Ind Cas 418=A I R 1928 Pat 225 Subsequent conduct of

Lal Ghose ...rms of ..., not an ...ourt to ...le if the ...30 Ind ...s to the ... of the

contract were never in the deed to be acted upon from the very beginning *Narendra* v *Bholanath*, 77 Ind Cas 154=27 C W. N 336, see also *Ali Sheikh* v *Iman Ali*, 35 Ind Cas 102

A different view has been taken by the Bombay High Court in *Dalloo* v *Ramchandra*, 30 B 119=7 Bom L R 669, where *Jenkins C. J* said "The plaintiffs sue to recover possession of land alleging that the document passed by his father, though in form an absolute conveyance was intended to operate as a mortgage The grounds on which their contention is based, are that the consideration was a debt and not money paid at the time; that the plaintiff's father, notwithstanding the execution of the deed, remained in possession until his death, and that after his death his widow remained in possession for

...of the trans ...nder- ...eous ...he-e ...il in ...is of ... Act; ...enable the ...ule, 2 Deg ...ples We ...within the ...we should ...g on us" ...dmissible, ...92 of the ...L R 239 ...ning the

intention of the parties in interpreting languages used in a written document **S.**

case is that there was no agreement enforceable by law to sell the property, but that there was a mortgage agreement, it should be specifically determined [illegible] parties as shown by evidence, is a mortgage [illegible] Bom L R 764 The plaintiff sued to

is not open to [illegible] misrepresentation [illegible] void *Sangira* [illegible] *ma* v *Godigeya*, [illegible] om L R 684 [illegible] mortgage dated 1899 The mortgage having been expressed in the form of a sale deed, he [illegible]

words which refer to s 12 of the Evidence Act, and does not point to any [illegible] *Gopal* v *Morar*, 15 Bom L R [illegible] *aua*, 31 Bom L R 1266, *Gopal* [illegible] The object of s 10 A of the [illegible]

Bom L R 1266 [illegible] the case of *Balkishen Das* v [illegible]

inference that there was a contemporaneous oral agreement or statement between [illegible]

2 from, the terms of any contract, grant or disposition of property which has been reduced to writing, and no exception is made in any of the provisions to sect on 92 or elsewhere in the Act, in favour of evidence which consists of the acts and conduct of parties from which an inference might be drawn that there was such an oral agreement to vary the terms of the contract or grant The question before us is really concluded by the recent decision of the Privy Council in *Balkishen Das* v *Legge*, 27 I A. 58=22 A. 149 In this connection we may also draw attention to the distinction which is drawn by the same tribunal between admissibility of evidence to show that a recital of a fact in a contract or grant is erroneous, and evidence to vary the terms of a contract or grant (*Sri Lal Chand* v *Indrajit*, 27 I A 93=22 A. 370), and also to the decision in the House of Lords in *North Eastern Railway* v *Lord Hastings*, (1900) A C 260 in which it was held that when the words of a deed were plain and unambiguous, the fact that the parties understood it otherwise and acted on such understanding for a period of more than forty years, could not affect the construction of the instrument and the effect to be given to it.' See also *Venkata* v *Subramania* (1917) M W N 674, *Chall Venkata* v *Devaj hakshmi*, 1912 M W. N. 164. Where the contemporaneous agreement though in writing is not registered, it is not open to the party to show that what is apparently a sale was really a mortgage *Meenakshesundaram* v *Chenchu*, 109 Ind. Cas 18=A. I R. 1928 Mad 409 Evidence of subsequent conduct to prove contemporaneous agreement is not admitted *Fitz Holmes* v *The Bank of Upper India*, 77 Ind Cas 523=5 Lah L J 439 In delivering the judgment the Court observed "On the question of whether he can be allowed to produce evidence of a contemporaneous oral agreement varying the terms of the written document, the learned senior [illegible] ery clearly and we find [illegible] which he comes that this [illegible] n which the High Courts [illegible] *Ma Shwe*, 44 I. A 236 [illegible] (P C) It was contended [illegible] ouncil has not definitely [illegible] =114 P L R 1901 As [illegible] wed *Preonath* [illegible] *ankar Abdur* [illegible] the Calcutta [illegible] g conduct as [illegible] ly the same way in [illegible] *Holms* v *The Bank of* [illegible] *anhya Mal*, 15 P W [illegible] *g Bin* v. *Ma Balig*, 3 [illegible] J. B R. (1902-1903) [illegible] 14 O. C. 321; *Ramesh* [illegible] B R 1908, 3rd Qr [illegible] Cas. 644, *Sookna* v [illegible] B L. R Sup Vol 399=5 W. R 76, *Jugobundhoo* v *Rukee*, W R. (1869) 388; *Mahomed* v *Raesoodeen*, 6 W. R 117, *Radha* v *Ram*, 9 W R 251; *Bulaki* v *Flad*, 27 P. R 1911=118 P W R. 1911=10 Ind Cas 1004

In Maung Kyin v *Ma Shwe*, 15 C W N 958=38 I A 146 P. C=21 M L J 1105, the appellants who [illegible] of certain properties unde [illegible] absolute conve [illegible] subsequently p [illegible] gagor In thi [illegible] conveyance sou [illegible] parties (as distinguished from evidence of oral statements and conversations constituting in themselves an agreement to contradict or vary the written instrument) to prove that the transact [illegible]

on this appeal is whether or not that evidence was properly rejected .. . Its object was to show that whatever the terms of the document may have been, none of the parties had acted on them as effecting an absolute sale, but that through a long course of mutual dealings materially affecting their respective positions

claim
disclosed
anteceden
certainly
opinion on the construction or application of section 92 of the Indian Evidence Act in relation to the deeds of the 4th March, 1903 That case again went up to the Privy Council (*Vide Maung Kyin* v *Ma Shwe La*, 22 C W N. 2

Lordships are now in possession of the facts and of concurrent findings upon the most important of them Upon the non admissibility of the evidence reliance is placed by the respondents upon section 92 of the Indian Evidence

the respondents maintain that the
ed On the contrary, the Appellants
the section, they are entitled to set
the parties as inconsistent with the
transfer of property and only consistent with the true nature of the transaction having been one of mortgage or transfer of mortgage They found upon a considerable body of authority to that effect, the cases cited being, *Bakshu Lakshman* v *Govinda Kanji* 4 B 594; *Hem Chander* v *Kally Charan*, 9 C 528, *Rakken* v *Algappudayan*, 16 M 80, *Preonath* v *Madhusudan*, 25 C 603=2 C W N 591, *Khanlar* v *Ali Hafez*, 28 C 256 and *Mahomed Ali* v *Nazar Ali*, 28 C 289=5 C W N 326 The judgment of *Mr Justice Melville* in the first of these cases is repeatedly founded upon in the course of the series, in which the learned Judges expressly followed the English equity doctrine as expressed in *Lincoln* v *Wright*, 4 Deg & J 16 by *Lord Justice Turner* thus 'The principle of the Court is that the Statute of Frauds was not made to cover fraud If the real agreement in this case was that as between plaintiff and *Wright*, the transaction should be a mortgage transaction, it is, in the eye of *this Court, fraud to insist on the conveyance as being absolute, and parol* evidence must be admissible to prove the fraud' In the opinion of their Lordships, this series of cases definitely ceased to be of binding authority after the judgment of this Board pronounced by *Lord Davey* in the case of *Balkishen Das* v *Legg*, 27 I A 58=4 C W N 153 It was there held that oral evidence was not admissible for the purpose of ascertaining the intention of the parties to written documents *Lord Davey* cites section 92 of the Indian Evidence Act, and adds —The cases in the English Court of Chancery which were referred to by the learned Judges in the High Court have not in the opinion of their

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remains in India But the respondents rightly refer to *Achuta Ramaraju* v *Subbaraju*, 25 M 7, *Maung Bin* v *Ma Hlaing* 3 L B R 100 and *Datloo Valad* v *Ram Chandra*, 30 B 119, and in particular to the judgment of *Jenkins C J* in the last case In this the p *Lord Davey*, has been rightly followed ita v *Annada Chandra*, 71 Ind Cas W. N 336=77 Ind Cas 151 In 17 M.

729 (P C) the question was whether documents executed between the parties constituted a m... ...th an agreement to reconve... ostensibly as a sale with a r... a mortgage, *Lord* ... has ... now ... sent ... um- ... 58= 22 A 149=4 C W. N 153, are clearly required to show in what manner the language of the docume...

In *Baijnath Singh* ... R. 787, the suits were instituted by ... the *Natu Singh Oil Co* on the footing that certain transactions entered into between the plaintiff and defendant, *Hajee Mahomed Jamal*, were mortgages The defendant contended that the transactions were, as they purported to be, absolute sale to the original defendant followed by contracts for the resale of the shares to the plaintiff, that time was ... chase had been extingu... of the transactions Sir ... in *Balkishen Das* v *Legge*, 27 I A 58=22 A 149=4 C W N. 153, that under section 92 of the Indian Evidence Act, as between the parties to an instrument, oral evidence of intention ... 92 merely pres- cribes a rule of ...

PROVISO (1).

Scope of the provisos The admissibility of extrinsic parol testimony to ...

... or variation or contradiction of, a written transaction ... concern- ...orandum,

(2) Fraud, mistake, illegality, incapacity, failure of consideration, or other matter showing that the writing is not the valid transaction it purports to be

(3) Any collateral verbal agreement on the same subject-matter, consistent ... the written ... g is not a ... the written

statement of ... S.
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49 A. 680—

Scope of proviso (1)—Parol evidence is admissible to show that a writing is not really the valid transaction which it purports to be. Such evidence may therefore be given to prove fraud mistake, illegality, incapacity, failure of consideration, or other matter affecting the validity of a writing as a document *Cockle Cas* 341. In *Henkle* v *Royal Ex Ass. Co*, 1 Ves 317, *Lord Hardwicke* said. "No doubt, but this Court has jurisdiction to relieve in respect of a plain

which they put down is final as to what they mean; it is the binding record of the agreement. But they are always at liberty to show whether it is the binding record of the agreement Suppose that the signature were made in the course of a dramatic representation, or suppose a printed form of agreement were used ... his name in the space meant for the p ... be at liberty to show the real s ... *in Wake* v *Harrop*, 7 Jur 710; C ... *Platt*, (1900) 1 Ch 616, *Dobell* v *Stephens*, 3 L J K B 89, *Cockle Cas* 341 So the first proviso in no way ... *Mark Ev* 73 So the rule is ... nce, under the proper pleading, that it never had any legal of forgery or fraud, or for the due execution and delivery, ... *m*, 9 East 421, 422, *Taylor* § ... stive *Benimadhab* ... 3) In delivering

... defence to point ... nt and to claim protection from enquiry ... ntradiction and variance of the terms ... of which is not in question In such cases, the Court is not bound by what has been described as a mere paper expressions of the parties and is *not* precluded from enquiring into the real nature of the transaction between them The first proviso to that section, therefore, declares that any fact may be proved which would invalidate any

want of due execution or cap

But in my opinion, this is not so, as the instances given are not exhaustive but, as appears from the use of the words 'such as' are set out by way of illustration ... come ... the ... that ... the ... the

2. did not wish to put in writing *Mottayabhan* v *Palani* (1913) M W N 650=25 M L J 290=20
jointly and severally
he signed only as a s
his signature that he
in the evidence *Maung Sein* v *Ma Saw* 3 Bur L J 112=32 Ind Cas 816 When a document can be shown to come within proviso (1), evidence of contemporaneous oral agreement contradicting the document is admissible *Mahomed* v *Abdul*, 63 Ind Cas 368 Under proviso (1) to s 92 any fact may be proved
vn that there was never any
l was altogether dropped
cannot be given effect to
to the defendant in a redemption suit to plead that the mortgage is a fictitious document intended to cover a previously
the first proviso to sec
invalidate the deed S
purporting to be a
standing of both parties that it is not to be treated as the real contract between them, is not an agreement enforceable by law, and there is not a contract at all and does not acquire gre
Ma aiah v *Cassim Ali* L
property in suit to defend
a conveyance in consideration of services rendered or to be rendered by defendant No 2 in inducing his master L to sell certain property to the plaintiff *Held* that the defendant No 2 was entitled to prove the real transaction by oral evidence *Nabi Khan* v *Mussamat Sewal* 9 Ind Cas 161=15 C W N 408 Where a party deliberately and with eyes open executes a deed of sale he can not be allowed to set up against it an oral agreement that the sale is a mortgage He may prove that a mortgage was intended but that by fraud, mistake or otherwise
tended to execute a sale deed
it that the sale was to be
C P L R 12
Parties can show that they never came to an agreement or that written contract havi
e uncertain date *Radhakissen* v *D*
admissible for the purpose of invalidating a written agreement *Dholan Das* v *Ralya Singh*, 85 P R 1898 Under this proviso any fact may be proved which would invalidate any document
Therefore in a suit on a bond, a defendant
s
Lah, 81 P R 188 Haji

s olus of a conveyance in an apparent sale deed formed only part of the real agreement between the parties, and the oral agreement to re convey to the vendors which gave them a claim to equitable relief formed another part of the same transaction, it is in the eye of law a fraud to insist on the conveyance as
as for proving
dence of the oral
it would invali
date the document as a deed of absolute sale within the meaning of the first proviso to the section and constitute a ground for a Court of equity and good conscience giving effect to it only as a mortgage *Rakken* v *Alagappudayam* 15 M 80 This proviso seems to apply to cases where evidence is admitted to show that a contract is void or voidable, or subject to reformation upon the ground of fraud
s where the
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20 B 636

-S. 9

It may always be shown that the document in question never had any legal existence On this ground rests the very important exception that duress or fraud in the inception of the contract may be proved, although accompanied by the

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e case, to

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Ev 4th Ed pp 537, 538 If the fraud is clearly proved, one of the essential elements of contract—consent—is wanting Thus it may be proved by parol evidence that any material part of the contract was fraudulently omitted or inserted by the other party, (*Heter* v *Glassgou*, 79 Pa 79) or that it was fraudulently misread to one not able to read and that he was thus induced to give his signature; (*Mc Messon* v *Sherman*, 51 Wis 303) or that a part of the contract was not reduced to writing because of the fraud of one of the parties, in which case the whole transaction is open to explanation by parol evidence *Phyfe* v *Wardell*, 2 Edw Ch (N Y) 47 In brief, if one person fraudulently

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Russ, 16

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motives and intentions that prompted the parties to execute the same Such evidence is permissible to show fraud in a transaction which, if shown, annuls the contract, and prevents its enforcement It is not admitted for the purpose of varying the terms of a contract but merely to ascertain whether it is a *bonafide* transaction or sham If there is no fraud, the contract will stand, conversely, if there is fraud, the purpose of the admission of parol testimony is served *Fairbanks* v *Simpson*, 28 S W 128 (*Am*) In such cases any secret agreement

radicting the face of the

nto (*Gray* v *Hankinson*,

entire transaction may be investigated

brought by one of the contracting pa

contract should not be impeached or changed, unless it appears that one of the parties was fraudulently misled or deceived Without enumerating them then,

cient to warrant the

The foundation

2. of the actual agreement of fraud other than that rol and written terms. It is not enough that there are parol stipulations contradictory to the written agreement *Vansant* v. *Runyon*, 19 Ky Law Rep. 1981 The rule which prefers written to unwritten evidence does not so apply as to exclude the latter ... lently obtained, and ... mnity to the party ... year provided tha ... at 75 per cent ... suit for rent on the ... *kabuliyat* was executed ... payment of interest at ... ound to be true *Held* that under the circumstances the *kabuliyat* was not the real agreement between the parties, having been induced by fraudulent misrepresentation, and the tenant was not liable to pay interest claimed on the basis of the *kabuliat* *Nadia* v *Birendra*, 20 C W N 1067

The fraud, which under proviso 1 of section 92, may be proved must be fraud which would invalidate the document and therefore subsequent fraud in respect of the document not such as to invalidate it, could not be a ground for admitting extraneous oral evidence under proviso 1 of section 92 *Kesharrao* v. *Raya*, 8 Bom L R 287 When there is a duly signed receipt for the payment of rent oral evidence could not be admitted in supersession of the recitals in the receipts ... the receipts there is a question ... his proviso *Kunwar Behari* v ... in the proviso is wide enough to include a fraud on the registration law Thus a party can show that an item was fictitiously put in *Gopi Nath* v *Rup Ram*, 1930 A L J 926 = A. I R 1930 All 786

Where the transaction beginning with a sale deed amounted to a mortgage between the plaintiffs and defendands *Held* if s 92 be applied the proviso, to that section would admit the evidence, because it would be fraud to insist upon a claim made by the appellants to property arising out of such transaction, when the appellants must have known that the plaintiffs were the true owners. *Mahadeo* v *Tularam*, A I R 1922 Bom 256

Where an assignment is impeached on the ground that it is colourable and has the effect of defeating the rights of third parties, the provisions of section 92 of the Evidence Act are no bar to the production of oral evidence by such third parties *Parumal* v *Mahomed Ali*, 6 S L R 107 In a suit to recover rent under a *kabuliyat held* that evidence of an oral agreement set up by the defendant, while admitting execution of the *kabuliyat*, was admissible for the purpose of proving the fraudulent character of the transaction between the parties. *Kashinath* v *Brindaban*, 10 C 649, *Kasim Noor* v *Bebee*, 1 W R. 76.

Coercion or intimidation Coercion is defined by section 15 of the Indian Contract Act When consent to an agreement is caused by coercion, the agreement is a contract voidable at the option of the party whose consent was so caused. (*Vide section 19 of the* ... instrument obtained by illegal duress is an instrument, ... be, by ... food or ... its may ... ress or ... d not a mere ... *Abdul* 14 M ... M 214 On this ground rests the very important exception that duress or fraud, in the ... by the most ... void a ... Id 490, ... operty, ... amount ... on, the ... ay him

a certain sum and deliver up a note of the lessee then held by the lessor. The evidence established the facts stated, and the Court said it would be difficult to **S. 92**

Undue influence ... 'Influence, in order to ... would make it sufficient to ... by coercion or fraud" ... at p 45 Similarly *Parl* ... observed: "Undue influ ... in a state of ... *l*, in *Williams* v ... destroying free

Illegality The c ... it is forbidden by law, c ... the provisions of any ... person or property of another, or the Court regards it as immoral, or opposed to public policy In each of these cases, the consideration or object of an agreement is said to be un...

in which it is intended to ... *Budge Budge Mill*, 33 C 70..., *Cun Contract Act* p 10... The legality of a contract has to be determined by the law of the place of performance, or if no particular place is designated by the law of the place where the contract is made But the *lex fori* det... be recognised Although ther... the law applicable to it, it ... laws expressly prohibit such an agreement Nor will the *lex fori* suffer the foreign law to be applied, if the agreement is contrary to the interests of the state or to common principles of justice and morality *Santos* v *Illidge*, 28 L J C P 317 Accordingly, the Court will not enforce an agreement obtained by threats of a criminal prosecution although the agreement is valid according to the law of the country where it was made and where the parties to it were domiciled *Kaufman* v *Gerson* (1904) 1 K B 591; *Cun Contract Act* p 103 Illegality covers instruments or transactions against public policy, such as ...

... *Dickenson*, ... *Ev* § 1137 So oral evidence ... object or consideration of an agreement in writing is unlawful and that therefore the agreement is void *Kashi Nath* v *Brindaban*, 10 C. 649, *Anup Chand* v *Chanbsi*, 12 B 585; *Beni Midhab* v *Sadasook*, 32 C 437 Moreover, when it appears that the transaction

is thus unlawful, it is the right and may be the duty of the Court to take cognizance of the fact although it may not have been pleaded *Fischer* v *Kamali Naicker*, 8 M. I A 187; *Scott* v *Brown*, (1892) Q B 724; *Hill* v *Clarke*, 27 A 267, *Cun Contract Act* p 104 Oral evidence is admissible to show that an agreement in writing to sell Government pro notes is really an agreement made by way of wager on its market price on a future day *Eshoor Das* v. *Venkata Subba Ram*, 17 M 480

Want of due execution "Execution" when applied to a document, is the last act or series of acts ... completion *Bhowanji* v *De* ... to the act of completing a ... *by the testator, yet in ordinar* ... the testator and the attestation of his signature *Per Sir* ... *Syed Ali*, 12 O L J 1=A I. R ... with executing a signed document, ... legal consequences, the act which ... h he adopts and makes his own the ... neral, immaterial whether he has ... ned it It is even ... acknowledged, or ... *Wigmore* § 2134 ... st be in writing, ... ion, Seal, Attesta ... These formalities ... some of the Acts as an inherent element of form in the validity of the transaction Like all other ... may be suffi ... ty be ... they ... ding *certain general dange* ... the sake of this policy. ... r the ... was entitled to produce oral evidence to prove that the ... gal The *fact* that the ... an unlawful object, is ... n the suit is brought ... *nruvengada* v *Maung*

Want of capacity of the contracting parties Parol evidence may also under the proper pleading, be offered to show that the party was incapable of contracting by reason of some legal impediment, such as infancy, coverture, idiocy, insanity, or intoxication *Barnet* v *Buxton*, 2 Atk 167. Besides the two classes of persons *non compotes mentis*, *viz* idiots and lunatics *Lord Coke* mentions two more classes *viz*, those who were of good and sound memory, but by the visitation of God has lost it, and those who have become *non compotes* by their own act, as drunkards (*Will Exor* 25) In the former of these two latter classes must be reckoned those who from sickness, grief, accident or old age ... who are not like those classed by *Lord Coke*, as *lunatics* ... those under ... has assigned ... *rte Cranmer*, ... 13; *Rigway* v

... made without considera ... unt of ... each ... pay a ... 1872) ... d into ... where ... sidera- ... from ... L J.

From this judgment Chaitram Rambilas appealed

1915

CHAITRAM RAMBILAS v BRIDHI CHAND KESRICHAND

JENKINS C J

Mr N N Sircar and *Mr H C Mazumdar*, for the appellants, contended that there had been no refusal on the part of the arbitrators to take evidence, and that the respondents had not made the case in their petition that they were ignorant of the rules of the Bengal Chamber of Commerce or that they were not bound by those rules They referred to the case of the *Ganges Manufacturing Company Ld*, v *Indra Chand* (1) in support of their contention that the rules of the Chamber of Commerce were imported into the contract, and they also referred to *Benjamin* v *Barnett* (2)

Mr L P E Pugh and *Mr. C C Ghose*, for the respondents We rely upon two points (*a*) misconduct, and (*b*) our ignorance of the rules of the Chamber of Commerce, which are therefore not binding upon us As to the first point, a refusal to hear evidence is misconduct, see Russell on Arbitration and Award, 9th Ed, pp 148, 149 They also referred to *Harvey* v. *Shelton* (3) With regard to our second point, we cannot be bound by rules of which we are ignorant *Perry* v *Barnett* (4)

JENKINS C.J This is an appeal from an order of Mr. Justice Imam made apparently under section 14 of the Indian Arbitration Act There was an arbitration followed by an award But it is alleged that there was misconduct on the part of the arbitrators; and it is on the ground of this misconduct that the application was made to the Court and succeeded before the learned Judge. The misconduct suggested was the failure to hear evidence Whether there was that failure or not is a matter in dispute.

(1) (1906) I L R 33 Calc 1169
(2) (1903) 8 Com Cas 244 247
(3) (1844) 7 Beav 455 462
(4) (1885) 15 Q B D 388

1915

CHAITRAM RAMBILAS v. BRIDHICHAND KESRICHAND

JENKINS C J

But the way in which the case was presented to the learned Judge and in which he understood it appears from this passage in the judgment: "The petitioners' complaint is that the arbitrators refused to allow them to adduce evidence to establish their contentions and proceeded with the arbitration according to the Rules of the Tribunal of Arbitration established by the Bengal Chamber of Commerce and not according to the law under the Indian Arbitration Act. The petitioners' contention is that the arbitration clause in the contract is merely an agreement to abide by the decision of the Chamber without accepting to be governed by the wide powers of that body as expressed in their rules." It is apparent therefore from this that it was admitted that the misconduct depended upon the alleged *non-applicability of the rules governing an arbitration* by the Bengal Chamber of Commerce. I cannot attribute any other meaning to the words of the judgment which I have just quoted.

The first question, therefore, which we have to consider is whether these rules were imported into the contract. Even without the assistance of any authority it appears to me that these rules were imported into the contract and that without such importation the contract would be insensible so far as it related to arbitration. For, it would involve the ridiculous position that every member of the Chamber of Commerce would have to sit on the arbitration So that on the contract itself I should have felt no doubt. But apart from that there is a very careful judgment of Mr. Justice Harington in *Ganges Manufacturing Co., Ld., v. Indra Chand* (1), delivered as far back as the 5th June 1906, where the contract was in the same terms as that with which we are now concerned

(1) (1906) I L R 33 Calc 1169

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CHAITRAM RAMBILAS
v.
BRIDHI CHAND KESRICHAND

JENKINS C J

The learned Judge came to the conclusion which I have indicated as a correct view of the contract That decision was certainly binding on the learned Judge and according to my opinion, should have been followed by him It may not be binding on us in the strict sense But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

Therefore it appears to me that on the basis on which this case was argued and conducted before Mr Justice Imam there was no misconduct, because the rules of the Chamber of Commerce were applicable

It appears to us unnecessary to consider other matters But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under section 14 of the Indian Arbitration Act It is so unsatisfactory that I do not think that there should be a remand In my opinion the appeal should be allowed and the application dismissed The respondent should pay the costs of the hearing before Mr Justice Imam and before this Court

WOODROFFE J I agree that the appeal should be allowed The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce However this may be, I entirely agree with the judgment of Mr Justice Harington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of

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CHAITRAM RAMBILAS v. BRIDHICHAND KESRICHAND.

JENKINS C.J.

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(1) (1906) I. L. R. 33 Calc. 1169.

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CHAITRAM LAMBHAS v. BRIDHI CHAND KESRICHAND.

JENKINS C. J.

The learned Judge came to the conclusion which I have indicated as a correct view of the contract. That decision was certainly binding on the learned Judge and according to my opinion, should have been followed by him. It may not be binding on us in the strict sense. But I think it is entitled to every respect and it agrees with the view I entertain on the subject.

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It appears to us unnecessary to consider other matters. But I cannot refrain from pointing to the fact that the application, verified and supported in the way it is, forms a most unsatisfactory basis on which to claim relief under section 14 of the Indian Arbitration Act. It is so unsatisfactory that I do not think that there should be a remand. In my opinion the appeal should be allowed and the application dismissed. The respondent should pay the costs of the hearing before Mr. Justice Imam and before this Court.

WOODROFFE J. I agree that the appeal should be allowed. The fact that the Chamber of Commerce has framed rules for its arbitration is, I should have thought, well known to every trader in Calcutta, particularly to those accepting contracts stipulating for arbitration by the Chamber of Commerce. However this may be, I entirely agree with the judgment of Mr. Justice Harington in the case referred to by the Chief Justice that if a party to a contract has agreed to submit to an arbitration of the Bengal Chamber of

1915 Commeice he must be held to be bound by the iules of

CHAITRAM RAMBILAS v. BRIDHI CHAND KESRICHAND that Chambei.

MOOKERJEE J I agiee with the Chief Justice

Appeal allowed

Attoineys for the appellant · *Manuel & Agarwallah*

Attoineys for the iespondents: *Pugh & Co*

W. M. C.

APPELLATE CIVIL.

Before Mookerjee and Beachcroft JJ

1914 Aug 4

PROKASH CHANDRA GHOSE
v
HASAN BANU BIBI.*

Mortgage—Interest—Loss of part of security by acquisition of mortgaged land—Mortgagee applying to Land Acquisition Judge for return of mortgage money (out of the compensation money) within term, whether entitled to interest for the whole term—Land Acquisition Act (I of 1894) ss 18, 30

If the mortgagee makes a demand for payment within the term, and the mortgagoi complies, the mortgagee cannot insist upon payment of interest for the whol of the term

Letts v *Hutchins* (1) *In re Moss* (2) *Smith* v *Smith* (3) referred to

Where the mortgagee has given notice requiring payment within the term he cannot withdraw it without the consent of the mortgagor

Santley v *Wilde* (4) followed

* Appeal from Original Decree, No 210 of 1913, against the decree of H P Duval District Judge of 24 Parganas, dated April 26, 1913.

(1) (1871) L R 13 Eq. 176
(2) (1885) 31 Ch D 90
(3) [1891] 3 Ch 550
(4) [1899] 1 Ch 747, 2 Ch 474.

1914

PROKASH CHANDRA GHOSE
v.
HASAN BANU BIBI

Where the mortgagor agreed to keep the money for one year from 28th September 1912 on condition that the land should remain as security for the loan during the term but one of the properties given as security had been acquired (the mortgagee probably having no knowledge thereof) and on the 11th October 1912 the mortgagor applied to the Land Acquisition Deputy Collector that the money due under the mortgage (including one full year's interest) might be paid to him out of the compensation money, and the mortgagor consented

Held that as the contract between the parties could not be performed according to its letter by reason of circumstances beyond their control, the mortgagor was not bound to pay interest beyond the period of one month (as admitted by him)

Bakhtawar Begam v *Husaini Khanum* (1) explained

APPEAL by the mortgagee, Prokash Chandra Ghose (petitioner) against an award in an apportionment case under the Land Acquisition Act

On the 28th September 1912, one Hasan Banu Bibi mortgaged four properties in Calcutta (including her demarcated and partitioned share in premises No 16 Muhammad Crescent 2nd Lane) to one Prokash Chunder Ghose for Rs 5,000 interest being payable monthly at the rate of 12 per cent per annum, the mortgage in consequence not being redeemable till 28th September 1913 The statutory declaration for the acquisition of premises No 16, Muhammad Crescent 2nd Lane, had been published on the 28th February 1912 and the award of the Collector was made on the 20th September 1912, and apparently the mortgagee had no knowledge of these proceedings under the Land Acquisition Act On the 14th October 1912, the mortgagee applied to the Land Acquisition Deputy Collector for payment to him (out of the compensation money) of Rs 5,000 as principal together with Rs 600 as interest thereon for one year, the mortgagee thus wanting a return of the mortgagee money within the first month only, together with interest for the full term of one

(1) (1914) I L R 36 All 195

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year The mortgagor consented to the repayment of the principal amount but objected to the payment of one whole year's interest as, within one month of the mortgage and of the award, the mortgagee had prevented the mortgagor from enjoying the Rs 5,000 by pressing the Land-Acquisition Deputy Collector to stop payment to her of this sum. In fact the latter stopped payment to the mortgagor of the whole Rs 5,600 out of the compensation money. No objection was taken by either of the parties as to whether this question regarding the payment of interest for the whole term stipulated could be considered in the course of the land acquisition proceeding On 13th January 1913 the Land-Acquisition Deputy Collector referred this dispute (as to apportionment of compensation) to the Court In his judgment dated 26th April 1913, Mr H P. Duval, the Special Land Acquisition Judge, held that the mortgagee was in equity entitled to only one month's interest on Rs 5,058 only out of the sum in deposit, as he could have called upon the mortgagor to give additional security under section 68 of the Transfer of Property Act, but preferred to follow the money in the Land Acquisition Court and thus realise his dues (with the consent of the mortgagor) before the time fixed

Hence the mortgagee preferred this appeal to the High Court claiming an additional sum of Rs 550 as interest for the remaining eleven months

Babu Baidya Nath Dutt (with him *Babu Tarakeswar Pal Chowdhury, Babu Mohini Nath Bose* and *Babu Bhupendra K Ghose*), for the appellant The mortgage having been for a term of one year ending on 28th September 1913, the acquisition (within the term) of the land given as part security gives rise to no equity which supersedes the covenant to pay interest up to that date Under the mortgage contract, the mortgagee is entitled to interest for a whole year and the

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mortgagor is bound to pay that sum even though the mortgage money is repaid on an earlier date: *Bakhtawar Begam* v. *Husaini Khanum* (1). Further I rely on the provisions of sections 108 and 114 of the Land Clauses Act 1845 which relate to the acquisition of mortgaged properties in England.

Babu Probodh Chandra Chatterjee for the respondent. The appellant gave me the use of his money for one year and I therefore agreed to pay him interest for that period but as he has subsequently deprived me of its use by wanting the return of the mortgage money within the term he is not entitled to interest for the full period of one year. *Bakhtawar Begam's Case* (1) is an authority only for the proposition that ordinarily and in the absence of a special condition entitling the mortgagor to redeem during the term for which the mortgage is created the right of redemption can only arise on the expiration of the specified period. Here the contract between the parties cannot be performed according to its letter as the land has been acquired and the mortgagee has thus lost a part of his security and though he could have applied for additional security under section 68 of the Transfer of Property Act he immediately applied to the Land Acquisition Collector for the withdrawal of the money. So he is not entitled either by law or in equity to more than one month's interest.

Babu Baidya Nath Dutt in reply.

MOOKERJEE AND BEACHCROFT JJ. This appeal is directed against an award in an apportionment case under the Land Acquisition Act. The facts necessary for the decision of the question of law raised before us may be briefly stated.

On the 28th September 1912 the appellant advanced

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demand for payment within the term, and the mortgagor complies, the mortgagee cannot insist upon payment of interest for the whole of the term Reference may, in this connection, be made to the cases of *Letts* v *Hutchins* (1), *In re Moss* (2), and *Smith* v. *Smith* (3) Indeed where the mortgagee has given notice requiring payment within the term, he cannot withdraw it without the consent of the mortgagor *Santley* v *Wilde* (4)

In the present case the mortgagee might have called upon the mortgagor, under section 68 of the Transfer of Property Act, to give additional security He did not adopt that course and claimed a refund of the money, to which the mortgagor consented. Under these circumstances, it is plain that the mortgagor was not bound to pay interest beyond the period of one month Reliance has finally been placed upon the provisions of sections 108 and 114 of the Land Clauses Act, 1845, relating to the acquisition of mortgaged properties It is sufficient to observe that the Indian Legislature has not framed similar provisions applicable to this country

The result is that the decree of the Court below is affirmed and this appeal dismissed with costs

G S

Appeal dismissed.

(1) (1871) L R 13 Eq 176
(2) (1885) 31 Ch D 90
(3) [1891] 3 Ch 550
(4) [1899] 1 Ch 747 2 Ch 474

APPELLATE CRIMINAL.

Before Fletcher and Beachcroft JJ.

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EMPEROR.*

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Nov. 12.

Misjoinder of Charges—Joint trial for offences under s. 120B of the Penal Code and ss. 19 (f) 20 of the Arms Act, committed in pursuance of the object of the conspiracy—Identity of transaction—Criminal Procedure Code (Act V of 1898) s. 239—Joint possession of arms—Mere keeping of fire-arms not an offence—"Fire-arms" whether inclusive of parts of the same—Arms Act (XI of 1878) ss. 4, 5, 14, 19(a) (f) 20—Criminal conspiracy, proof of—Punishment when act contemplated not done—Penal Code (Act XLV of 1860) ss. 109 116, 120B.

A charge of criminal conspiracy to manufacture arms, under s. 120B of the Penal Code read with section 19(a) of the Arms Act (XI of 1878), may be tried jointly with charges of offences under ss. 19 (*f*) and 20 of the latter Act committed in pursuance of the object of the conspiracy.

As long as the conspiracy continues the transaction which began with the forming of the common intention continues and the offences under ss. 19 (*f*) and 20 of the Arms Act are committed in the course of the same transaction.

Legal Remembrancer, Bengal v. *Mon Mohan Roy* (1) followed.

Where two persons rented a house and lived in it and parts of arms were found in one of the rooms:—

Held, that both being in joint occupation of the house, were in joint possession of the articles so found.

The word "fire arms" in s. 14, read with the meaning of 'arms' in s. 4 of the Arms Act, includes parts of fire arms. "Fire-arms" means only arms fired by gunpowder or other explosives.

Ahmed Hossein v. *Queen Empress* (2), *Emperor* v. *Dhan Singh* (3) followed.

* Criminal Appeals Nos. 591 and 592 of 1914, against the order of F. Panton, Additional Sessions Judge of 24 Parganas, dated June 15, 1914.

(1) (1914) 19 C. W. N. 672; 21 C. L. J. 195.

(2) (1900) I. L. R. 27 Calc. 692.

(3) (1907) 5 Cr. L. J. 435; 3 N. L. R. 53.

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The offence under ss 5 and 19 (a) of the Arms Act is not a mere keeping of arms, but a keeping of the same for sale

In cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from the established facts of the case Where two persons took a house in which a considerable number of pieces of fire arms was found with tools and implements, and work had been actually done to some of the parts of fire arms, the Court may and ought to infer a conspiracy to manufacture arms

Per CURIAM Where there is only a conspiracy to manufacture arms without an actual manufacture the sentence should be imposed under s 120B of the Penal Code read with s 19 (a) of the Arms Act and s. 116 of the Penal Code, and the maximum term of imprisonment awardable under these sections is 9 months' rigorous imprisonment

Per BEACHCROFT J The punishment awardable under s 120B of the Penal Code varies according as the offence has or has not been committed in consequence of the conspiracy If an offence has been committed the punishment is that provided by s 109 of the Penal Code though, strictly speaking, there should not be a conviction in such cases of conspiracy but of abetment If it has not been committed the punishment is governed by s 116 of the Penal Code

APPEAL by Harsha Nath Chatterjee and another

The appellants were tried before the Additional Sessions Judge of the 24-Parganas with the aid of Assessors charged under (i) s 19(*f*) of the Arms Act (XI of 1878), (ii) s 20 of the same and (iii) s 120B of the Indian Penal Code The Assessors found them guilty of offences under the Arms Act, but acquitted them of criminal conspiracy. The Sessions Judge, however, convicted them of all the three offences, and sentenced them to one year's rigorous imprisonment under the first, and to three years' rigorous imprisonment under the second and third charges, the sentences running concurrently

On the 2nd December 1913, the two appellants went to the house of one Bhutnath Sil, a travelling agent of Messrs Osler & Co who lived in Victoria Road, Baranagore for the purpose of renting a house in the same road belonging to one Nanda Lal De, the brother-

in-law of Bhutnath. The appellant, Khagendra, represented to Bhutnath that they were students of the Medical College, and gave his name as Khitindra Nath Roy. He paid Rs. 7 rent in advance and received a *kutcha* receipt for the sum. The balance, Rs. 4, was paid subsequently, and a fresh receipt for the whole amount was given by N. L. De, the *kutcha* receipt being returned to him. Another month's rent was also paid and a receipt given for the same. The two accused lived in the house. It appeared that they used to keep the door and windows of the house abutting the road constantly closed.

On the 25th January 1914, Mr. Denham, Deputy Commissioner of Police, received certain information in consequence of which he proceeded to Baranagore with Mr. Buller, Inspector-General of Police, Mr. Lowman and other police officers. They reached the house in Victoria Road early next morning, burst open the door and entered the premises Harsha Nath was found in the room abutting on the road and was arrested. Two search witnesses were called from the road and the police officers proceeded to search the place. In a room on the north of the court-yard were found the two rent receipts and, among other articles, certain parts of two double-barrelled breech-loading guns, *viz.*, double-barrelled breech-loader action, trigger guard, trigger plate with triggers, trigger plate screw, double bolt part of a gun action, top lever part of a gun, barrel pin, guard or fire-end screws, guard pin, parts of a top lever spring broken nipples of a breech-loader and another complete gun action without the stock and locks. A search list was drawn up and the above were entered therein as items IX to XI, XIV to XVI, XIX, XX, XXII to XXXI. In addition, implements for the repairs of guns were also found in the room.

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Constables in plain clothes were then stationed in the vicinity of the house with instructions to arrest every one who entered. The first to do so was one Chinibas Neka, a waterman, who used to supply the inmates of the house daily with water. At 10 or 10-30 P.M., Khagendra was arrested as he entered the house. On being questioned by Mr. Denham next morning, he explained that he had gone to the house by invitation to see a friend named Dinobandhu Bhattacharji.

After a preliminary inquiry held by Babu P. C. Chatterjee, Deputy Magistrate, Alipore, the accused were committed to the Sessions on 4th March 1914. The trial came on before Mr. Panton, Additional Sessions Judge, with the aid of two assessors, on 4th June. The appellants were charged as follows—

First, that you, on or about the 26th January 1914, at Baranagore, had in your possession and under your control the arms Exhibits IX to XI, XIV to XVI, XIX, XX, XXII to XXXI, in contravention of s. 14 of the Arms Act . . . an offence punishable under s. 19 (f) of the Act.

Secondly, that you, on or about the 26th January 1914, at Baranagore, had in your possession and control the arms enumerated above in contravention of s. 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant . . . an offence punishable under s. 20 of the Act.

Thirdly, that you, during a period from the 2nd December 1913 to 26th January 1914, conspired to manufacture or keep fire arms in contravention of the provisions of s. 5 of the Arms Act, and thereby committed an offence under s. 120B of the Penal Code read with s. 19 (a) of the Arms Act.

The accused, who were convicted and sentenced as stated above, appealed to the High Court.

Mr. N. Sen, *Mr. S. C. Roy*, and *Babu Khitish Chandra Neogi*, for the accused, in appeal No. 591.

Mr. S. C. Roy, and *Babu Ramani Mohan Chatterjee* for the accused, in appeal No. 592.

The Advocate-General (*Mr. G. H. B. Kenrick, K.C.*) *Mr. N. Gupta*, *Babu Hemendra Nath Mitter*, and

Babu Nirode Chunder Chatterjee for the Crown in both cases

Cur adv vult

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FLETCHER J These are two appeals by the two accused against their conviction and the sentences passed on them by the learned Additional Sessions Judge of the 24 Parganas

The two accused were charged before the learned Sessions Judge with having committed offences under three heads The first charge against the accused was that they had in their possession or under their control certain arms in contravention of the provisions *of section 14 of the Indian Arms Act (Act XI of 1878)* The second charge was that they had in their posses sion or control such arms in contravention of section 14 of the Indian Arms Act in such a manner as to indicate the intention that such act might not be known to any public servant The third charge was that during a period from the 2nd of December 1913 to the 26th January 1914 they conspired to manufac ture or keep fire arms in contravention of the provi sions of section 5 of the Indian Arms Act The two Assessors who assisted the learned Judge at the trial were of opinion that both the accused were guilty of the offences charged against them under the first two charges but that they were not guilty of the offence charged under the third charge The learned Judge however convicted the two accused under all the three charges and sentenced each of them to undergo the following terms of imprisonment namely under the first charge one year s rigorous imprison ment and under the second and third charges three years rigorous imprisonment the sentences to run concurrently

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Secondly, that you on or about the 26th January 1914 at Baranagore had in your possession and control the arms enumerated above in contravention of s. 14 of the Arms Act in such manner as to indicate an intention that such act might not be known to any public servant, an offence punishable under s. 20 of the Act.

Thirdly, that you during a period from the 2nd December 1913 to 26th January 1914 conspired to manufacture or keep fire arms in contravention of the provisions of s. 5 of the Arms Act and thereby committed an offence under s. 120B of the Penal Code read with s. 19 (a) of the Arms Act.

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The facts of the case lie in a narrow compass On the 25th of January last, Mr Denham, Deputy Commissioner of Police, received certain information In consequence of this information Mr Denham accompanied by the Inspector-General of Police and certain other superior officers proceeded to a one-storied house in Victoria Road, Baranagore Early in the morning of the 26th January they arrived at the house The door of the house having been forced the party entered The first accused Harsha Nath, *alias* Moti Lal, was found in the room that abuts on the road In a room on the other side of the courtyard, portions of fire-arms and certain tools were found Two receipts for the rent of the house were also found The accused Harsha Nath was arrested. He declined to make any statement with reference to the things found in the house A search list was then drawn up in the presence of witnesses and the party left Constables in plain clothes were posted at the house with instructions to arrest any one who might come to the house The first person to do so was the water-carrier, Chinibas Neka, who has been called as a witness for the prosecution About 10 or 10 30 of the same night—the accused Khagendra in his statement fixes the hour as 8 or 8-30—the accused Khagendra arrived at the house and was arrested The first question that we have to decide is what was the connection of the two accused with the house at Baranagore

That they have some connection with the house is not denied, nor could it be since both of them were arrested there The case for the prosecution is that on the 2nd of December last the two accused rented from the witness, Bhut Nath Sil, this house which is the property of his brother-in-law Nanda Lal De The accused represented that they were students at the Calcutta Medical College and that owing to the high

prices ruling in Calcutta they found it convenient to live at Baranagore. The accused Khagendra gave the name of Khitindra Nath Roy. The rent of the house was fixed at Rs. 11 per mensem, and on the 2nd of December Khagendra paid Rs. 7 on account of the rent for that month and received the *kutcha* receipt Ex. 11. The balance of the rent for that month was subsequently paid and a formal receipt Ex. 2 was handed over. Another month's rent was subsequently paid and the receipt Ex. 1 was given. The *kutcha* receipt is said to have been returned by Khagendra when the formal receipt Ex. 2 was given to him. The two receipts Exs. 1 and 2 were found at the search on the 26th of January. The witnesses who depose to this part of the case are first Bhutnath Sil He is employed as travelling agent of Messrs. Osler & Co. His pay is Rs. 90 per mensem, plus a commission which amounts to Rs. 1,000 to Rs. 1,500 per annum. He is, therefore, apparently a man of respectability. The next witness is Bhutnath's son, Bhupendra, a lad of 14 years of age, and the third witness is Nanda Lal De, a sub-engineer employed in the Public Works Department and brother-in-law to Bhutnath Sil. He is also apparently a man of respectability. The house at Baranagore belongs to Nanda Lal De but is let out and looked after by Bhutnath Sil who or whose family receives the rent.

The witness Bhutnath Sil states that on the 2nd of December last two men came to him and after certain negotiations took the house at a rent of Rs. 11 per mensem. A payment of Rs. 7 was made on account of the first month's rent and the *kutcha* receipt Ex. 11 was given. The man who carried on the negotiations gave the name of Khitindra Nath Roy: The witness is positive that this man is the accused Khagendra and he believes, although he is not certain,

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that the man who was with him is the other accused Harsha Nath On that night Bhutnath left Calcutta for the United Provinces and did not return until the 28th of February on which day he gave his evidence before the Enquiring Magistrate Counsel has attempted to throw doubt on the evidence of Bhutnath on the ground that before his return to Calcutta he was interviewed by a police officer But in the ordinary course if the police intended to avail themselves of the evidence of Bhutnath they would have to interview him before calling him as a witness in order to find out what he would be able to prove I see no reason to doubt the evidence of Bhutnath

The boy Bhupendra states that on some date in December Khagendra came and paid to him the balance of the rent for that month The witness states that he handed to Khagendra Ex 2 and received in return the receipt Ex 11 Further, this witness states that in January the two accused came to him and paid the rent for that month and received the receipt Ex 1 Bhupendra at a subsequent date identified the two accused at the Alipore Jail This identification took place in the presence of a Magistrate and it is not suggested that the witness did not identify the accused The witness states that he did not see the accused at the thana previously The Sub-Inspector Dwijendra Nath Adhya says he does not remember whether Bhupendra saw the accused at the thana But even if Bhupendra's identification cannot be wholly relied upon, there is a body of evidence that shows conclusively that the house was rented and occupied by both the accused

Nanda Lal De was called chiefly to prove the receipts for rent The two receipts Exs 1 and 2 were found at the search Before the learned Judge a good deal of the cross-examination of some of the witnesses

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was directed to show that the name Khitindra Nath Roy appearing on these two receipts was written in a different handwriting and with a different ink to the rest of the writing on the receipts Mr Denham, however, is positive that these names appeared there when the receipts were found on the search and the search list supports his evidence

Then the evidence as to the occupation of the house shows clearly that these two accused were in occupation of the same.

The witness Chunibas Neka states that he took water to the house every day at 9 o'clock in the morning He used to shake the chain and call out, when one of the accused would come and open the door for him On his leaving, the door would be closed again

The witness Bagwan Biswal, who is a *mali* in a garden opposite the house, states that he has seen Khagendra both entering and leaving the house He further states that the doors and windows of the house were always kept shut The evidence of Jagabandu Das which was given before the Committing Magistrate states that the windows and doors always remained shut He further states that two men lived in the house in the latter part of Aghian and they did not mix or talk with the neighbours Jagabandu died before the trial took place, but his deposition before the Committing Magistrate was put in

As against this body of evidence showing the taking and occupation of the house by the two accused there are the statements of the accused The accused Khagendra, in a written statement that he filed before the learned Judge, stated that one night about 15 or 16 days before his arrest he met one Dinabandhu Bhattacharjee who, he says, was with him at the Dacca Imperial Seminary in the Municipal Market He

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states he asked Dinabandhu where he lived and that Dinabandhu said he lived at Baranagore where he worked for a contractor On Dinabandhu asking a similar question of Khagendra the latter stated that he had no fixed place of abode as the police were trying to connect him with the Barisal conspiracy case Dinabandhu then asked Khagendra if he would like to come with him for a day or two, and he said he would come next day Next day accompanied by Dinabandhu he went to the house at Baranagore where he saw the other accused. He left after staying there two or three hours On the 26th of January he returned to Baranagore at 8 or 8-30 A M and was arrested and taken to the police-station This story is wholly improbable and does not cast any doubt on the direct evidence connecting Khagendra with the house No trace of this Dinabandhu has been found, and there can be little doubt that he does not exist Further the statement of Khagendra that he was in a public place like the Municipal Market when the police were searching for him is highly improbable On the other hand, his statement that the police were searching for him may furnish a good reason why he should take this house at Baranagore to escape from the police The evidence shows that he was successful in so doing between the 2nd of December and the 26th of January.

The statement of the accused Harsha Nath is that he came to Calcutta about the end of December to seek employment He used to walk near the Gole Dighi and having a fine voice he used to sing In this way he made many acquaintances including the aforesaid Dinabandhu. Dinabandhu hearing of the position of Harsha Nath forthwith invited him to come and stay in his house in Baranagore Harsha Nath says he went to stay there on the 5th or 6th January. Some two or three days before his arrest Harsha Nath, says

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Dinabandhu, left for "somewhere" on business expecting to return in three or four days. It is remarkable that Harsha Nath who was, according to his story, on terms of intimacy with Dinabandhu did not know the "somewhere" to which Dinabandhu had gone on business.

The whole story of this accused, commencing with Dinabandhu who is alleged to be a resident of and employed at Baranagore taking his walks in College Square, Calcutta, down to Dinabandhu's departure for "somewhere' two or three days before Harsha Nath's arrest is manifestly untrue.

The evidence leaves no doubt in my mind that the two accused rented this house on the 2nd of December, and that they were jointly in possession of it, on the day of their arrest, *viz.* the 26th of January last.

It is not open to doubt that the tools and portions of fire-arms were found in the house at the time of the search. But it has been argued that the evidence does not establish in whose possession such articles were. Counsel has argued that there is some rule of law that in circumstances such as the present the Court cannot impute possession to either of the accused. There may, however, be joint possession of the articles and the fact as to whose possession the articles were in at the date of the search must be decided on the evidence in the case.

Now, the evidence establishes that both the accused were in joint possession and occupation of the house. They took the house falsely representing that they were medical students. The evidence on behalf of the prosecution also proves that during the occupation and possession of the accused, the doors and windows of the house were always kept closed. Why should the doors and windows of the house be kept closed? And can any one doubt that in that state of things

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both the inmates of the house must have been fully aware of what was going on in the house? The evidence leaves no doubt in my mind that both the accused were in fact in possession of these articles

I will now proceed to consider the case under the three charges that have been framed against the accused But before doing so I will dispose of an objection raised by counsel as to the whole trial It was argued that the whole trial was illegal owing to misjoinder of charges That, however, clearly is not so The offences charged in this case were committed in the same transaction and section 239 of the Code of Criminal Procedure authorises such charges to be tried together If authority be wanted for the course adopted in the present case the very recent judgment of this Court in *Superintendent and Remembrancer of Legal Affairs, Bengal* v *Mon Mohan Roy* (1)

Coming then to the particular charges the first charge against the accused is framed under section 19 (*f*) of the Indian Arms Act, namely, of having in their possession or under their control arms in contravention of the provisions of section 14 of the Act The arms of which section 14 prohibits the possession without a license are "fire arms." Section 4 of the Act says that the word "arms" as used in the Act shall include "parts of arms" That being so, unless there is something repugnant in the subject or context, wherever the word "arms" occurs in the Act it has got to be read as including "parts of arms" Moreover, by section 4 of the Act the words "arms" also includes "fire arms" That being so, it seems to me obvious that the word "fire-arms" as used in section 14 includes parts of the "fire-arms"

(1) (1914) 19 C W N 672 21 C L J 195

Section 4 clearly means that the whole includes the part and when the Act deals with a particular class of arms such as fire-arms the section means that parts of fire-arms are included in the word 'fire-arms'. The word 'fire-arms' only means arms that are fired by means of gunpowder or other explosive."

If section 14 prohibits the possession of arms that are fired by means of gunpowder or other explosive then clearly having regard to section 4 the possession of parts of such arms is prohibited. That the possession of parts of fire-arms is prohibited by section 14 was decided by this Court in the case of *Ahmed Hossein* v. *Queen Empress* (1). A similar view was also taken by the Court of the Judicial Commissioner for the Central Provinces in the case of *Emperor* v. *Dhan Singh* (2).

In my opinion the learned Judge rightly convicted both the accused of being in possession of fire-arms in contravention of section 14 of the Act. The second charge against the accused was one of being in possession of fire-arms in contravention of the provisions of section 14 in such manner as to indicate an intention that such act may not be known to any public servant. Under the provisions of section 20 of the Act this constitutes a different offence to that mentioned in section 19 (*f*). The only additional element necessary to constitute an offence under section 20 is that the possession should be in such manner as to indicate an intention that such act may not be known to any public servant. The evidence of concealment in the present case is clear and conclusive. The evidence proves that the two accused falsely representing themselves as medical students took the house at Barranagore and that the accused Khagendra gave a

(1) (1900) I. L. R. 27 Calc. 692. (2) (1907) 5 Cr. L. J. 435; 3 N. L. R. 53.

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false name. Further, the door and windows of the house were kept closed and also a very important fact—the accused Khagendra was wanted by the Police and, therefore, would wish to conceal himself and what he was doing. On this evidence an offence under section 20 is proved against both the accused. The third charge against the accused was one of conspiring to manufacture or keep fire-arms punishable under section 120B of the Indian Penal Code *read with section* 19 *(a)* of the Indian Arms Act. The learned Judge has convicted both the accused of being parties to a conspiracy both to manufacture and keep arms. The learned Judge, however, is clearly wrong in treating the keeping of arms as an offence under section 19*(a)* of the Indian Arms Act. The offence is keeping for sale not keeping only. Does then the evidence prove a conspiracy to manufacture arms? Now, in cases of conspiracy the agreement between the conspirators cannot generally be directly proved but only inferred from other facts proved in the case. The facts proved in this case leave no doubt that such a conspiracy to manufacture arms existed between the two accused. First, there is the taking of the house. Next, the finding of a considerable number of pieces of fire-arms on the premises. To what use were these articles to be put? Then there is the fact of the finding of the tools at the premises. The evidence also shows that there is reason to believe that work had actually been done to some of the portions of fire-arms found at the search. From these facts the Court can and ought to infer that the two accused had conspired together to manufacture arms. On this charge the learned Judge sentenced each of the accused to undergo 3 years' rigorous imprisonment. That sentence, however, appears to be illegal. Section 120 B of the Indian

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Penal Code provides that the accused in a case of criminal conspiracy shall be punished in the same manner as if he had abetted such offence. The learned Judge found that there was only a conspiracy to manufacture without an actual manufacture. The learned Judge has however sentenced the accused under the 3rd charge on the footing that the punishment was provided for by section 109 of the Indian Penal Code. But in that view the punishment for a conspirator is much more severe than the punishment for an abettor. Section 120B provides that they shall be punished the same. The sentence on the accused on the third charge ought on the findings made by the learned Judge to have been imposed under section 120B of the Indian Penal Code read with section 19(*a*) of the Indian Arms Act and section 116 of the Indian Penal Code. Under these sections the maximum sentence that can be imposed on the accused under the 3rd charge is one of nine months rigorous imprisonment. I think we ought therefore to reduce the sentence passed on each of the accused under the third charge to one of nine months rigorous imprisonment. I see no reason to interfere with the sentences passed under the other two charges. The two appeals will therefore subject to the reduction of the sentences passed under the third charge be dismissed.

BEACHCROFT J. I agree. As I was a member of the Bench which decided *Superintendent and Remembrancer of Legal Affairs Bengal* v. *Mon Mohan Roy* (1) it is perhaps sufficient to say that nothing that I have heard in argument in this case leads me to alter the opinion which I then formed as to the legality of trying together charges of conspiracy and of offences

(1) (1914) 19 C. W. N. 672; 21 C. L. J. 193.

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committed in carrying out the object of the conspiracy. But it will be as well to indicate shortly the line of argument taken and the fallacy which underlies it.

The argument was that the possession of fire arms is a totally distinct offence from the offence of conspiracy to manufacture arms, and as the offence of conspiracy is complete so soon as the persons *conspiring have formed a common intention*, the two offences cannot be said to have been committed in the same transaction. The fallacy in this argument is that it assumes that the transaction is complete as soon as an offence is committed, in other words, that the term transaction is synonymous with the term "offence". It is clear that, so long as the conspiracy continued, the transaction, which began with the forming of the common intention, continued, and the first two offences charged were committed in the course of this transaction.

The punishment that may be awarded on a conviction under section 120B, seems to vary according as the offence has or has not been committed in consequence of the conspiracy. If an offence has been committed the punishment is provided by section 109 of the Indian Penal Code, if an offence has not been committed punishment is limited to the extent provided by section 116. Perhaps, strictly speaking, in the former case there should not be a conviction for conspiracy but for the abetment of the offence for conspiracy followed by an act done to carry out the purpose of the conspiracy amounts to abetment. In the present case there has been no finding by the Judge, nor can it on the evidence be found as a fact that the offence was committed. The sentence that can be imposed is, therefore, that provided by section 116.

E. H. M.

APPEAL FROM ORIGINAL CIVIL.

Before Jenkins C.J., Woodroffe and Mookerjee JJ.

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April 28.

Contempt of Court—Practice—Appeal—Assisting in contempt—Procedure.

Where the prohibitory injunction on the defendant firm made no mention of M, an assistant, or of servants and agents, but the notice of motion for committal for breach thereof was upon M who did nothing after service on him of the injunction:

Held, that the notice of motion was erroneous, and the procedure which had been adopted was misconceived: the proceedings against M, if any, should have been for *assisting* in a contempt of Court.

Held, also, (on the merits) that there had been no contempt or participation in contempt on M's part, as all that he did had been done prior to the injunction.

APPEAL by John Innes Marshall, an assistant in the firm of J. F. Kendrew & Co., the defendants, from the judgment of Greaves J., dated 31st March 1915.

The facts of the proceedings for injunction and for committal for contempt for breach thereof, out of which this appeal arises, appear fully from the following judgment of Greaves J., dated 31st March 1915:—

"The notice of motion in this case is directed to one J. I. Marshall, who is in the employ of the defendant firm, and it asks that he shall stand committed to the Presidency Jail for having committed a breach of an injunction granted by me on the 20th March instant, *restraining the defendant firm, their servants and agents* (I am here quoting the words of the motion) from disposing of, selling, or dealing in any manner with, the goods referred to in the plaint herein over Tuesday, the 23rd of March 1915

* Appeal from Original Civil No. 30 of 1915.

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and for an order on J I Marshall to pay to the plaintiff his costs of and incidental to this application The notice of motion is dated 26th March 1915 and was duly served on Mr Marshall

This application arises under the following circumstances —

On the 30th of January 1914, a contract was entered into between the plaintiff (Grandhi Vankata Ratnam) and the defendants (J F Kendrew & Co) for the sale of 500 cases of matches Certain of the cases were delivered between the months of March and December 1914 but on that day certain cases still remained undelivered. On the 17th of March of this year the plaintiff received information to the effect that another consignment of matches of 75 cases marked with the plaintiff's name had arrived in Calcutta and that the defendant firm was trying to dispose of them to somebody other than the plaintiff Thereupon interviews took place between the defendant firm and the plaintiff's son and the defendant firm expressed their willingness to deliver the goods at a certain price which was higher than the price which the plaintiff considered that he was bound to pay On the 19th of March, the defendants threatened to dispose of the goods, unless the plaintiff purchased them at the price of 1*s* 6¾*d* per gross They threatened to sell the goods by 11 o clock on the 20th of March unless the plaintiff was willing to pay this price On the same day, the 19th March, a letter was written by the plaintiff's solicitor saying that the defendant could not sell the goods to a third person, as they were the property of the plaintiff On the 20th March 1915 the plaint was filed in this suit at 12 o'clock, and, at 1 30 on that day, an application was made to me for an injunction and I granted an *ad interim* injunction over the following Tuesday in these terms, *restraining the defendants* from selling disposing of, or otherwise dealing with the goods referred to in paragraph 3 of the plaint, and I gave the plaintiff liberty to serve the defendants with the notice of motion for the following Tuesday, for an injunction restraining the defendants from selling, disposing of, or dealing with, the goods pending the hearing of this action and for a Receiver of the goods I directed the notice of motion to be served before 4 o clock at No 3, Commercial Buildings where the defendant firm carry on business or if these premises were closed, then on Mr Cameron who was the manager of the defendant firm, at his private address It appears, from the evidence of the plaintiff before me, that after the injunction was granted, the plaintiff's son accompanied by one Askhay Kumar Rudra, an attorney of this Court and assistant of Babu Charu Chandra Bose, Attorney for the plaintiff, went to No 3 Commercial Buildings and arrived there at about 2 15 P M They enquired at the office for Mr Cameron and were told that Mr Cameron was not there, and thereupon the plaintiff's son took the attorney to Mr Marshall,

as he was the next superior officer in the office of the defendant firm The plaintiff's son and his attorney stated that they read out a copy of my order to Mr Marshall in the presence of Mr Surita, an advocate of this Court and that after reading out the same they handed Mr Marshall a copy of the order and they state that he read the same in their presence and in the presence of Mr Surita that they asked Mr Marshall to sign an acknowledgment of the receipt of the copy of the said order but Mr Marshall refused to do this and said that his firm had already sold the goods Akshay Kumar Rudra the attorney, goes on to say that he attended immediately after at the office of the Jetty Superintendent of the Port Commissioners with the plaintiff's son, and showed a copy of my order to the Deputy Superintendent and read out the same to him and asked him to sign an acknowledgment which he refused to do saying that he could only act on an order signed by an officer of this Court Both the deponents state that at the goods shed at the Jetty, they saw several cases of matches marked with the plaintiff's mark, which was pointed out and the attorney states that he pointed out the goods to the plaintiff's son and also to one Satya Charan Ray who was the Jetty sircar of the plaintiff, asking the plaintiff's son to count the number of packages there, which he and the Jetty sircar accordingly did, telling the attorney that there were 75 cases of matches lying there The affidavit of the attorney further states that, on the following day, he was informed by the plaintiff's son that 53 cases of matches had been sent to the Howrah station and the same were lying there at No 13 Goods Shed, Howrah There is an affidavit also filed on behalf of the plaintiff by Satya Charan Ray, confirming the counting of the cases of matches and also stating that after the attorney and the plaintiff's son had left one Pran Kristo Coondoo who was a sircar in the employ of the defendant company and whom he knew, came to Jetty No 2 and gave directions to certain cartmen to take the goods to Murgihatta Godown baree He states that a portion of these goods were, thereafter, removed to Jetty Shed No 2 by the employee of the defendant company

On behalf of Mr Marshall, 3 affidavits are filed one by himself in which he states at paragraph 4 that, about 2 30, after office hours and after the business of the defendant firm was closed for the day, and while he was preparing to leave the office being actually in the act of changing his clothes a person whom he did not know, accompanied by one Grandhi Subramaniam, called, and saw him at No 3 Commercial Buildings stating that he was an assistant of Messrs Bose and Company and wanted to see Mr Cameron Mr Marshall states that he informed him that Mr Cameron was away from office and he, Mr Marshall was the next officer in charge of the office Mr Marshall states that the attorney informed him tha

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he had obtained an injunction restraining Mr Cameron from disposing of the 75 cases of the matches in question, and that he told him, as was the fact, *that they had already been sold and paid for*, and then the attorney asked him to whom they had been sold he thereupon said that, if they wrote and asked him he would give them information in writing as he did not want to run the risk of being misrepresented if he gave any information verbally Mr Marshall then goes on to state that he left the office shortly after with Mr Surita and one Mr Moss who were both present Mr Marshall further states that the attorney produced and handed to him a piece of paper with some typewritten matter on it which bore no signature to shew that it was a copy of an actual order He states that he glanced at the document, but did not read it through before handing it back to him and he denies that the document was read out to him and he is supported in his denial by an affidavit of Mr Surita In paragraph 6 of his affidavit Mr Marshall states that he had nothing whatever to do with the removal of or the endeavour to remove any of the goods in question, and that he never at any time sold or disposed of or otherwise dealt with the goods or any of them in disobedience or contempt or breach of the alleged injunction or order, and he states in paragraph 7, that for the first time he came to hear that the Jetty sircar Pran Kristo Coondoo had been concerned in the removal of the said goods, when he found the statements to that effect in that affidavit of Sattya Charan Roy He states that this removal was not done in pursuance of any order or injunction given by him or by any one belonging to the defendant firm and he states that he has since ascertained that the sircar did, on the 20th of March, remove or cause to be removed some of the goods, but that he did so after office hours in his spare time and at the request of and on behalf of the purchaser Jugal Kissore Pyne, and in nowise on behalf of the defendant firm

As before stated, Mr Surita filed an affidavit which corroborates Mr Marshall's statements with regard to the interview on the afternoon of 20th March A further affidavit is filed on his behalf by one Jugal Kishore Pyne who states that on the 3rd of March, he agreed to purchase from the defendant firm 75 cases of matches at Re 1 7 6 per gross He states that the purchase was completed by him at the office of the defendants on 20th March and that he paid a sum of Rs 5 507 13 0 as referred to, as the price of the matches, and that he was thereupon handed the gate pass in respect of the goods, to obtain delivery from the Port Commissioners' Jetty He states that the purchase price was paid and the whole transaction was completed by some time between 12 noon and 12 30 on Saturday, and that he thereupon immediately arranged with one Pran Kristo Coondoo, the defendant firm's Jetty sircar, for an extra charge of Rs 3 to remove the

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goods from the Jetty to his godown at Sukea's Lane, and that he gave him the gate pass He states that some time about 4 or 4-30 in the afternoon, he returned to his godown and there found that in the interval 53 cases out of 75 cases had been brought from the Jetty and stored there, and he never heard about any injunction until 22nd March.

Now, it is urged before me on behalf of Mr. Marshall that there has been no breach of the terms of the injunction, inasmuch as he has not sold, disposed of, or otherwise dealt with, the goods, and considerable discussion took place before me with regard to the absence from my order of the words "permitting the disposal of or dealing with the goods", and that was urged on behalf of Mr Marshall that, in the absence of these words, he had committed no breach of injunction and that he was not guilty of any contempt of Court In my opinion the absence of these words makes no difference see *Harding* v. *Tingey* (1)

Now, it seems to me abundantly clear from the facts stated in the affidavits that, if Mr. Marshall had applied his mind to the injunction and communicated with the Jetty Superintendent or with the purchaser of the goods, or in any case, if he had communicated the name of the purchaser to the plaintiff, the removal of the goods in question could not have taken place, and that in that case these proceedings would not have been brought. Of course, when it comes to a matter affecting the liberty of the subject, he is entitled to have the terms of the injunction considered with the greatest strictness and have everything that could possibly be urged or said in his favour considered on his behalf and given effect to, and it would clearly be wrong to send Mr Marshall to prison having regard to the facts and circumstances of this case, but I cannot think that he performed the duty, which is incumbent on every good citizen to perform, of assisting the process of the Court in whatever form it comes before him That the goods were dealt with despite the injunction or after it had been granted was due to his action or rather inaction; he has therefore committed contempt of Court and accordingly, although I make no order for committal, I direct Mr. Marshall to pay the costs of this motion"

Mr. Marshall, being dissatisfied with the above order, preferred this appeal.

Mr. M. Zorab (with him *Mr. Hyam*), for the appellant. This is the contempt motion of the 26th March 1915 Mr. Justice Greaves has found me guilty of contempt of Court and has ordered me to pay costs.

(1) (1864) 12 W. R. (Eng), 684, 685

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[JENKINS, C.J. We were told that he was ordered to pay costs without being found guilty of contempt.]

Since getting a copy of the order I find from the judgment that he has been found guilty of contempt.

[JENKINS, C.J. That gets over the difficulty of the appeal lying.]

Yes. The terms of the injunction restrain the defendants only, and nothing is said about their "servants or agents." Notice of the injunction was directed to be served on Mr. Cameron, the Manager of Messrs. Kendrew & Co., whereas Mr. Marshall is an employee under him. It is not a mandatory injunction, but a prohibitory one. The words "servants and agents" have been added in the notice of motion for committal for contempt for breach thereof.

I submit (i) that, the injunction being directed to the defendant firm, Mr. Marshall could not be proceeded against for breach of injunction (might be for contempt): see *Lord Wellesley* v. *The Earl of Mornington* (1). (ii) If I could not be found guilty of breach of injunction, I could not be shown to be guilty of any other species of contempt of Court, which is the genus, breach of injunction being a species. I must have an opportunity of tendering an apology on general principles and therefore I am entitled to know the particulars of the breach. (iii) Upon the merits—the affidavits in support of this motion do not show breach of injunction, or contempt of any kind. (iv) There are no materials, no discretion, much less jurisdiction of Court, to order me to pay costs, and further the Court proceeded on a misapprehension of facts. The two cases of *Lord Wellesley* v. *The Earl of Mornington* (1) show that the injunction really did not extend to servants and agents.

(1) (1848) 11 Beav. 180, 181.

I therefore submit that the case for breach of injunction must go, and there is no such finding either

[JENKINS C. J. You submit that the procedure on injunction must be followed?]

Yes. See Kerr on injunction with regard to the procedure to be followed; also *Woodroffe's injunction*, 3rd Edition, p 73 The motion is to be supported by affidavit specifying the particular acts constituting breach

Passing on to the *merits* in paragraph 7 of their affidavit they say they gave notice of injunction to me and that Pran Kristo Coondoo was instrumental in removing the goods from the Jetty. It being a Saturday and Mr. Justice Imam being indisposed, the injunction order was got from Mr Justice Greaves at his house. Mr. Marshall, at 2-30 P M the same day, said the goods had been sold (though 53 only out of 75 cases had been removed). We had already sold them to Jugal Kishore Pyne, and the injunction itself had failed.

[JENKINS C J. It does not appear that Marshall did anything?]

Nothing, except that a letter was written by him before 11 o'clock on the 20th March, the injunction being intimated to Mr Marshall at 2-30 P M that day

[MOOKERJEE J. Is Mr Marshall said to have done anything beyond what is stated in paragraph 7?]

That is all

That is just the reason why Mr. Justice Greaves set it aside Further, the goods are alleged to have been removed by the sircar of Messrs Kendrew & Co, on behalf of and under payment from the purchaser Jugal Kishore Pyne The learned Judge refers to the case of *Harding* v *Tingey* (1) cited in Kerr on

(1) (1864) 12 W R (Eng) 684 685

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Injunctions foi quite a different purpose I submit that this order cannot stand

[JENKINS C J We will hear the respondent now]

Mr N N Sircar (with him *Mr C C Ghose*) for the respondent I wish to support the order Assuming Mr Marshall knew nothing at all about the order of injunction though the selling had been completed, he knew at 2 30 P M on Saturday that the order of the court prevented the defendant *dealing with* or *disposing of* the goods at the Jetty Marshall was the next man in the office after Cameron and their firm s sircar removes the goods The papers show that Marshall s statement on the 26th that he knew nothing is absolutely false He admits he glanced through it Yet he would not give the name of the purchaser

[*JENKINS C J What has that got to do with the* question before us—whether he did anything towards selling or disposing?]

That is one of the facts that will go to show that Marshall was determined not to carry out or give effect to the Courts order If his story is accepted, there can be no breach of injunction or contempt And must we serve every darwan or servant of the firm?

[JENKINS C J You have your remedy against the firm]

The partners are not here But Marshall who was in charge of these goods with our mark on them dealt with them and sold them *before* and again dealt with them *after* the injunction

[JENKINS C J How do you show he assisted in the breach?]

In this way the sircar does not make any affidavit and Marshall says he knew nothing about the removal till the 26th The whole intention of that injunction was to keep the goods where they were On their

own showing the goods were not removed till 4-30 P.M. He came to Court with two absolutely lying cases: Marshall's attorney says that the goods were sold and removed in the morning, while Marshall in paragraph 7 of his affidavit denies removal under his orders. Marshall has got to change his case because he found from the plaintiff's affidavit that they had found all the goods at the Jetty where they had proceeded direct from Marshall's office on Saturday.

[MOOKERJEE J. If the purchaser had got the gate-pass, then there was a delivery to him?]

That is what the purchaser, Jugal Kishore Pyne, says in his affidavit.

[JENKINS C.J. There is no suggestion that that is false. As to Marshall lying, there is nothing to show it. It seems to us you misapprehend the position.]

I cannot carry the case further.

JENKINS C.J. This is an appeal from an order of Mr. Justice Greaves which has been treated before us as an order finding that there had been a contempt by the appellant Marshall which merited, if not imprisonment, at any rate, the payment of the costs of the motion. The notice of motion called upon J. I. Marshall, an assistant of the defendant firm, to take notice that, on Monday the 29th March 1915, an application would be made on behalf of the plaintiff for an order that he, J. I. Marshall, do stand committed to the custody of the Superintendent of the Presidency Jail for having committed a breach of the injunction granted by Mr. Justice Greaves on the 20th March 1915, restraining the defendant firm, *their servants and agents* from disposing of, selling or dealing in any manner with, the goods referred to in the plaint. That notice of motion is erroneous, for, the injunction

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JENKINS C J

makes no mention of Mr Marshall or of servants and agents It necessarily follows from this that the procedure which had been adopted was misconceived The proceedings against Mr Marshall, if any, should have been for *assisting* in a contempt of Court But the case need not be disposed of on that ground, because, on the merits, it has not been made out that Mr Marshall in any way assisted in a contempt of Court He did nothing He did not dispose of, sell, or deal with the goods Nor did he in any way *assist* in disposing selling of, or dealing with them *after* service on him of the injunction All that he did was done prior to the injunction It has been suggested before us that he is in some way responsible for the delivery which is said to have taken place after the injunction But on the facts it appears that the delivery was prior to the injunction There was no contempt or participation in contempt on Mr Marshall's part In my opinion, the order of the learned Judge is erroneous and must be set aside and the motion dismissed with costs of the hearing before Mr Justice Greaves and before us

WOODROFFE J I agree

MOOKERJEE J I agree

G S *Appeal allowed*

Attorneys for the appellant *Orr, Dignam & Co*
Attorney for the respondent *Charu Chandra Bose*

PRIVY COUNCIL.

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v.

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(AND ANOTHER APPEAL CONSOLIDATED).

P.C.*
1915
June 16, 17,
July 13.

[ON APPEAL FROM THE HIGH COURT AT FORT WILLIAM IN BENGAL.]

Hindu Law—Inheritance—Succession to Impartible Estate governed by rule of primogeniture where no custom excluding females existed—Widow of holder who died without male issue—Evidence of separation in joint family—Junior member leaving family house and living in separate residence after obtaining grant for maintenance.

The succession, on the death of a holder without male issue, to an impartible estate which descended by the rule of primogeniture, the junior members of the family being entitled to grants for maintenance, and where no custom excluding females existed, depended on whether there had been a separation between two brothers, the father and predecessor in title of the deceased holder and the father of the next contingent reversioner. On that question the Courts in India differed, the Subordinate Judge finding that a separation had taken place, and the High Court being of opinion that what had occurred did not in intention and fact amount to a complete separation.

Held (reversing the decision of the High Court) that the evidence clearly proved that there had been a complete separation, and that the widow of the last holder was therefore entitled to succeed to the estate for a Hindu widow's interest in priority to the next male reversioner.

Consolidated appeal 31 of 1913 from a judgment and two decrees (7th January 1910) of the High Court at Calcutta, which reversed a judgment and two decrees (22nd January 1909) of the Court of the Subordinate Judge of Monghyr.

The plaintiffs were the appellants to His Majesty in Council.

* *Present*: VISCOUNT HALDANE, LORD SHAW, SIR JOHN EDGE AND MR. AMEER ALI.

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The main question for determination on this appeal was as to whether the appellants had established that a separation took place between the respective predecessors in interest of the appellants and the respondents, (the said predecessors having been two brothers members of a Hindu joint family governed by the Mitakshara law), so as to bar the title of the respondents to the property in suit

That property was an ancestral family property, called Taluka Telwa, an impartible estate the succession to which was governed by the rule of primogeniture It descended to, and was owned by, Thakur Bhairo Narayan Singh who died in 1272 F.S (1863) leaving two sons, Ranjit Narayan Singh and Bhupat Narayan Singh

The succession to the estate was regulated by a custom of the family by which the eldest son of the last holder succeeded to the *gadi* as sole owner, the other sons being entitled to receive maintenance In accordance with the custom Ranjit Narayan, on the death of his father, succeeded to the *gadi* as Thakur, and on 14th Assin 1287 F S (14th September 1879) Ranjit Narayan executed a mokurari pottah in favour of his younger brother Bhupat Narayan, by which he assigned to him 2 mouzahs and 4 bighas of kamat land in another mouzah as a grant for his maintenance By the terms of the deed the land granted was not alienable by the grantee, but notwithstanding that prohibition Bhupat Narayan executed mortgages from time to time in order to raise money when he needed it

In 1306 F S (1897) Ranjit Narayan died leaving a widow Gyan Kumari, and a minor son Ram Narayan The widow was made guardian of her minor son who, according to the custom, succeeded to the *gadi* as Thakur.

Bhupat Narayan died in Magh 1311 F.S. (1902), leaving a son, the respondent Chaturbhuj Narayan, whose four sons were the other respondents.

Ram Narayan died while still a minor in 1312 F.S. (1903) leaving no issue but only a widow, the appellant Tara Kumari. She applied to the Revenue Courts to have her name registered as heiress of her deceased husband and as such proprietress of the gadi. Chaturbhuj Narayan, who claimed to be the Thakur on the death of Ram Narayan without male issue, made objection. He alleged that he and Bhupat Narayan had never ceased to be joint members of the family with Ranjit Narayan and Ram Narayan and that he alone succeeded to the *gadi* on the death of the latter according to the custom, and that he had since been in possession, and he also applied for registration of his name as Thakur, his application being granted and Tara Kumari's rejected, a decision which was subsequently confirmed on appeal by the Revenue Courts and authorities.

During his life time Thakur Ranjit Narayan Singh had incurred debts and had executed certain mortgages and after his death his creditors demanded payment. Tara Kumari thereupon sold a half share of Taluk Telwa to the appellant Maharajah Sir Raveneshwar Pershad Singh Bahadur for Rs. 50,000 on 16th September 1906, which was to be applied to pay off the amount due on the mortgages amounting to Rs. 47,639 and the balance was to defray the expenses of Tara Kumari in the present litigation. The appellant the Maharajah paid off the mortgages.

On 19th August 1907 the appellants instituted the present suits against the respondents. She joined the Maharajah as a formal defendant in her suit, and he joined her as a defendant in his suit in the same way, and also made the mortgagees party defendants.

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The claim in each suit was substantially for a *declaration that Tara Kumari had succeeded to the* estate as heiress on the death of her husband, and that the defendant Chaturbhuj Narayan Singh had no title thereto, on the ground that the *mokurari grant* of 1287 F S had constituted a separation between Ranjit Narayan and his brother Bhupat, and that from that time they had ceased to be members of a joint family and the *gadi* had formed the separate estate of Ranjit Narayan. The plaintiffs claimed to recover possession of their respective half shares

The Maharajah in his plaint also prayed in the alternative for relief on the basis of the mortgages which he had paid off, and of which he was the assignee, in the event of its being held that the defendant, *Chaturbhuj Narayan*, was *entitled to the property* in succession to Ram Narayan

The defendant Chaturbhuj Narayan denied that there had been any separation between Ranjit Narayan and Bhupat Narayan as alleged · he contended that they had remained joint in food and estate, that the mokurari pottah was merely a provision for maintenance, and he claimed that he became, on the death of Ram Narayan, the owner of the estate He also *contended* that the plaintiff Maharajah could *not* in the same suit claim relief in the alternative as he had done.

The only issues material for the purposes of this appeal were—

(i) Is the suit bad for misjoinder of parties and causes of action?

(ii) Did Bhupat Narayan Singh and his son Chaturbhuj Narayan separate from Thakur Ranjit Narayan Singh and Ram Narayan Singh in food and estate, and did the two branches of the family headed by Thakur Ranjit Narayan Singh and Bhupat Narayan Singh

live joint in food and estate till the death of Thakur Ram Narayan Singh? 1915

(iii) If the two branches of the family separated, as alleged by the plaintiffs, did Taluk Telwa continue to be joint undivided property of the family even after the separation, by reason of its being impartible ancestral property, and did it pass to the defendant Chaturbhuj Narayan Singh by survivorship on the death of Thakur Ram Narayan Singh in preference to his widow?

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The Subordinate Judge held on the facts proved before him that Bhupat Narayan Singh separated from his elder brother after the execution of the mokurari pottah in his favour, and that the first defendant (Chaturbhuj Narayan Singh) as a separated member of the family was not entitled to succeed to the estate in preference to the plaintiff Tara Kumari as the widow of the last holder. He also held that the Maharajah's suit was not bad for misjoinder of parties or causes of action; that the sale to him was valid; that the mortgages were for family ancestral debts; that they were duly paid off by the Maharajah; and that he was entitled to recover such payments from the estate. He was, however, of opinion that the alternative relief claimed by him could not be granted inasmuch as he had not asked for consequential relief.

Both suits were accordingly decreed, and so far as the titles of the plaintiffs were respectively concerned they were declared entitled to equal half shares of the estate with possession and costs from the first defendant.

Appeals were preferred by the defendants from each of those decrees to the High Court, and were heard by a Division Bench of that Court consisting of BRETT and SHARFUDDIN JJ. who reversed the decrees of the Subordinate Judge, and dismissed both suits with costs.

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The High Court, while accepting all the facts as found by the Subordinate Judge, was of opinion that such facts were not sufficient to prove that there was a "complete separation" between Bhupat Narayan Singh and Ranjit Narayan Singh, and it accordingly held that at the time of the death of Thakur Ram Narayan Singh the first defendant and his sons were not separate from him, and therefore that "the estate must follow the ordinary line of inheritance to joint property under the Mitakshara law, subject to the rule of primogeniture"

As to the alternative relief claimed by the Maharajah as transferee of the mortgages, the High Court was of opinion 'that it could not be claimed in the suit as framed, being inconsistent with the main relief sought in the suit," but it agreed with the Subordinate Judge in holding that the debts for which the mortgages had been given were family ancestral debts legally recoverable from the estate, and which had been discharged by the Maharajah

On these appeals,

Sir R Finlay, K C, and *G R Lowndes*, for the appellants, contended that at the time of the death of Ram Narayan Singh, Chaturbhuj Narayan, the first respondent, and his sons were separated from him in food, worship and estate, and had no right, in preference to Tara Kumari, to succeed to any part of the estate in suit The property being said by the respondents to be impartible the appellants had to show that a separation as above took place, and it was submitted that on the evidence in the case it had been established that there had been a complete separation, and that the Subordinate Judge had rightly so held. The respondents rely on, among others, the case of *Lahteshwar Singh* v.

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Rameshwar Singh (1) to support their contention that this estate being impartible there can be no separation in estate between Ranjit Narayan and his brother Bhupat Narayan; but if that was the holding in that case, it is submitted it was wrongly decided. In the present case the grant of the mokurari pottah, it was contended, showed an indication of an intention to separate, and it is certain that Bhupat Narayan, after the lease was granted, went away, built himself a house, and lived in it apart from his brother. He, and not Ranjit Narayan though then head of the family, had paid the expenses of a daughter's marriage and had borrowed money to do so after the granting of the mokurari lease, and Bhupat Narayan had in 1905 stated in proceedings in Court that he was separate from the Thakur. Even if the estate is impartible, it was submitted that the question of separation was one of intention and of fact to be determined on the evidence: *Bejai Bahadur Singh* v. *Bhupindra Bahadur Singh* (2). Stokes's Hindu Law, Books 166, 167, and Mitakshara, Chapter II, Section 12, verse 1, were also referred to.

As to the alternative relief and misjoinder of parties in the case of the Maharajah appellant, reference was made to the Civil Procedure Code, 1908, Sections 45 and 28. There was no objection in law to alternative inconsistent claims and it was not necessary for the plaintiff to seek consequential relief by suing for payment of the mortgage debts.

DeGruyther, K. C., and *A. M. Dunne*, for the respondents contended that the appellants had wholly failed on the evidence to establish any separation according to Hindu Law between Ranjit Narayan Singh and Bhupat Narayan Singh; that the rights of Bhupat and

(1) (1909) I. L. R. 36 Calc. 481. (2) (1895) I. L. R. 17 All. 456; L. R. 22 I. A. 139.

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his sons and descendants as junior members of the joint family continued up to the death of Ram Narayan Singh, and that the respondent Chaturbhuj Narayan Singh then became entitled to the property in suit as Thakur and owner of it. Impartible property on devolution, it was submitted, becomes joint property for the purpose of devolution, and therefore the widow being only entitled to maintenance is excluded: see Mayne's Hindu Law (7th edition), pages 731, 732, also page 671 paragraph 495. [*Sir R. Finlay, K. C.*, said the property, being impartible, was never joint.] The case of *Lalitеshwar Singh* v. *Rameshwar Singh* (1) decided that there can be no separation in estate in the case of an impartible raj; see also *Raja Rup Singh* v. *Rani Baisni* (2). In that case what the contention now is was laid down thus:— After referring to the case of *Chintamun Singh* v. *Nowlukho Konwari* (3), their Lordships say, "In the last mentioned case, following the decision in *Yanumula Venkayamah* v. *Yanumula Boochia Vankondora* (4), it was held that an ancestral estate even though impartible is not the separate or self-acquired estate of the single member upon whom it devolves so long as the family continues joint": see *Venkata Rao* v. *Court of Wards*(5) [*Sir Jhon Edge* referred to *Chintamun Singh* v. *Nowlukho Konwari* (3).] In that case there was in fact a partition of part of the property in 1832 as is shown in the original record of the case, the rest of the property remaining undivided. Here there was no separation. The mokurari grant was one merely for maintenance, and did not indicate any intention to separate. [VISCOUNT HALDANE: You

(1) (1909) I. L. R. 36 Cal. 481.

(2) (1884) I. L. R. 7 All. 1, 11; L. R. 11 I. A. 149, 154.

(3) (1875) I. L. R. 1 Cal. 153; L. R. 2 I. A. 263.

(4) (1870) 13 Moo. I. A. 333, 339.

(5) (1879) I. L. R. 2 Mad. 128; L. R. 7 I. A. 38.

[illegible] together and not isolate [illegible] all the evidence as to separation [illegible] the case.] The Subordinate Judge [illegible] could not of itself create a separation. The opinion of the High Court on it was [illegible]. 1918

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The fact that after the grant of the maintenance lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead, that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan." Reference was made to *Sartaj Kuari* v. *Deoraj Kuari* (1). The Maharajah appellant was not entitled in this suit to the relief claimed by him in the alternative.

Sir R. Finlay, K.C., in reply, referred to *Durga Prasad Singh* v. *Durga Konwari* (2) where it was held that it did not necessarily follow from the fact of an estate being impartible, that no division or separation can be effected with respect to it. For determining the heirs the same rules as to partible estates: *Jogendra Bhupati Hurro Chundra Mahapatra* v. *Nityanand Man Singh* (3); *Kali Krishna Sarkar* v. *Raghunath Deb* (4), *Katama Natchiar* v. *Rajah of Shivagunga* (5). There was no inconsistency between impartibility and the succession of a female.

(1) (1888) I. L. R. 10 All. 272, 285;
L. R. 15 I. A. 51, 63, 64.

(2) (1873) 20 W. R. 155, 156, 157.

(3) (1890) I. L. R. 18 Cal. 161

(4) (1903) I. L. R. 31 Cal. 224

(5) (1863) 9 M. I. A. 539, 611

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Ram Nundun Singh v *Janki Koer* (1) *Raja Rup Singh* v *Rani Baisni* (2) was distinguishable as the family was joint in that case, and a widow could only get maintenance This case must be determined on the evidence *Bejai Bahadur Singh* v. *Bhuvendra Bahadur Singh* (3), and here there was sufficient evidence, it was submitted, of separation

The judgment of their Lordships was delivered by

SIR JOHN EDGE These are consolidated appeals That in which Thakurani Tara Kumari is the appellant has arisen in a suit which was brought by her on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons In that suit Maharajah Sir Ravaneshwar Pershad Singh was a *pro formâ* defendant The other appeal in which Maharajah Sir Ravaneshwar Pershad Singh is the appellant, has arisen in a suit which was brought by him on the 19th August 1907 in the Court of the Subordinate Judge of Monghyr against Chaturbhuj Narayan Singh and his minor sons In the latter suit Thakurani Tara Kumari and others were *pro formâ* defendants In each suit the Subordinate Judge made a decree in favour of the plaintiff in the suit From each decree Chaturbhuj Narayan Singh and his minor sons appealed to the High Court of Judicature at Fort William in Bengal, which, by its decree in each appeal, reversed the decree to which the appeal related and dismissed the suit From those decrees of the High Court these consolidated appeals have been brought

The Thakurani is the widow of Thakur Ram

(1) (1902) I L R 29 Calc 828 ; L R 29 I A 178

(2) (1884) I L R 7 All 1 ; L R 11 I A 149

(3) (1895) I L R 17 All 456 ; L R 22 I A 139, 150

Narayan Singh, who was a son of Thakur Ranjit Narayan Singh, who was the elder of the two sons of Thakur Bhairo Narayan Singh. Chaturbhuj Narayan Singh was the son of Bhupat Narayan Singh, who was the younger son of Thakur Bhairo Narayan Singh. Thakur Ram Narayan Singh died without issue male. The immovable property to which the suits relate is known as Taluka Telwa, otherwise the Telwa Garh in the district of Monghyr. Taluka Telwa is an ancestral impartible estate which, in his lifetime, was held as his estate by Thakur Ram Narayan Singh, and had previously been held by his father Thakur Ranjit Narayan Singh and before him by his father Thakur Bhairo Narayan Singh. By the kulachar or family custom Taluka Telwa descends by the rule of primogeniture. The appellants allege that Thakur Ranjit Narayan Singh, on the 14th September 1879, granted to his brother Bhupat Narayan Singh a mokurari pottah (perpetual lease) of a part of Taluka Telwa for the maintenance of Bhupat Narayan Singh and his descendants, and that Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh separated and ceased to constitute a joint Hindu family, except *in so far as the family custom applies*, the law of the Mitakshara governed Thakur Bhairo Narayan Singh and his descendants. The Thakurani claims that she, as the widow of Thakur Ram Narayan Singh, who left no issue, succeeded to the estate on his death for a Hindu widow's interest. It is proved that after her husband's death she, in order to discharge debts which had been contracted by Thakur Ranjit Narayan Singh, sold a moiety of Taluka Telwa to the Maharajah. In her suit the Thakurani claimed possession of one moiety of Taluka Telwa, as the widow of Thakur Ram Narayan Singh. The Maharajah in his suit claimed possession of the other moiety of

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Taluka Telwa as the vendee from the Thakurani. Chaturbhuj Narayan Singh is in possession, and he and his minor sons deny that Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated.

The written statement of Chaturbhuj Narayan Singh in the suit of the Thakurani is not before this Board, but his written statement in the suit of the Maharajah is, having regard to the evidence and to the findings of the Courts below, instructive. In his written statement in the Maharajah's suit Chaturbhuj Narayan Singh alleged:—

4. That the said family is governed by the Benares School of Hindu Law save and except that according to family custom the said ancestral zamindari descends according to the rule of primogeniture on the eldest male member of the eldest line and the junior members are entitled to maintenance and that females are in no way entitled to succeed to the said zamindari. The junior members even after khorposh or maintenance grants are made to them out of the joint property are entitled to obtain the expenses of marriage, sradh and other similar ceremonies and all other necessary expenses from the income of the said property in the hands of the holder of the said estate for the time being.

5. That with reference to paragraph 3 this defendant states that Thakur Ranjit Narayan Singh succeeded to the said estate on the death of his father in accordance with the family custom aforesaid and that the mokurari settlement referred to in the said paragraph was also made in accordance with the said custom and not otherwise. This defendant craves leave to refer to the original of the said mokurari deed for the terms thereof. This defendant wholly denies that either before or after the said mokurari settlement Bhupat Narayan Singh became separate from the said Ranjit Narayan Singh or that he was at any time separate in food, worship or estate from the said Ranjit Narayan Singh or that he lived in a house separately built. This defendant asserts that he and his father the said Bhupat Narayan Singh during his life time were joint in food, worship and estate with the said Ranjit Narayan Singh and after his death with Thakur Ram Narayan Singh and that they never ceased to reside in the family dwelling house. This defendant continued joint in food, worship and estate with the said Thakur Ram Narayan Singh until the latter's death and thereafter with the defendant No. 6 until shortly before the commencement of the registration proceedings when disputes and disagreements arose. The allegations to the contrary in paragraph 3 of the plaint are wholly false.

6 That assuming though by no means admitting that Bhupat Narayan Singh and this defendant became separate from Thakur Ranjit Singh in the year 1287 F S and since then he and this defendant were separate in mess and business and lived in a separate house as has been falsely alleged in the plaint this defendant submits that nevertheless the impartible estate Taluka Telwa continued to remain joint family property as before as it never was nor could be the subject of partition and the defendant No 1 therefore became solely entitled to it under the family custom on the death of Thakur Ram Narayan Singh in preference to his widow

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The "defendant No 1" mentioned in the written statement is Chaturbhuj Narayan Singh, and the "defendant No 6" is the Thakurani, who, as has been already stated, was a *pro formâ* defendant in the suit of the Maharajah. So far as is now material, the defence of Chaturbhuj Narayan Singh, as disclosed by his written statement, was that females were by the family custom excluded from a succession to the impartible estate and that the joint family had not separated.

No custom excluding the widow of a sonless and separated holder of the impartible estate of Taluka Telwa from the succession to the estate for a Hindu widow's interest has been proved, and it is well decided law that the widow of the last holder of an *impartible* estate which descends by the rule of primogeniture is not excluded from the succession if her husband was in fact separated and died without issue male, and if no custom which would exclude her from the succession is proved. It was held by this Board in *Neelkisto Deb Burmono v. Beerchunder Thakoor* (1) that where a custom is proved to exist it supersedes the general law, which, however, still regulates all outside the custom. In *Ram Nundun Singh v. Janki Koer* (2) this Board held that:—

There is no inconsistency between a custom of impartibility and

(1) (1869) 12 Moo I. A. 523

(2) (1902) I. L. R. 29 Calc. 828; L. R. 29 I. A. 178

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the right of females to inherit, as may be illustrated by the well known *Shivagunga Case* (1) and therefore the general law must prevail unless it be proved that the custom extends to the exclusion of females

Consequently the only issue in these suits which is now material is one of fact, namely, the issue as to whether Thakur Ranjit Narayan Singh and Bhupat Narayan Singh separated

The Subordinate Judge came to the conclusion that Thakur Ranjit Narayan Singh, being displeased with his brother Bhupat Narayan Singh because the latter kept women, separated from him It was found as a fact by the Subordinate Judge that Bhupat Narayan Singh built a pucca house about a *tussi* (120 feet) to the westward of the family house, established a *Tulsi Pinda* there, and removed his family to his pucca house and lived there separately from Thakur Ranjit Narayan Singh As a fact Thakur Bhupat Narayan Singh built a wall between his pucca house and the family house of Thakur Ranjit Narayan Singh and established a separate Thakurbari in his house The houses were quite separate houses, as was found by the Subordinate Judge on the evidence

A daughter of Chaturbhuj Narayan Singh was married after Thakur Ranjit Narayan Singh had in 1879 granted the mokurari pottah to Bhupat Narayan Sing Chaturbhuj Narayan Singh attempted to prove that Thakur Ranjit Narayan Singh defrayed the expenses of that marriage. The Subordinate Judge, however found on incontestable evidence that the expenses of the marriage were defrayed by Bhupat Narayan Singh and not by Thakur Ranjit Narayan Singh As a matter of fact, Bhupat Narayan Singh borrowed Rs 689-2-6 for the expenses of that marriage, and on the 27th June 1897 gave to Shib Lal Modi and Amir Modi a mortgage of lands which he held under

(1) (1863) 9 Moo. I A 539

the mokurari pottah to secure the repayment to them of, amongst other moneys, that sum of Rs. 689-2-6 which was stated in the mortgage deed to have been borrowed by him from them "for performing the marriage of my own granddaughter, *i.e.*, the daughter of my son, Baba Chaturbhuj Narayan Singh."

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On the 27th April 1905 Chaturbhuj Narayan Singh, on his examination in a criminal case which apparently related to the removal of some timber, stated, "I am separate from the Thakur of Telwa."

On a careful review of all the evidence the Subordinate Judge came to the conclusion that Bhupat Narayan Singh and his son Chaturbhuj Narayan Singh were separate from Thakur Ranjit Narayan Singh and his son Thakur Ram Narayan Singh.

The learned Judges of the High Court, whilst accepting as correct the findings of facts of the Subordinate Judge on which he had come to the conclusion that there had been a complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh, came to the conclusion that it was not proved that there was a separation in intention and in fact. As it is difficult to understand the reasoning of the learned Judges of the High Court, it is better to give the following extracts from their joint judgment. They say:—

"It is the case common to both sides that Bhupat Narayan was a man of licentious habits and that he made himself a nuisance to his brother Ranjit Narayan and created a scandal by introducing his mistresses into the family dwelling house. It was in consequence of this that Ranjit Narayan executed the maintenance grant in his favour in 1287 to enable him to start a separate establishment. There can be no doubt that, after receipt of the grant, Bhupat Narayan built himself a new house outside the old family dwelling and that in course of time a Thakurbari and a Tulsi Pinda were established in that house and that a wall of separation between his house and the family house was constructed. It seems to be also beyond doubt that after receipt of the grant Bhupat Narayan raised money by mortgages on the property leased to him and spent it on the

[illegible] in food as sufficient pro[illegible] Ranjit Narayan and Bhupat [illegible] joint Hindu family We have given ou[r] [illegible] judgment of the Subordinate Judge and also [illegible] the arguments of the learned pleader and counsel which [illegible] advanced before us and even though we accept the findings of th[e] [Sub]ordinate Judge we are unable to agree in his conclusion that the plainti[ffs] have proved that there was a separation in intention or in fact

"The fact that after the grant of the mokurari lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan."

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation.

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa

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had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh. Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate. They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom. Their contingent interest under the custom was liable *to be defeated by an alienation* of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint, and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom. The Thakurani sold a moiety of the impartible estate to the Maharajah, and as there was valid necessity for that sale she conveyed a good title to the Maharajah.

Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed, that the decrees of the High Court should be set aside with costs, and the decrees of the Subordinate Judge should be restored.

The respondents Chaturbhuj Narayan Singh *and* his four minor sons must pay the costs of the appeals.

Appeals allowed.

Solicitors for the appellants: *Downer & Johnson.*

Solicitors for the respondents: *T. L. Wilson & Co.*

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marriage of members of his family and on their maintenance Still are not all these acts such as might have been expected on the part of a member of the family who had received a grant for his maintenance? Or must they be accepted as incontestable proof of an intention to separate from Ranjit Narayan from the time of the grant and of a separation in fact from that time?

"It has not been contended before us, nor indeed could the contention be accepted as a sound one that a separation in estate and from the joint family must follow as a necessary consequence from the receipt of a maintenance grant

"The learned Subordinate Judge has accepted these facts coupled with the admitted separation in food as sufficient proof that from the date of the maintenance grant, Ranjit Narayan and Bhupat separated and ceased to be members of a joint Hindu family We have given our careful consideration to the judgment of the Subordinate Judge and also to the evidence and the arguments of the learned pleader and counsel which have been advanced before us and even though we accept the findings of the Subordinate Judge we are unable to agree in his conclusion that the plaintiffs have proved that there was a separation in intention or in fact

The fact that after the grant of the mokurari lease for maintenance Bhupat Narayan lived in a separate house alongside his family homestead that he and his branch of the family were afterwards separate in food and possibly in worship, and that he paid the expenses of his family out of the profits of the property granted to him for maintenance, by borrowing money on mortgages on that property, do not appear to us in this case to be sufficient to prove that there was a complete separation between Bhupat Narayan and Ranjit Narayan, by which Bhupat sacrificed his expectancy to succeed to the family property on the failure of nearer male heirs of Ranjit Narayan

In the opinion of their Lordships, the evidence clearly proved that there had been complete separation between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh in worship, in food and in estate, and they find that there had been complete separation

Their Lordships infer from the extracts which they have quoted from the judgment of the learned Judges of the High Court that those Judges considered that there could have been no complete separation of the joint family, as the impartible estate of Taluka Telwa

had not been partitioned between Thakur Ranjit Narayan Singh and his brother Bhupat Narayan Singh Those learned Judges overlooked the fact that Bhupat Narayan Singh and his son had no coparcenary rights in the impartible estate and no rights in that estate which entitled them or either of them to a partition of the impartible estate They could not have prevented Thakur Ranjit Narayan Singh from alienating that impartible estate in such a way as to determine any contingent interest they had in it under the custom Their contingent interest under the custom was liable to be defeated by an alienation of the estate by Thakur Ranjit Narayan Singh even if the family had remained joint and as the family ceased to be a joint Hindu family the ordinary Hindu law of the Mitakshara gave to the Thakurani her widow's interest in the impartible estate in priority to the contingent interest of Chaturbhuj Narayan Singh under the custom The Thakurani sold a moiety of the impartible estate to the Maharajah and as there was valid necessity for that sale she conveyed a good title to the Maharajah

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Their Lordships will humbly advise His Majesty that these consolidated appeals should be allowed that the decrees of the High Court should be set aside with costs and the decrees of the Subordinate Judge should be restored

The respondents Chaturbhuj Narayan Singh and his four minor sons must pay the costs of the appeals

Appeals allowed

Solicitors for the appellants *Downer & Johnson*

Solicitors for the respondents *T L Wilson & Co*

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